Committee on Rules

U.S. House of Representatives
106th Congress

Hearings of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

TESTIMONY | TRANSCRIPT| STREAMING AUDIO

DATE: October 27, 1999

TIME: 10:00 AM

ROOM: H-313 The Capitol

WITNESSES

Panel 1:

- Douglas Cox, Principal Deputy Assistant Attorney General, Office of Legal Counsel, DoJ (1988-1993)
  Partner; Gibson, Dunn & Crutcher LLP
- Neil Kinkopf Special Assistant, Office of Legal Counsel, DoJ (1993-1997)
  Professor of Law, Georgia State University
- Robert Bedell, Administrator, Office of Federal Procurement Policy, OMB (1986-1988)
  Deputy & Acting Administrator, Office of Information & Regulatory Affairs, OMB (1983-1986)
  Deputy and Acting General Counsel, OMB (1973-1983)
  President, RPB Company
- Tom Sargentich, Senior Attorney Adviser, Office of Legal Counsel, DoJ (1978-1983)
  Professor in Constitutional & Administrative Law, Washington College of Law, American University

Panel 2:

- William Olson, Co-Author, CATO research paper entitled "Executive Orders and National Emergencies"
  President, William Olson P.C.

Panel 3:

- Ray Mosley, Director, Office of the Federal Register, National Archives and Records Administration

PURPOSE OF THE HEARING

The purpose of this hearing is to review the process, guidelines and legal authorities of executive orders and assess their impact on the legislative process. Given the size and scope of the federal government, their use has at times also had significant policy implications for all citizens, raising the specter of "executive lawmaking." This hearing is designed to review an important and infrequently considered area of Executive/Congressional relations to raise awareness and promote vigilance and active oversight by the committees of Congress.

Executive orders by this (and any President) can have significant policy implications and can encroach upon the lawmaking authority of the Congress. Congressional action to guard against this trend is constrained by the separation of powers – but greater awareness and understanding of the process in Congress and greater transparency for the public is an important defense of the proper balance between the branches.

Because there is broad discretion for the President, because the ability to issue an executive order confers enormous, unilateral power to the President, and because the federal government has grown so dramatically in recent decades – Congress has a continuing obligation to remain vigilant and ensure that its institutional prerogatives and the legislative process are not diminished or ignored. In addition, Congress has a role in making sure that there is public awareness of (to ensure accountability for) policies implemented through executive orders. This is an important area of oversight for the committees of Congress.

BACKGROUND

Article I of the Constitution states that "All legislative powers herein granted shall be vested in a Congress of the United States" while Article II states that "the executive power shall be vested in a President of the United States." The power of the Presidency was further defined to include the role of "Commander in Chief of the Army and Navy of the United States" and empowerment to "take care that the laws be faithfully executed." The distinction between the authorities of the executive and legislative branches of our three-branch system of government has in practice, however, proven to be less clear-cut than the language of the Framers suggested. The issuance of executive orders, proclamations and directives by the President is a practice not specifically enumerated in the Constitution, although it has been generally identified as flowing from the authorities vested in the President by Article II.

The practice of using executive orders to set policy has evolved over the years and is currently governed by principles that have been established by precedent, oversight by Congress and the public, and intervention by the courts. It is generally accepted that, where executive orders have been based upon appropriate constitutional or statutory authority, they have the force and effect of law.

Most experts cite as the origin of the executive order a directive issued by President George Washington on June 8, 1789 compelling a report from the holdover Confederation government. The number of executive orders issued by Presidents has grown significantly since that time. While the current system of numbering such orders did not begin until 1907, a review of Presidential directives by CRS concludes that prior to President Grant, no President issued more than 80 orders. By contrast, in the latter half of this century Presidents have routinely issued several hundred executive orders. A watershed era occurred during the presidency of Franklin Delano Roosevelt, who issued more than 3500 executive orders during his 12 years in office. Traditionally, newly elected Presidents have issued a series of executive orders at the outset of their terms, implementing management policies and setting guidelines.

Since June of 1962, procedures for preparation, presentation and filing of executive orders have been governed by Executive Order 11030, issued by President Kennedy. In the Administrative Procedures Act of 1946, Congress mandated that the number and text of all executive orders must be published in the Federal Register, with an exception only for those directives that are classified due to national security content. The Office of Federal Register at the National Archives is responsible for maintaining original copies and the final publication of executive orders, and currently this information is publicly available on the Internet at the Archives site www.nara.gov.

The underlying authority for issuance of specific executive orders is derived from the Constitution or from statute. As explained in Congressional Quarterly's "Guide to the Presidency" (1989) the power of the President goes beyond those authorities actually enumerated in the Constitution.

"'Express' powers – those specifically named in the Constitution – like the veto give presidents a limited set of tools for shaping legislation. But powers implied in the Constitution, and given substance by years of continuous reinterpretation, are the source of the president's ability to act alone, often without specific congressional statute. . . An offspring of the implied powers doctrine is the executive order. This critical instrument of active presidential power is nowhere defined in the Constitution but generally is construed as a presidential directive that becomes law without prior congressional approval. It is based either on existing statutes or on the president's other constitutional responsibilities. Executive orders usually pertain specifically to government agencies and officials, but their effects often reach to the average citizen."

In certain instances since the practice began, Congress has taken action in response to executive orders, frequently to sanction by ensuing statute the policy implemented by an executive order or, on occasions involving

controversial matters, to seek to withhold funding for the implementation of an executive order. The options available to Congress in the face of an executive order it opposes are constrained by the nature of a system that requires legislation emerging from the Congress to be signed or allowed to become law by the President. The Congress may seek to nullify, repeal, revoke, terminate or de-fund an executive order, but each such action requires the eventual concurrence of the President (most likely the same President that issued the order in the first place).

The Congress may also seek to repeal the underlying statutory authority upon which a particular executive order was based. If the underlying statute is repealed, any ensuing executive order based upon that law is no longer valid. Another tool available to the Congress is to seek to implement a sunset or termination date for statutory authority upon which an executive order is based. In this way, when the sunset date is reached, it is up to Congress to determine whether to renew the provision or let it die. A major tool in the arsenal of the Congress with regard to executive orders lies in the power of the purse. Congress may withhold funds for the implementation of an executive order, thereby directly challenging the President's ability to put in place a particular policy.

On the other hand, in instances where the President issues an executive order that Congress does not oppose, but rather Congress wishes to exert its legislative authority in that area, Congress may seek by statute to sanction the action taken by the President. Similarly, the Congress may wish to sanction portions of an executive order, modify others and repeal others. Congress has the option, through the legislative process, of imposing its own stamp on a policy area staked out by executive order.

In his book, Constitutional Conflicts Between Congress and the President

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The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

Statement of Congressman Porter J. Goss,
Chairman, Subcommittee on Legislative and Budget Process

THE SUBCOMMITTEE WILL COME TO ORDER. WELCOME TO AN IMPORTANT ORIGINAL JURISDICTION HEARING OF THE SUBCOMMITTEE ON LEGISLATIVE AND BUDGET PROCESS. OUR SUBCOMMITTEE'S JURISDICTION, WHICH IS MOST OFTEN ASSOCIATED WITH TOPICS RELATED TO THE BUDGET PROCESS, ALSO INCLUDES RESPONSIBILITY FOR REVIEWING MATTERS OF CONCERN ABOUT THE RELATIONSHIP BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES.

IN MY RELATIVELY SHORT TENURE ON THIS COMMITTEE, I RECALL THAT MY PREDECESSOR IN THIS POSITION – THE DISTINGUISHED FORMER MEMBER FROM SOUTH CAROLINA, BUTLER DERRICK -- USED THE JURISDICTION OF OUR SUBCOMMITTEE TO CONSIDER THE IMPORTANT ISSUE OF THE POCKET VETO.

IN THAT TRADITION, WE ARE HERE TODAY TO CONSIDER THE SUBJECT OF EXECUTIVE ORDERS AND THE MANNER IN WHICH THEY IMPACT ON THE LEGISLATIVE PROCESS.

EXECUTIVE ORDERS ARE AT THEIR SIMPLEST MEANT TO BE INSTRUCTIONS BY THE PRESIDENT TO HIS SUBORDINATES. IN THEIR MOST BENIGN FORM, THEY ARE MANAGEMENT TOOLS, MEANS BY WHICH A CHIEF EXECUTIVE CAN ESTABLISH CONFORMITY AND CONSISTENCY ACROSS THE MANY FAR-FLUNG ELEMENTS OF HIS ADMINISTRATION.

YET THINGS HAVE RARELY BEEN THAT SIMPLE IN THE REALM OF FEDERAL GOVERNANCE. SINCE THE FIRST EXECUTIVE ORDER WAS ISSUED IN 1789 BY PRESIDENT GEORGE WASHINGTON, THERE HAVE BEEN OCCASIONS WHERE ORDERS ISSUED BY THE PRESIDENT HAVE ENGENDERED PUBLIC DEBATE AND CONTROVERSY, SOMETIMES LEADING TO CONGRESSIONAL OR

JUDICIAL REACTION. WE HAVE SEEN THIS TREND INCREASE IN RECENT DECADES, AS THE SCOPE AND REACH OF THE FEDERAL GOVERNMENT HAS BROADENED - INCREASING THE PROBABILITY THAT POLICIES IMPLEMENTED ACROSS THE ENTIRE EXECUTIVE BRANCH END UP IMPACTING UPON THE LIVES OF THE CITIZENRY. SOME HAVE TERMED THE ACTIVE USE OF EXECUTIVE ORDERS "EXECUTIVE LAWMAKING."

IT ALSO APPEARS TO ME THAT WE HAVE ENCOUNTERED SIGNIFICANT CREATIVITY AND INGENUITY ON THE PART OF PRESIDENTS TO USE EXECUTIVE ORDERS TO ADVANCE THEIR AGENDAS WHEN THE LEGISLATIVE PROCESS HAS PROVEN UNWILLING OR UNABLE TO YIELD THE DESIRED RESULTS. MEMBERS MAY RECALL THAT, AS RONALD REAGAN WAS PREPARING TO TAKE OFFICE AS PRESIDENT IN 1981, THE HERITAGE FOUNDATION PUBLISHED A BOOK ENTITLED MANDATE FOR LEADERSHIP, WHICH INCLUDED A LIST OF PROPOSALS TO IMPLEMENT MORE CONSERVATIVE POLICIES THROUGH EXECUTIVE ORDER. THAT LIST COMPRISED 22 AREAS OF POLICY, COVERING A BROAD RANGE OF ISSUES AND CONTROVERSIES. ON THE FLIP SIDE OF THE IDEOLOGICAL SPECTRUM, WE CAN NOTE THAT IT WAS A SENIOR ADVISER TO PRESIDENT CLINTON WHO SUMMED UP THE TREMENDOUS POWER OF THE PRESIDENT TO MAKE POLICY VIA EXECUTIVE ORDER WHEN HE SAID "STROKE OF THE PEN, LAW OF THE LAND. KIND OF COOL."

ADDITIONALLY, A BY-PRODUCT OF MODERN TECHNOLOGY APPEARS TO HAVE BEEN GREATER PUBLIC AWARENESS OF AND INTEREST IN THE UNILATERAL ACTIONS TAKEN BY THE EXECUTIVE. TODAY WE HAVE CABLE TELEVISION, TALK RADIO, AND THE INTERNET AS MEANS TO PROVIDE UNPRECEDENTED ACCESS TO A WEALTH OF INFORMATION FOR THE AVERAGE CITIZEN WITH AN INTEREST. I HAVE FOUND IN RECENT YEARS THAT MORE AND MORE OF THE PEOPLE I REPRESENT IN SOUTHWEST FLORIDA ARE CONTACTING ME TO DISCUSS CONCERNS WITH EXECUTIVE ORDERS.

WHEN YOU CONSIDER THE TOPIC OF EXECUTIVE ORDERS THERE ARE ALMOST AS MANY SUBJECT AREAS POSSIBLE UNDER THIS HEADING AS THERE ARE POLICIES OF THE FEDERAL GOVERNMENT. EXECUTIVE ORDERS HAVE TOUCHED UPON A BROAD RANGE OF ISSUE AREAS, AND I KNOW THAT WE WILL GET INTO SOME OF THOSE SPECIFIC CASES AS WE PROCEED TODAY. I SHOULD POINT OUT THAT THERE IS A WHOLE CATEGORY OF EXECUTIVE ORDERS RELATING TO IMPLEMENTING POLICIES FOR OUR NATIONAL SECURITY. TODAY THESE ARE KNOWN AS PRESIDENTIAL DECISION DIRECTIVES – OR P-D-D'S – AND THEY ARE MOSTLY CLASSIFIED DUE TO THEIR SENSITIVE CONTENT. I WISH TO ENSURE MY COLLEAGUES THAT, AS CHAIRMAN OF THE INTELLIGENCE COMMITTEE, I KNOW THAT CONGRESSIONAL

OVERSIGHT IN THIS AREA IS VIGOROUS AND THOROUGH.

WE HAVE CHOSEN FOR OUR STARTING POINT IN TODAY'S HEARING THE BROADER VIEW: WE ARE LOOKING AT THE PROCESS OF EXECUTIVE ORDERS – WHERE DO THEY COME FROM AND UNDER WHAT AUTHORITY ARE THEY ISSUED? WHAT ARE THE PROCEDURES UNDERTAKEN BY THE VARIOUS ELEMENTS OF THE EXECUTIVE BRANCH WITH RESPONSIBILITY FOR EXECUTIVE ORDERS? WHAT HAVE THE TRENDS BEEN OVER RECENT HISTORY WITH RESPECT TO EXECUTIVE ORDERS? TO WHAT EXTENT DOES THE PUBLIC NEED TO KNOW OR EVEN CARE ABOUT EXECUTIVE ORDERS? WHAT IS THE PROPER ROLE OF THE CONGRESS IN GUARDING ITS LEGISLATIVE PREROGATIVES? AND, HOW WELL HAS CONGRESS BEEN DOING IN CONDUCTING OVERSIGHT IN THIS AREA?

THESE ARE SOME OF THE QUESTIONS THAT WE HAVE DIRECTED TO OUR WITNESSES TODAY. I AM GRATEFUL FOR THEIR PARTICIPATION.

WE'LL START OFF WITH A PANEL OF EXPERTS – FIRST WE'LL HEAR FROM DOUGLAS COX, WHO IS CURRENTLY A PARTNER AT THE LAW FIRM GIBSON, DUNN AND CRUTCHER AND FORMERLY WAS PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL IN THE OFFICE OF LEGAL COUNSEL AT DOJ UNDER PRESIDENT BUSH. JOINING HIM ON THIS PANEL IS NEIL KINKOPF, WHO UNTIL 1997 SERVED AS SPECIAL ASSISTANT IN THE OFFICE OF LEGAL COUNSEL AT DOJ AND CURRENTLY TEACHES LAW AT GEORGIA STATE UNIVERSITY. WE ALSO HAVE ROBERT BEDELL, WHOSE CAREER AT OMB INCLUDED SERVING AS ADMINISTRATOR OF THE OFFICE OF FEDERAL PROCUREMENT POLICY, DEPUTY AND ACTING ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, AND DEPUTY AND ACTING GENERAL COUNSEL OF THE OMB. BOB'S TENURE SPANNED 15 YEARS AND FOUR PRESIDENTS AND TODAY HE IS THE PRESIDENT OF THE RPB GOVERNMENT AFFAIRS COMPANY. LASTLY ON THIS PANEL WE WILL HEAR FROM TOM SARGENTICH, CURRENTLY PROFESSOR OF CONSTITUTIONAL AND ADMINISTRATIVE LAW AT THE WASHINGTON COLLEGE OF LAW AT AMERICAN UNIVERSITY. TOM FORMERLY SERVED AS A SENIOR ATTORNEY ADVISOR IN THE OFFICE OF LEGAL COUNSEL AT DOJ UNDER PRESIDENT'S CARTER AND REAGAN.

WE WILL THEN HEAR FROM WILLIAM OLSON WHO HAS JUST COMPLETED A STUDY FOR CATO ON THE ISSUE OF EXECUTIVE ORDERS. AND WE'LL CONCLUDE THE HEARING WITH A PRESENTATION BY RAYMOND MOSLEY, THE DIRECTOR OF THE OFFICE OF THE FEDERAL REGISTER AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

I WOULD LIKE TO NOTE THAT WE HAD EXTENDED TO THE CLINTON ADMINISTRATION, THROUGH OUR MINORITY, THE OPPORTUNITY TO PARTICIPATE IN TODAY'S HEARING. OUR STAFF WAS TOLD THIS OFFER WAS DECLINED, WHICH IS CERTAINLY THEIR RIGHT. PERHAPS AS THIS PROJECT OF REVIEW PROCEEDS, THEY WILL WISH TO BECOME INVOLVED IN SHARING THEIR THOUGHTS ON SOME OF THESE IMPORTANT ISSUES.

BEFORE I TURN TO OUR WITNESSES, I ALSO WANT TO ADVISE MEMBERS THAT THIS TOPIC IS ONE OF INTEREST TO MANY OF OUR HOUSE COLLEAGUES. IN FACT, I UNDERSTAND THE HOUSE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW HAS SCHEDULED A HEARING ON EXECUTIVE ORDERS FOR TOMORROW. THEY PLAN TO CONSIDER TWO LEGISLATIVE PROPOSALS THAT HAVE BEEN INTRODUCED ON THIS SUBJECT.'

AND WITH THAT, I YIELD TO MR. FROST.

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Statement of Congressman David Dreier,
Chairman, Committee on Rules

At the urging of Speaker Hastert, House committees have been expanding their programmatic oversight activities to ensure that the Executive Branch is properly implementing the public policies enacted by Congress. Executive Orders are a significant, yet less frequently examined, tool for carrying out legislative intent.

This hearing is not intended for focus on one particular Executive Order but to shine light on the whole practice and to better understand its implications for Executive Branch and Legislative Branch relations.

The President's executive order authority is not something we have an interest in undermining. And this hearing is not focused on the actions of just one President. We, do, however, want to make sure that Executive Orders continue to be written with the appropriate constitutional or statutory authority, and that they are not used to subvert the legislative process, or to implement policies that are not in the public interest.

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Statement of Congresswoman, Deborah Pryce,
Member of the Subcommittee on Legislative and Budget Process

Mr. Chairman, thank you for holding today's hearing on the power of the president to establish policy through executive order. As the use of executive orders becomes more prevalent and the policy they establish has a more tangible impact on the lives of the people we represent, I think it is appropriate for Congress to examine the process by which these orders are developed and whether the legislature's lawmaking responsibility is being encroached.

Judging by my constituent mail, I think it is fair to say that the public awareness of the power of executive order has increased, and Congress should be able to explain to the public why the President is establishing policy without congressional approval. We have a responsibility to ensure transparency of the process by which executive orders are established and respond when the executive branch oversteps its constitutional or statutory authority.

This can be accomplished, in part, through vigilant congressional oversight in an effort to preserve a balance of power and protect our legislative prerogative. In doing so, we will protect the power of the people we represent, to whom we are accountable. I think this hearing is an important first step in that process.

So, I thank Chairman Goss, again, for holding this hearing, and I look forward to the testimony of our witnesses who have given much more thought to this subject than I or many of my colleagues. I appreciate the time you all are taking to share your knowledge with us this morning.

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Douglas Cox, Principal Deputy Assistant Attorney General, Office of Legal Counsel, DoJ (1988-1993), Partner; Gibson, Dunn & Crutcher LLP

THANK YOU, CHAIRMAN GOSS, FOR INVITING MY SUBMISSION ON THE IMPORTANT SUBJECT OF THE IMPACT OF EXECUTIVE ORDERS ON THE LEGISLATIVE PROCESS. THE SPECIFIC QUESTIONS I WILL ADDRESS ARE THE ROLE OF EXECUTIVE ORDERS WITHIN OUR CONSTITUTIONAL SYSTEM, AND THE TOOLS AVAILABLE FOR CONGRESS TO RESPOND TO EXECUTIVE ORDERS.

I. EXECUTIVE ORDERS

AS AN INITIAL MATTER, IT IS IMPORTANT TO RECOGNIZE THAT THE PRESIDENT HAS BROAD AUTHORITY TO ISSUE EXECUTIVE ORDERS, TO GUIDE AND CONTROL THE FUNCTIONING OF THE EXECUTIVE BRANCH. AS THE SUPREME COURT RECOGNIZED IN THE STEEL SEIZURE CASE, *YOUNGSTOWN SHEET & TUBE CO. V. SAWYER*, 343 U.S. 579, 585 (1952), THE PRESIDENT'S EXECUTIVE ORDER AUTHORITY HAS TWO POTENTIAL SOURCES: THE CONSTITUTION, AND FEDERAL STATUTES.

ALTHOUGH EXECUTIVE ORDERS ARE NOT EXPLICITLY MENTIONED IN THE CONSTITUTION, THE AUTHORITY TO DIRECT THE EXECUTIVE BRANCH IS INHERENT IN THE PRESIDENT'S CONSTITUTIONAL ROLE AS THE HEAD OF A UNITARY EXECUTIVE BRANCH. THAT AUTHORITY IS ALSO A NECESSARY PART OF THE PRESIDENT'S POWER TO PERFORM HIS CONSTITUTIONAL DUTY TO "TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED." ARTICLE II, SECTION 3.

SOME EXECUTIVE ORDERS MAY ALSO BE ROOTED IN OTHER CLAUSES OF THE CONSTITUTION, SUCH AS THE APPOINTMENTS CLAUSE AND THE COMMANDER-IN-CHIEF CLAUSE. PRESIDENT TRUMAN BASED EXECUTIVE ORDER 9981, ORDERING THE DESEGREGATION OF THE ARMED FORCES, ON HIS COMMANDER-IN-CHIEF POWERS. CONGRESS ITSELF OFTEN

GRANTS THE PRESIDENT ADDITIONAL AUTHORITY TO ISSUE EXECUTIVE ORDERS, EITHER EXPRESSLY OR BY GRANTING HIM SIGNIFICANT DISCRETION IN EXECUTING THE LAWS. WHEN CONGRESS GRANTS THE PRESIDENT SUBSTANTIAL DISCRETION, EXECUTIVE ORDERS PROVIDE AN APPROPRIATE MECHANISM FOR THE PRESIDENT TO INFORM HIS SUBORDINATES WITHIN THE EXECUTIVE BRANCH AS TO THE WAY IN WHICH THAT DISCRETION IS TO BE EXERCISED.

FOR EXAMPLE, 22 U.S.C. § 287c EXPLICITLY CONTEMPLATES THAT THE PRESIDENT WILL ISSUE EXECUTIVE ORDERS TO GIVE EFFECT TO UNITED NATIONS SECURITY COUNCIL RESOLUTIONS. IT IS A VERY GENEROUS GRANT OF DISCRETION, AND AUTHORIZES THE PRESIDENT, AMONG OTHER THINGS, TO "INVESTIGATE, REGULATE, OR PROHIBIT, IN WHOLE OR IN PART, ECONOMIC RELATIONS OR RAIL, SEA, AIR, POSTAL, TELEGRAPHIC, RADIO, AND OTHER MEANS OF COMMUNICATION BETWEEN ANY FOREIGN COUNTRY OR ANY NATIONAL THEREOF OR ANY PERSON THEREIN AND THE UNITED STATES . . . ." 22 U.S.C. § 287c(a).

SIMILARLY, 40 U.S.C. § 471 ET SEQ., THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT, SPECIFICALLY AUTHORIZES THE PRESIDENT TO ISSUE POLICIES AND DIRECTIVES "AS HE SHALL DEEM NECESSARY TO EFFECTUATE THE PROVISIONS" OF THE ACT. 40 U.S.C. § 486. THE ACT'S GENERAL PURPOSE OF FURTHERING THE "ECONOMIC AND EFFICIENT" PERFORMANCE OF THE FEDERAL GOVERNMENT'S PROCUREMENT FUNCTIONS MAY PLAUSIBLY SUPPORT A WIDE RANGE OF PRESIDENTIAL POLICIES. AND AS AN HISTORICAL MATTER, PRESIDENTS HAVE FREQUENTLY RELIED ON THE ACT TO JUSTIFY EXECUTIVE ORDERS.

THE PRESIDENT, IN ISSUING AN EXECUTIVE ORDER BASED ON A STATUTE, IS ENGAGING IN A PROCESS SIMILAR TO ADMINISTRATIVE RULEMAKING: BOTH PROCESSES REQUIRE AND PERMIT EXECUTIVE BRANCH OFFICIALS TO EXERCISE DISCRETION WITHIN THE STATUTORY FRAMEWORK CREATED BY CONGRESS. THE CONCEPT OF "CHEVRON DEFERENCE" TO RULEMAKING BY CABINET DEPARTMENTS IS A FAMILIAR ONE. BUT IT IS ALSO AN ACKNOWLEDGMENT OF PRESIDENTIAL DISCRETION IN THE INTERPRETATION OF VERY MANY STATUTES. ALTHOUGH RULEMAKING DIFFERS FROM EXECUTIVE ORDERS IN MANY WAYS -- CHIEFLY BY BEING SUBJECT TO THE PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT -- THE CONCEPT OF EXECUTIVE BRANCH DISCRETION THAT IS UNCONTROVERSIAL IN THE RULEMAKING SETTING SHOULD NOT BE DRAMATICALLY MORE CONTROVERSIAL IN THE HIGHLY SIMILAR CONTEXT OF EXECUTIVE ORDERS. WHETHER THE PRESIDENT IS RELYING ON HIS CONSTITUTIONAL POWERS OR ON STATUTORY AUTHORITY, IT IS VITALLY IMPORTANT TO THE

NATION THAT THE EXECUTIVE POWER BE EXERCISED FORCEFULLY AND CONSISTENTLY, AND THAT THE CHIEF EXECUTIVE'S LAWFUL POLICY PREFERENCES BE CARRIED OUT BY HIS SUBORDINATES WITHIN THE EXECUTIVE BRANCH. EXECUTIVE ORDERS ARE BINDING ON OFFICIALS WITHIN THE EXECUTIVE BRANCH.

PRESIDENTS HAVE EXERCISED THEIR AUTHORITY TO ISSUE EXECUTIVE ORDERS THROUGHOUT OUR HISTORY. PRESIDENT WASHINGTON, FOR EXAMPLE, ISSUED DIRECTIVES THAT TODAY WOULD BE CLASSIFIED AS EXECUTIVE ORDERS, USING THEM TO MANAGE THE BUSINESS OF THE EXECUTIVE BRANCH IN SUCH AREAS AS PROSECUTORIAL PRIORITIES, AND HARMONIZING THE PUBLIC POSITIONS OF THE CABINET DEPARTMENTS. SUBSEQUENT PRESIDENTS, INCLUDING PRESIDENT ADAMS AND PRESIDENT JEFFERSON, FOLLOWED SUIT. BY TRADITION, THE DISTINCTION OF ISSUING EXECUTIVE ORDER NUMBER ONE IS AWARDED TO PRESIDENT LINCOLN, ALTHOUGH IN FACT THE PRACTICE OF NUMBERING EXECUTIVE ORDERS DID NOT ARISE UNTIL THIS CENTURY.

THE HISTORICAL PRACTICE IS SIGNIFICANT IN THIS INSTANCE BECAUSE IT GIVES CONTENT TO "THE EXECUTIVE POWER" GRANTED TO THE PRESIDENT BY THE CONSTITUTION. AS JUSTICE FRANKFURTER STATED IN HIS CONCURRENCE IN THE STEEL SEIZURE CASE, "A SYSTEMATIC, UNBROKEN, EXECUTIVE PRACTICE, LONG PURSUED TO THE KNOWLEDGE OF THE CONGRESS AND NEVER BEFORE QUESTIONED, ENGAGED IN BY PRESIDENTS WHO HAVE ALSO SWORN TO UPHOLD THE CONSTITUTION . . . MAY BE TREATED AS A GLOSS ON 'EXECUTIVE POWER' VESTED IN THE PRESIDENT BY § 1 OF ART. II." 343 U.S. AT 610-11 (FRANKFURTER, J., CONCURRING).

BROAD AS THE PRESIDENT'S POWERS ARE, THEY ARE PLAINLY NOT UNLIMITED. THEY ARE LIMITED BY THE CONSTITUTION'S TEXT; THEY ARE LIMITED BY THE PRINCIPLE OF SEPARATION OF POWERS EMBODIED IN THE CONSTITUTION; THEY ARE LIMITED BY THE NON-DELEGATION DOCTRINE; AND THEY ARE OFTEN LIMITED BY STATUTORY TERMS THAT GRANT THE PRESIDENT ONLY A NARROW DISCRETION.

IN RECENT DECADES, PRESIDENTS HAVE RELIED ON THE ATTORNEY GENERAL TO REVIEW AND APPROVE PROPOSED EXECUTIVE ORDERS. EXECUTIVE ORDER 11,030, ISSUED IN 1962 AND WHICH CONTINUES (AS AMENDED) TO GOVERN THE FORM OF EXECUTIVE ORDERS AND THE PROCEDURES TO BE FOLLOWED IN ISSUING EXECUTIVE ORDERS, PROVIDES THAT THE ATTORNEY GENERAL IS TO REVIEW PROPOSED EXECUTIVE ORDERS FOR "FORM AND LEGALITY."

THE ATTORNEY GENERAL STILL PERFORMS THAT FUNCTION IN CERTAIN EXCEPTIONAL CASES: ATTORNEY GENERAL CIVILETTI, FOR EXAMPLE CHOSE TO APPROVE PRESIDENT CARTER'S EXECUTIVE ORDERS FOR DEALING WITH THE IRANIAN HOSTAGE CRISIS IN AN OPINION OVER HIS OWN SIGNATURE. 4A OP. OFF. L. C. 302 (1981). BUT THE ATTORNEY GENERAL HAS FORMALLY DELEGATED THE RESPONSIBILITY TO APPROVE EXECUTIVE ORDERS TO THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL ("OLC"), IN WHICH I WAS PRIVILEGED TO SERVE DURING THE ADMINISTRATIONS OF PRESIDENT REAGAN AND PRESIDENT BUSH.

THE TERMS OF THAT DELEGATION, IN 28 CFR § 0.25, ARE THEMSELVES INSTRUCTIVE. OLC IS RESPONSIBLE NOT ONLY FOR REVIEWING PROPOSED EXECUTIVE ORDERS FOR "FORM AND LEGALITY," BUT ALSO FOR "MAKING NECESSARY REVISIONS" TO PROPOSED ORDERS BEFORE "THEIR TRANSMISSION TO THE PRESIDENT." FURTHER, OLC OFFERS ITS LEGAL OPINION IN WRITING, SO THAT THERE IS A FORMAL RECORD THAT THE EXECUTIVE ORDER WAS REVIEWED FOR LEGALITY, AND A FORMAL DOCUMENT SIGNED BY A RESPONSIBLE OFFICIAL IN OLC VOUCHING FOR THE LAWFULNESS OF THE PROPOSED ACTION.

I UNDERSTAND THAT THE CLINTON ADMINISTRATION CONTINUES TO FOLLOW THESE PROCEDURES.

THERE IS THUS NOTHING NECESSARILY SUSPECT OR UNLAWFUL ABOUT EXECUTIVE ORDERS. THEY ARE PART OF OUR CONSTITUTIONAL ORDER AND OF THE LONG-ESTABLISHED FUNCTIONING OF THE EXECUTIVE BRANCH. THE VAST MAJORITY OF EXECUTIVE ORDERS ATTRACT LITTLE ATTENTION OR CONTROVERSY. GIVEN THAT THE PRESIDENT IS POLITICALLY ACCOUNTABLE FOR THE PERFORMANCE OF HIS ADMINISTRATION, EXECUTIVE ORDERS OFFER A VALID AND NECESSARY MECHANISM FOR THE PRESIDENT TO EXERCISE HIS LAWFUL POWERS.

II. CONGRESSIONAL RESPONSES TO EXECUTIVE ORDERS

THE PRESIDENT'S AUTHORITY TO ISSUE EXECUTIVE ORDERS IS SUBJECT TO ABUSE, AS ARE ALL GOVERNMENT POWERS. UNDER THE GUISE OF DIRECTING THE EXECUTIVE BRANCH, A PRESIDENT MAY FURTHER POLICIES CONTRARY TO STATUTE, OR MAY SHIFT ENFORCEMENT PRIORITIES IN WAYS THAT FRUSTRATE THE INTENTIONS OF CONGRESS. SOME EXECUTIVE ORDERS MAY CROSS THE LINE BETWEEN EXECUTING THE LAW AND LEGISLATING.

THE THREAT OF ABUSE MAY BE PARTICULARLY HIGH WHEN CONGRESS AND THE EXECUTIVE BRANCH ARE CONTROLLED BY

DIFFERENT PARTIES. CERTAINLY WHEN ADMINISTRATION OFFICIALS ANNOUNCE THAT THEY INTEND TO ADOPT SWEEPING EXECUTIVE ORDERS DESIGNED TO CIRCUMVENT CONGRESS, OR IN REACTION TO A DECISION BY CONGRESS TO REJECT PARTS OF THE PRESIDENT'S PROGRAM, CONGRESS IS RIGHT TO BE CONCERNED THAT ITS LEGISLATIVE POWERS MAY BE MISAPPROPRIATED.

THE RISK OF SUCH ABUSES, HOWEVER, SHOULD NOT LEAD CONGRESS TO CONCLUDE THAT ALL EXECUTIVE ORDERS ARE SUSPECT. NOR SHOULD CONGRESS ATTEMPT TO CONSTRAIN BY LEGISLATION THAT PART OF THE PRESIDENT'S EXECUTIVE ORDER AUTHORITY THAT DERIVES FROM THE CONSTITUTION.

RATHER, CONGRESS SHOULD BE VIGILANT TO GUARD ITS LEGISLATIVE PREROGATIVES AND TO MAINTAIN THE SEPARATION OF POWERS THROUGH ITS OWN CONSTITUTIONAL AUTHORITY. WHEN CONGRESS IS CONFRONTED BY AN EXECUTIVE ORDER THAT IT BELIEVES EXCEEDS THE PRESIDENT'S POWERS, IT HAS MANY TOOLS WITH WHICH TO RESPOND. FIRST, BY STATUTE ALL SUBSTANTIVE EXECUTIVE ORDERS ARE REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER. 44 U.S.C. § 1505. CONGRESS AND THE PUBLIC THUS RECEIVE NOTICE OF EXECUTIVE ORDERS. CONGRESS MAY RESPOND TO AN EXECUTIVE ORDER BY EXERCISING ITS LEGISLATIVE POWERS TO ENACT CONTRARY LEGISLATION, OR TO DENY FUNDING TO CARRY OUT AN EXECUTIVE ORDER. ANY SUBSEQUENT CONTRARY LEGISLATION WILL BIND THE PRESIDENT'S DISCRETION, ASSUMING THAT THE LEGISLATION DOES NOT IMPERMISSIBLY INVADE THE PRESIDENT'S CONSTITUTIONAL POWERS.

THUS, FOR EXAMPLE, PRESIDENT CARTER ISSUED EXECUTIVE ORDER 11,988 IN MAY 1977. THAT EXECUTIVE ORDER WAS INTERPRETED BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AS REQUIRING THE BANK REGULATORY AGENCIES TO PROHIBIT REGULATED INSTITUTIONS FROM MAKING LOANS SECURED BY REAL PROPERTY WITHIN A FLOOD PLAIN UNLESS FLOOD INSURANCE WAS AVAILABLE. SUBSEQUENT TO THE ISSUANCE OF THE EXECUTIVE ORDER, CONGRESS CHANGED THE LAW TO PERMIT SUCH LOANS, AND OLC NOT SURPRISINGLY CONCLUDED THAT "THE STATUTE TAKES PRECEDENCE OVER" THE EXECUTIVE ORDER. 2 OP. OFF. L. C. 41 (1978).

SECOND, A PRESIDENT MAY RESPOND TO POLITICAL PRESSURE OR COMPLAINT ABOUT AN EXECUTIVE ORDER. EXECUTIVE ORDER 13,083, PRESIDENT CLINTON'S ATTEMPT TO ALTER PRESIDENT REAGAN'S FEDERALISM ORDER, ELICITED SUFFICIENT PUBLIC OUTCRY THAT PRESIDENT CLINTON "SUSPENDED" HIS

OWN EXECUTIVE ORDER BY MEANS OF A SUBSEQUENT EXECUTIVE ORDER. E.O. 13,095.

THIRD, CONGRESS AS A PROPHYLACTIC MATTER CAN LIMIT THE PRESIDENT'S ABILITY TO INVOKE STATUTORY AUTHORITY FOR EXECUTIVE ORDERS BY WRITING MORE SPECIFIC, MORE PRECISE LAWS. ALTHOUGH IN CERTAIN AREAS IT IS OFTEN NECESSARY OR DESIRABLE FOR THE PRESIDENT TO HAVE SUFFICIENT DISCRETION TO RESPOND TO CHANGING CIRCUMSTANCES, THAT IS NOT TRUE OF ALL LEGISLATION. CONGRESS FAILS TO PERFORM ITS ESSENTIAL LEGISLATIVE FUNCTION WHEN IT ALLOCATES EXCESSIVE DISCRETION TO THE EXECUTIVE. A VAGUE LAW THAT IMPOSES ON THE EXECUTIVE THE TASK OF BALANCING COSTS AND BENEFITS REMOVES THE DEBATE ABOUT THAT BALANCING FROM THE PEOPLE'S REPRESENTATIVES ASSEMBLED IN CONGRESS, AND RELEGATES IT TO A TECHNICAL WORLD OF REGULATION. A DIRECTION TO THE PRESIDENT, FOR EXAMPLE, TO MAKE HIGHWAYS "SAFER" WITHOUT ANY LEGISLATIVE CHOICE AMONG THE MANY COMPETING POLICY OPTIONS -- REQUIRING DIFFERENT AND MORE COSTLY AUTOMOBILE ENGINEERING, OR CHANGING HIGHWAY DESIGN, OR USING FEDERAL FUNDS TO ENCOURAGE THE STATES TO CHANGE THEIR LAW ENFORCEMENT POLICIES TO CONCENTRATE ON SPEEDERS -- WOULD GRANT THE PRESIDENT A GREAT DEAL OF DISCRETION TO MAKE POLICY CHOICES THAT CONGRESS FAILED TO MAKE.

FOURTH, CONGRESS COULD PASS A STATUTE THAT REQUIRED THE PRESIDENT, WHENEVER HE INVOKED A GRANT OF STATUTORY AUTHORITY TO JUSTIFY AN EXECUTIVE ORDER, TO IDENTIFY THAT STATUTE WITH PARTICULARITY. THAT WOULD AVOID THE PHENOMENON OF EXECUTIVE ORDERS BASED GENERICALLY ON UNSPECIFIED "LAWS OF THE UNITED STATES."

FIFTH, CONGRESS COULD ALSO BY LEGISLATION REQUIRE THE PRESIDENT, WHENEVER HE INVOKED A GRANT OF STATUTORY AUTHORITY TO JUSTIFY AN EXECUTIVE ORDER, TO SEND THE EXECUTIVE ORDER TO CONGRESS AND DELAY ENFORCING THE ORDER FOR THIRTY DAYS, TO GIVE CONGRESS AN OPPORTUNITY TO REVIEW THE ORDER AND DETERMINE IF A LEGISLATIVE RESPONSE WAS NECESSARY. CONGRESS PRESUMABLY WOULD WANT TO BUILD INTO ANY SUCH REQUIREMENT AN EXCEPTION FOR BONA FIDE EMERGENCIES.

SIXTH, CONGRESS HAS A HOST OF OTHER MEANS TO INFLUENCE THE PRESIDENT. CONGRESS CAN CONDUCT OVERSIGHT HEARINGS TO PRESS THE ADMINISTRATION TO EXPLAIN ITS LEGAL REASONING; CAN RESTRICT OR REDUCE APPROPRIATIONS; AND CAN TAKE SUCH INDIRECT ACTIONS AS SLOWING THE CONFIRMATION OF PRESIDENTIAL NOMINEES IN AN ATTEMPT TO PERSUADE THE PRESIDENT TO WITHDRAW A QUESTIONABLE

ORDER. ACCORDING TO PRESS REPORTS, FOR EXAMPLE, THE SENATE DELAYED A CONFIRMATION VOTE ON ONE OF PRESIDENT CLINTON'S CABINET NOMINEES UNTIL THE PRESIDENT AGREED TO DROP A PLANNED EXECUTIVE ORDER THAT WOULD HAVE INSTRUCTED FEDERAL AGENCIES TO CONTRACT WITH UNIONIZED COMPANIES. *E.G., THE BALTIMORE SUN*, MAY 1, 1997 AT 2A.

FURTHER, IN ADDITION TO CONGRESS'S OWN POWERS TO RESTRAIN ABUSES, IN SOME CASES THE PRESIDENT'S ISSUANCE OF AN EXECUTIVE ORDER CAN BE SUBJECT TO JUDICIAL REVIEW. THE STEEL SEIZURE CASE INVOLVED A CHALLENGE TO AN EXECUTIVE ORDER. MORE RECENTLY, PRESIDENT CLINTON'S EXECUTIVE ORDER 12,954, INVOLVING STRIKER REPLACEMENTS, WAS HELD TO BE INVALID BY THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. CHAMBER OF COMMERCE OF THE *UNITED STATES V. REICH*, 74 F.3D 1322 (D.C. CIR. 1996). THE POSSIBILITY OF JUDICIAL REVIEW CANNOT REPLACE CONGRESSIONAL OVERSIGHT, HOWEVER. PRIVATE PARTIES ARE OFTEN UNWILLING TO SPEND THE TIME AND MONEY TO CHALLENGE THE FEDERAL GOVERNMENT, AND IN SOME CASES IT MAY BE DIFFICULT TO IDENTIFY PARTIES WITH STANDING TO SUE.

III. CONCLUSION

EXECUTIVE ORDERS ARE A PART OF THE PRESIDENT'S CONSTITUTIONAL AUTHORITY. CONGRESS HAS OFTEN ADDED TO THAT AUTHORITY BY GRANTING THE PRESIDENT BROAD STATUTORY DISCRETION. THE PRESIDENT MUST HAVE SUCH BROAD AUTHORITY TO DIRECT AND CONTROL HIS SUBORDINATES IN THE EXECUTIVE BRANCH.

IF AN EXECUTIVE ORDER EXCEEDS THE PRESIDENT'S AUTHORITY, CONGRESS MAY ACT LEGISLATIVELY TO CORRECT THE PRESIDENT, OR MAY USE ANY OF NUMEROUS POLITICAL TOOLS. IN A PROPER CASE, THE JUDICIARY IS ALSO ABLE TO STRIKE DOWN AN EXECUTIVE ORDER THAT IS CONTRARY TO LAW.

WHEN A PRESIDENT OVERREACHES AND USES EXECUTIVE ORDERS TO INVADE OR SUPERSEDE THE LEGISLATIVE POWERS OF CONGRESS, CONGRESS MAY BE SUFFICIENTLY PROVOKED TO CONSIDER AN ACROSS-THE-BOARD APPROACH TO REIN IN THOSE ABUSES. ALTHOUGH THAT REACTION IS UNDERSTANDABLE, CONGRESS MUST BE CAREFUL TO UNDERSTAND THE EXTENT TO WHICH EXECUTIVE ORDERS ARE A NECESSARY ADJUNCT OF THE PRESIDENT'S CONSTITUTIONAL DUTIES. AT ALL TIMES, CONGRESS HAS AMPLE LEGISLATIVE AND POLITICAL MEANS TO RESPOND TO ABUSIVE OR LAWLESS EXECUTIVE ORDERS, AND THUS CONGRESS SHOULD RESIST THE TEMPTATION TO PURSUE MORE SWEEPING, MORE DRACONIAN AND MORE QUESTIONABLE RESPONSES.

Committee on Rules

U.S. House of Representatives

106th Congress

Hearing of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

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The Constitution vests the legislative power in Congress and the executive power in the President, but it nowhere defines those powers. To be sure, the Constitution enumerates the subjects to which the legislative power extends,"(1) but it does not offer a definition of what that power is, nor does it define "executive power." This was not inadvertent. The framers were practical statesmen who understood that each branch of government would be ambitious and seek to secure as much power, at the expense of the other branches, as possible. The framers also understood that any attempt to stop this by marking clear boundaries on the executive and legislative powers would be futile. Madison derisively referred to such formal demarcations as "parchment barriers." The genius of the Constitution's structure lies in the practical response it adopted. Instead of assuming that angels would govern, it structures the branches so that, as Madison put it, "ambition will be made to counteract ambition"; each branch, in short, would act as the guardian of its own constitutional role. In holding these hearings the committee is fulfilling the Constitution's vision of how the government would and should work.

The Constitution creates a federal government of limited and enumerated powers. Therefore, consideration of any federal action must begin with an inquiry into whether the action is validly authorized. When the President acts unilaterally, such as by issuing an executive order, his authority must derive from either the Constitution or a law, typically a statute."(2) If the President issues an executive order that is based entirely on authority that the Constitution's text grants exclusively to the President, that executive order, by definition, does not involve a deployment of a legislative power."(3) I will confine my comments to the two contexts that implicate directly Congress's legislative role: where the President's authority to issue an executive order is founded on statute alone, and where the order is based on a combination of constitutional and statutory authority.

The relationship between the executive and legislative powers within these contexts is not fixed and definite, but is better conceptualized as a spectrum.

The extent of each is a function of several mutable factors: the specific statute at issue, the nature of Congress's underlying constitutional power, the nature of relevant constitutional powers vested in the President, and the specific facts surrounding the executive order."(4) Consequently, it is difficult to offer general prescriptions for safeguarding the legislative power against executive overreaching. Nevertheless, I believe that there is support for a number of observations:

I. As long as Congress legislates, its legislation will, unavoidably, vest the executive branch with discretion as to how to enforce Congress's laws.

II. As long as the executive branch holds executive discretion, it is generally desirable that this discretion be subject to some degree of presidential supervision and control.

III. Congress is amply equipped to protect its legislative role from presidential overreaching.

IV. Beyond Congress, there are significant, additional checks against presidential usurpation of the legislative role.

I.

Executive branch lawmaking, to refer back to the title of this hearing, is inevitable. Faithful execution of the laws demands it. In a recent article, two important presidential scholars have argued that the ability to act unilaterally is the defining feature of modern American presidency."(5)

Statutes are not self-enforcing. Every statute unavoidably conveys some discretion. When any officer charged with the execution of a law decides how to exercise that discretion, the officer engages in something that can well be called lawmaking. Imagine a specific and straightforward law, one that declares a speed limit of 55 mph on a given highway. An officer charged with enforcing that law will have to determine whether to pull over a car for going 56 mph. An officer who does will have to leave his patrol car to write out the ticket and may then miss a car going by at 85 mph. In a world where it is impossible to catch every offender, the executive will have to determine which offenders to ticket and which to let pass. The executive may well determine that it is most faithful to the legislature's purpose by adopting a policy that it will not pull over anyone who goes less than 60 mph. Has the executive made law? Certainly. Has the executive been irresponsible or unfaithful to the legislature? Certainly not.

Moreover, executive discretion flows from the durability or duration of statutes. Because statutes remain operative over time, they apply in the context of circumstances that will have changed in ways that are unforeseeable to even the most conscientious legislature. Applying a statute under significantly changed circumstances from those the enacting Congress faced necessarily involves executive judgment. Whatever course the executive chooses to take, including the choice to take no course of action, when confronted with changed

circumstances can be termed executive lawmaking. Consider, for example, the government shutdown. The statute that required the cessation of government functions was the Anti-Deficiency Act."(6) The Congress that passed this ancient statute did not have in mind the circumstance of a complete lack of appropriations."(7) Yet Presidents have been duty bound to apply the Anti-Deficiency Act in that very unforeseen situation."(8)

The interplay of distinct statutes also occasions a great deal of executive lawmaking. Congress often passes inconsistent statutes. For example, a law may require a program to run at a specified level, but the appropriations made for the program may only permit it to run at 80% of the mandated level. The executive's determination of how to proceed involves what might be deemed lawmaking. Although such examples are common, Congress does not always enact language stating how to resolve plain and direct statutory conflicts.

Often, the interplay of statutes is not so readily apparent. Again, the government shutdown provides a useful example. The Food and Forage statute"(9) was enacted to ensure that military personnel who found themselves cut off from supplies could provide for themselves. It allows military personnel to secure food and necessary materiel. The Anti-Deficiency Act forbids incurring an obligation in advance of an appropriation. These statutes were enacted without apparent regard to one another, yet they come into tension during a lapse of appropriations. Resolution of that tension involves executive lawmaking.

It should not be surprising then that our history is full of examples of executive lawmaking, stretching continuously from George Washington through the present. Moreover, some of the most historically significant governmental laws have been issued by the President acting unilaterally. Some of these solitary acts deserve our praise as courageous, others merit approbation, the value of others is still debated. For example, President Washington issued the Neutrality Proclamation, declaring U.S. neutrality in the war between Britain and France and forbidding U.S. citizens from acting inconsistently with a state of neutrality."(10) Andrew Jackson effectively eliminated the Bank of the United States by ordering that the assets of the federal government be withdrawn. President Lincoln issued the Emancipation Proclamation freeing the slaves in the States of the Confederacy; Theodore Roosevelt withdrew public lands and set them aside to create a system of national parks; Franklin Roosevelt ordered the internment of Japanese Americans during World War II; President Truman desegrated the military and ordered the seizure of steel mills; and President Lyndon Johnson ordered the nation's first affirmative action program on the strength of the federal procurement statute.

II.

Given that lawmaking discretion is inevitable, it is proper and desirable that the discretion be exercised subject to the President's supervision, which is to say subject to executive orders. Unlike agencies, which tend to focus on a limited subset of federal laws and of policy concerns, the President enjoys a fairly panoramic view of both the executive branch and the United States Code. The

President is thus uniquely situated to bring about enforcement actions that are consistent across the executive branch and to set rational enforcement priorities. When a decision will have important consequences for more than one agency or department, the President alone can call upon the legal and policy advice of all interested agencies and weigh that input without being distracted by concern over agency jurisdiction or "turf battles.""[11]

Most importantly, presidential supervision means presidential accountability. If Congress were to deprive the President supervisory control over the exercise of discretion by a federal agency, Congress and the public could not hold the President responsible for abuses of power. Moreover, the President by virtue of his high political office and of being elected, is responsive to the public in ways that no other executive branch official is. Thus, popular concern about regulation by "faceless bureaucrats" would be heightened were the President unable to control the lawmaking discretion vested in the executive branch.

III.

Recognizing that even broad executive discretion is inevitable and possibly beneficial does not undermine my basic point about the Committee's inquiry. It is legitimate, indeed important, for Congress to remain vigilant that necessary and proper executive discretion is not carried too far. I would like briefly to canvass some of the measures that Congress might consider to protect its legislative role.

1. Legislating more specifically. That it may be impossible to eliminate all discretion does not mean it will be impossible to constrict more narrowly the extent of discretion. It may be possible and even salutary to study options for reducing executive discretion,"[12] but ultimately this is a dead end. The President does not possess broad discretion because Congress is lazy or slothful. The President possesses broad discretion because it is necessary for any statutory regime to be effective. For example, federal criminal laws are phrased in broad, even capacious, terms. Making them more specific would limit the possibility of prosecutorial abuse and harassment, all the better from the standpoint of individual liberty. However, precisely phrased federal criminal laws allow dangerous and flexible criminal enterprises to change the form of their dealings in order to evade the formal categories. For example, the first federal criminal code included approximately twenty crimes, including the crime of maiming, which Congress defined very precisely to apply:

if any person ... shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any of the manners before mentioned ...."[13]

This statute is remarkably specific, but for that reason fails to reach such obvious maimings as a stab wound to the ear or a blow to the nose with a club. The founders themselves were familiar with this problem. In setting forth the permissible grounds for an impeachment, they realized that a precise list of

crimes would inevitably exclude misconduct that is just as harmful to the republic as bribery and treason, but that do not satisfy the formally required elements of the crimes they might have listed. Favoring effectiveness over precision, the Constitution's drafters settled on the famously vague formulation, "high crimes and misdemeanors.""(14)

Federal law enforcement has been able to devastate the mafia and other criminal organizations precisely because it has at its disposal broad and vaguely worded statutes. Take away the flexibility and adaptability of federal law enforcement, and it cannot combat crime as effectively as it does.

Indeed, Congress's ability to accord lawmaking authority to the executive is generally viewed not as a derogation from its legislative power, but as one of the most important tools by which Congress can perform its legislative role. Again, history is instructive. To combat the Great Depression, Congress granted broad authority to the President to respond to economic conditions. When the Supreme Court struck down these delegations, its decisions were not viewed as promoting the power and authority of Congress. Its decisions were viewed instead as preventing Congress from enacting an effective remedy to a national crisis.

2. Legislating more frequently. Rather than trying to craft enduringly and unfailingly specific legislation, Congress should legislate more frequently. First, Congress must be vigilant in overseeing the rules that the executive branch promulgates. Congress should then repeal or amend executive branch lawmaking whenever it disapproves of the executive branch's rules. Second, Congress should be vigilant in overseeing its own statutes. Congress should seek to identify antiquated statutes, like the Anti-Deficiency Act and the Vacancies Act, before their application becomes problematic and it should keep abreast of how statutes it enacts come to interact with other statutory regimes. Where there is interplay, Congress may assert its legislative power to dictate the accommodation it prefers.

3. Oversight. Just as executive lawmaking occurs outside the framework of bicameralism and presentment, that is where Congress must look for methods to keep the executive in check. First and foremost is Congress's power to conduct oversight hearings. It would be risible to expect the President personally to participate in oversight hearings. Nevertheless, the President's executive orders on unclassified matters are publicly available. In addition, the President does not personally carry out his own executive orders. The agencies charged with doing so are themselves generally amenable to the oversight process. It is thus well within Congress's ability to inform itself as to how its statutes, and the discretion they confer, are being enforced and to discern whether there are any abuses.

Congress can supplement oversight hearings by requiring that agencies submit periodic reports describing the executive orders to which they are subject and conveying whatever other information Congress might find useful in performing its oversight function. It might, for example, call on the agency to discuss exactly how the executive order bears on or shapes the agency's enforcement of

affected statutes, the order's impact on the allocation of agency resources, and alternative enforcement regimes that the order requires the agency to forgo.

Having armed itself with information, Congress may consider several types of responses. First, it may legislate to alter or supplant completely the directives of a given executive order. Second, either or both houses can pass a resolution calling upon the President to rescind or amend any executive order. A third, drastic measure is censure. If Congress believes that the President has overstepped the proper bounds of his executive role and usurped the legislative function, it may pass a resolution of censure. This is what Congress did in response to President Andrew Jackson's decision to withdraw federal assets from the Bank of the United States, with the intent and practical effect of closing the bank."(15)

At this point an institutional symmetry appears. Much as Congress is (rightly) concerned about protecting its legislative role from presidential overreaching, the executive periodically complains that mechanisms such as those set forth above thwart the constitutionally proper executive role. In each case, the point is balance.

4. Structural reform. Congress might consider extending the Administrative Procedure Act to cover executive orders. This, however, would raise serious constitutional questions. Rather than attempting such a general structural reform, Congress could impose tighter structural requirements as a precondition to issuing certain executive orders. Where the President's authority to issue an executive order is based exclusively on a statute, the statute might enumerate a list of findings that must be made before the power can be exercised and require that the basis for the findings be published in the Federal Register."(18)

IV.

Even though not subject to the APA, executive orders are subject to important internal and external (to the executive branch) checks. Externally, the courts will conduct an independent review of any order that affects an individual with standing to bring a lawsuit."(19) Even when review in an Article III court is not available, there are other vehicles that can serve to provide external review of the legal basis for the President's assertion of authority to issue an executive order. For many types of executive orders, the opinions of the Comptroller General stand as an independent source of legal analysis. The Congressional Research Service, and the House and Senate Legal Counsel are also capable of providing members of Congress with an independent assessment of presidential assertions of authority. Aside from legal analysis, interest groups closely watch executive orders and raise policy objections if they disagree on policy grounds with the approach of an executive order. Finally, in the ways discussed above, Congress remains actively vigilant against the President overstepping the bounds of his authority. Indeed, the current majority in Congress has been, by at least one measure, the most active guardian of its legislative role against presidential incursions. In the twenty-five years from January 1973 through the end of 1997, legislation to overturn an executive order was introduced on 37 occasions. Of

these, 11 occurred in the last three years, 1995 - 1997."[20]

Before an executive order is submitted to the President for his signature, it is sent to the Office of Legal Counsel for approval of its form and legality."[21] The order proceeds to the President only if OLC agrees that the order is validly based on legal authority and a form memorandum stating the approval as to form and legality accompanies the order when it is presented to the President for his signature. Where the order presents a colorable issue as to the authority of the President, OLC will prepare a memorandum setting forth its analysis of the question. In the case of an order that does not involve classified material, the OLC analysis is generally made public. This allows Congress and the public to determine for themselves whether the order is validly based on legal authority, found either in the Constitution or in statutes. In addition, past opinions of OLC stand as guides, or precedent, by which to judge the reasoning that supports current executive orders. These internal procedures enable the external checks -- especially the vigilance of Congress, interest groups, and the courts -- to function more effectively.

1. *See, e.g.*, U.S. Const. Art. I, sec. 8.
2. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The President may also derive authority from a duly ratified treaty.
3. Such an order may, however, have ramifications for legislative prerogatives. It may bring about circumstances that yield strong pressure on Congress to enact appropriations. Such an executive order can also serve an agenda-setting function, diverting attention from what may otherwise have been higher congressional priorities. Each of these occurs when the President orders the use of military force, short of war.
4. For the classic exposition of this view, *see Youngstown Sheet & Tube*, 343 U.S. at 634-55 (Jackson, J., concurring).
5. *See* Terry Moe & William Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132 (1999).
6. *See* 31 U.S.C. secs. 1341-1342.
7. *See* GAO Redbook.
8. For an attempt to construe the Anti-Deficiency Act in the context of a complete failure of appropriations, see 43 Op. Att'y Gen. 29 (1981).
9. 3 Stat. 567, 568 (March 2, 1861).
10. For example, privateers were not permitted to sail from ports of the United States. The proclamation nearly led to war with France. The Neutrality Proclamation also spawned the famous Pacificus-Helvidius debate over the extent of the President's constitutional authority to conduct foreign affairs. For an excellent discussion, see H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs* 40 Wm. & Mary L. Rev. 1471 (1999).
11. An exception to this may arise when the disputing agencies include an independent agency. Here the President's institutional, or "turf," interest would yield an incentive to disfavor the independent agency.
12. For example, when Richard Nixon asserted and exercised broad authority, based on the Constitution and on statutes, to decline to expend appropriated funds, Congress responded to protect its appropriations power by enacting the Impoundment Control Act. *See* Pub. L. No. 93-344, 88 Stat. 297 (1974).
13. 1 Stat. 112, 115, 1st Cong., 2d Sess. (April 30, 1790).
14. *See* II Joseph Story, Commentaries on the Constitution, paras. 794-802 (1833).
15. From the perspective of protecting congressional power, this episode does not have an encouraging conclusion. Cowed by Jackson's continuing political popularity, Congress three years later rescinded the censure resolution. *See* Register of Debates, 24th Cong., 2d Sess. 379-418, 427-506 (1837); Senate Journal, 24th Cong., 2d Sess. 123-24 (April 15, 1834). In a particularly egregious case of repeated, dangerous, and contumacious usurpation of the legislative power, impeachment and removal would be available to protect the constitutional

structure of government. As 210 years of constitutional practice show, this is merely a theoretical possibility.

16. For a representative objection, see "Common Legislative Encroachments on Executive Branch Constitutional Authority," 13 Op. O.L.C. 299 (1989) (preliminary print). Not all administrations have shared this restrictive view of the constitutional relationship between the executive and Congress. *See, e.g.*, "The Constitutional Separation of Powers between the President and Congress" (Opinion of the Office of Legal Counsel, May 7, 1996) (superceding 13 Op. O.L.C. 299).
17. The Supreme Court so held in Franklin v. Massachusetts, 505 U.S. 788 (1992). For this reason, it declined to interpret the term agency to include the President.
18. Where the President's power is established in the Constitution's text, for example the appointments power or the pardon power, it would raise serious constitutional questions for Congress to regulate the President's exercise of the power in this way. *See, e.g.*, Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989).
19. Eighty-six executive orders have been subject to court challenge. Of these, the President's authority to issue the order has been upheld in seventy-two (approximately 84%). Moe & Howell, at 175.
20. Moe & Howell, at 166.
21. *See* 28 C.F.R. 0.25(b).

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U.S. House of Representatives
Committee on Rules

Hearing of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

Statement of Robert Bedell,
Administrator, Office of Federal Procurement Policy, OMB (1986-1988); Deputy & Acting Administrator, Office of Information & Regulatory Affairs, OMB (1983-1986); Deputy and Acting General Counsel, OMB (1973-1983); President, RPB Company

I am Bob Bedell and the Subcommittee invited me to testify during these hearings entitled "The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?" My perspective on the Executive Order process was gained from the 15 years I spent as an employee of the Office of Management and Budget from 1973 until 1988. I was the Deputy General Counsel and often Acting General Counsel until 1983. The OMB's General Counsel's Office is responsible for preparing Executive Orders for the President's consideration. From 1983 through most of 1986, I was the Deputy and often Acting Administrator of the Office of Information and Regulatory Affairs (OIRA) at OMB, where I carried out President Reagan's Executive Order No. 12291 establishing his regulatory policies. And from 1986 until 1988, I was the Administrator of the Office of Federal Procurement Policy at OMB.

There are orders by the Chief Executive and there are Executive Orders. Executive Orders are only one of several ways by which Presidents have communicated their policies and instructions to the heads of Executive departments and agencies.

Executive Orders are defined by statute to include documents issued by Presidents that have "general applicability and legal effect."[1] They do not include orders that are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof."[2] Since the enactment of the Federal Register Act"[3] in 1936, these Executive Orders have been required to be published in the Federal Register"[4] so that the public and Congress may be informed of the President's policies and instructions.

Orders of the President that do not have general applicability and legal effect, or that apply only to Federal agencies or employees are not required to be published in the Federal Register. These orders may be published or they may not be. Some of these orders and instructions dealing with the Federal Budget are published by the Office of Management and Budget as OMB Circulars. They deal with everything from the procedures and requirements for the preparation of the Budget that Federal law requires the President to submit annually, to instructions on how to implement the

Federal Advisory Committee Act.

Like Executive Orders, these Circulars can be quite important and are frequently watched with great interest by the public, the press and Congress. Examples of these Circulars are the designation of Standard Metropolitan Statistical Areas, the setting of overhead rates for various non-profit organizations, and the requirements and procedures for Federal agencies concerning contracting out for commercial services. Frequently, Congress will hold hearings examining these activities. I have testified at several.

My point in raising the OMB Circulars is partly to explain where some of the orders and instructions may be found that do not meet the statutory requirements to be an Executive Order published in the Federal Register. It is also my purpose to point out that there are a large number of documents that have been used by Presidents – and often relied upon by Congress – to oversee and administer the responsibilities of the Executive Branch of the Federal Government, and that Executive Orders are only one of a number of these mechanisms.

There are numerous other kinds of Presidential directives (often named differently in different Administrations) including Presidential Memoranda and National Security Decisions, which are not published but by which the President provides general instructions to agency heads of his policy preferences. Furthermore, there are the daily "orders" of the President and his delegates that are essential for running any government or any enterprise for that matter. Such decisions include those instructing the officers and employees of the Executive Branch with regard to budget and funding decisions, appointments to office, the construct of proposed legislation, national security decisions. Sometimes these meet the statutory requirements of the Federal Register Act and are processed and published in the Federal Register"[(5)]. Many times they do not.

Often, Executive Orders, Reorganization Plans, Federal agency rules and congressional enactments become intertwined creating the governing law for a matter or an activity.

A VERY SHORT OVERVIEW OF EXECUTIVE ORDERS

Executive Orders have been used by Presidents since the founding of the United States in order to communicate the President's policy preferences to his appointees, Congress and the public, and to guide agency heads in the exercise of their discretion. (Executive Orders are also used by many, if not all, of the Governors of the States.)

From 1907 until the Federal Register Act of 1936, every Executive Order was assigned a number by the Department of State. Orders issued prior to 1907 were assigned numbers retroactively. But if the Department of State did not have a document, it did not assign it a number.

Prior to 1936 when the Federal Register Act required Executive Orders with general applicability and legal effect to be published in the Federal Register, there was no single place to go to find the full text of them. Instead, there are various collections

and compilations of the messages and papers of the Presidents, from President Washington on. As you might imagine, these collections and compilations include all matters of state; some of the documents would meet our current definition of an Executive Order and others would not. Perhaps the best single source for Executive Orders is the CIS Index to Presidential Executive Orders & Proclamations, 1789-1983.

Since 1936, "Executive Orders" have been published in the Federal Register, and since 1938, they have been compiled annually in Title 3 of the Code of Federal Regulations. Since 1941, Executive Orders have been published in the U.S. Code Congressional and Administrative News. And, since 1965, Executive Orders can also be found in the Weekly Compilation of Presidential Documents.

Because an Executive Order remains in effect until modified and Presidents have often modified Orders issued by their predecessors or even themselves, there now are publications that indicate the Orders that have been rescinded, modified or that have not been, at least those Orders issued since 1945.

Recent Presidents have issued hundreds of Executive Orders. President Kennedy issued 214 Executive Orders from 1961-1963"[6]. President Johnson issued 324 from 1963-1969"[7]. President Nixon issued 346 from 1969-1974"[8]. President Ford issued 169 from1974-1977"[9]. President Carter issued 320 from 1977-1981"[10]. President Reagan issued 381 from 1981-1989"[11]. President Bush issued 166 from1989-1993"[12]. And President Clinton has issued 307 Executive Orders from 1993-Present"[13].

The Office of the Federal Register, created in the Federal Register Act of 1936, is now located in the National Archives and Records Administration and is responsible for the display and publication of Executive Orders.

THE PROCESS BY WHICH EXECUTIVE ORDERS ARE ISSUED

The process by which Executive Orders are issued is itself the subject of an Executive Order, currently Executive Order No. 11030, issued on June 19, 1962 by President Kennedy. This Order appears in the Federal Register"[14] and in the Code of Federal Regulations for the relevant period"[15]. As is the custom with modern Executive Orders, E.O. 11030 cites the Executive Orders (if any) that it supercedes, modifies or repeals, in this instance, Executive Order 10006 of October 9, 1948. One of the earliest Executive Orders on Executive Orders was Executive Order 5220 issued by President Hoover in 1929.

Under the current Executive Order on Executive Orders, a formal process for issuing this form of Presidential command has evolved. The process has four critical features:

1. Coordination of proposed Executive orders by the Office of Management and Budget.
2. Circulation of proposed Executive orders by the General Counsel of OMB to interested departments and agencies and concerned parts of the White House

staff. If there is a policy disagreement about the wisdom or terms of an Executive order, OMB determines or designs an inter-agency dispute resolution process to address the issues.

3. Transmission of the proposed Executive order from the Director of OMB to the President through the Office of Legal Counsel of the Department of Justice. The Office of Legal Counsel, on behalf of the Attorney General, issues an opinion on each proposed order expressing its views whether the proposal is acceptable for form and legality.
4. Circulation of the proposed Executive order within the White House staff, after its receipt from Justice, to make certain that its terms are acceptable to the President and that there are no further policy issues that need to be resolved.

Once these steps have been concluded, the Executive Order is presented to the President for his signature. The White House Clerk then transmits the signed Executive Order to the Office of the Federal Register for numbering and publication.

AREAS OF INTEREST TO THE SUBCOMMITTEE

In your letter inviting me to testify, you asked several questions and described several areas of interest, including –

- An examination of Executive Orders from a process perspective;
- The legal guidelines and historical precedent for them;
- The process by which they are developed and implemented;
- The impact that they can have on the prerogatives of the Congress;
- The extent to which the public is affected by them;
- Given the size, scope and reach of the modern federal government, whether it is appropriate for Executive Orders to have had the significant policy implications that they have had;
- What impact has the issuance of Executive Orders had on the lawmaking authority and responsibility of Congress?
- What should be the role of Congress in guarding its legislative prerogatives and maintaining the proper balance between the executive and legislative branches of government?

I believe that I have described the process by which Executive Orders are promulgated already, but will be pleased to address any other questions that the Subcommittee may have.

With regard to the legal guidelines for Executive Orders, let me comment briefly on the OMB role in addressing the legal issues concerning Executive Orders. First, the draft Orders are processed by the OMB General Counsel's Office, which coordinates with the relevant interests in the Executive Office of the President and the Department and Agencies. OMB General Counsel seeks to ensure that from the beginning there is sufficient authority for the issuance of the proposed Executive Order. In cases of doubt, the proposal is circulated to the Department of Justice at the initial stage, so that OMB may obtain an early opinion as to the legality of the proposal, as submitted, and whether changes are necessary to conform to the law.

The OMB General Counsel frequently coordinates with the Department of Justice,

both formally and informally, if there are significant questions about the authority involved or to determine if there are constraints upon the direction an Order must adhere to. The final call on the legality of a proposed Executive order is the responsibility of the Attorney General, through the Office of Legal Counsel, within the Department of Justice, during the formal transmission from the Director of OMB to the President. The White House staff will not initiate the final approval process for a proposed Executive order unless there is an opinion from the Department of Justice approving the proposed order on legal grounds. Finally, during the White House staff circulation of a proposed Executive order, the matter is reviewed by the White House counsel, who consults frequently with OMB and the Department of Justice about any questions of the President's legal or constitutional authority to issue the proposed order.

I should also add that each Executive Order begins with a statement of the authority for its issuance. Many times this is a statute enacted by Congress, sometimes it is purely an exercise of the President's authorities under the Constitution and sometimes it is a combination of the two. If a statute authorizes or requires the President to do something, the question of whether the President has somehow exceeded his authority is answered by looking to see whether what he does is within the scope of what Congress authorized him to do. If it is, the questions about authority (and encroachment on the prerogatives of Congress) I believe are largely resolved. If it is outside the scope of what is authorized by a statute, and not otherwise authorized by another statute or the Constitution, that action should be reversed. Federal courts have not hesitated to overturn Executive Orders that exceed the President's authority, most notably in the case of the Executive Order issued by President Truman to seize the steel mills during the Korean War.

The most difficult legal situation is where the President relying upon either a constitutional provision or a general statutory provision takes action in a field that has been highly regulated by Congress.

Sometimes – although rarely -- the legal judgments of the President's lawyers are not correct. This is in part because some judgments are close calls without clear precedent. Although I have no empirical evidence to support this, I believe that in most of these cases, the Executive Order is overturned as to its offending provisions. For most – if not all – Executive Orders, judicial oversight is generally available as is congressional oversight.

With regard to the impact that Executive Orders may have on the prerogatives of the Congress, I think that in very few instances – primarily where the Constitution or the Congress itself has assigned a responsibility or authority to the unreviewable discretion of the President – are the prerogatives of Congress unalterably affected by an Executive Order. Congress can act to undue what a President has done by Executive Order in most instances. The prerogative of Congress to legislate is accordingly not unalterably affected by most Executive Orders.

As a practical matter, if Congress chooses to over-ride a feature of an Executive Order by enacting a statute, the President may require that each House approve that legislation by a 2/3 vote, often a tall order. But this is the case with any legislation as provided in the Constitution. The real question is whether the President has the

requisite authority to do what he proposes in an Executive Order, and I believe that Congress retains its full panoply of prerogatives to deal with it.

The question of whether Presidents have become more assertive in issuing Executive Orders and the Congress less diligent in reviewing them and their authorities is a different question, of course, and one that is difficult for me to assess. I do know that the congressional oversight of programs that I helped to run at OMB was often quite intense. I find it hard to imagine more intense oversight by Congress than its constant review of OMB's review of agency regulations under President Reagan's Executive Order 12291. On the other hand, the newspapers tell me that Congress has not been slow to review and criticize the actions of successor Presidents, including their Executive Orders.

Whether it is any more or less intense today is hard for me to tell. But what I think is clear is that Congress – regardless of the Majority party – must carefully review presidential Executive Orders to ensure that the necessary authority is present and to ensure that they agree with the policy involved. If it doesn't, then it needs to address it as best it can, like any other decision or direction from the Chief Executive. This may be by legislation and it may be in the endless compromises that are the life-blood of the relationship between these Branches of our government.

With regard to the question of the extent to which the public is affected by them, I think the answer is that the public is affected by them, and depending upon the Order, an individual may be significantly affected by an Order. In part, this is because of the definition of an Executive Order – general applicability and legal effect. It is difficult to think of an Executive Order that would not affect the public in some way.

With regard to the question of whether it is appropriate for Executive Orders to have had the significant policy implications that they have had, I think that in the circumstance where Congress has delegated by statute the authority or the responsibility to make a decision, I am not troubled if a President then utilizes that authority or carries out his responsibilities by an Executive Order, even if the ramifications are significant. And there are several reasons for a delegation to the President by Congress, e.g., sometimes Congress delegates to the President decisions that it cannot agree on, leaving it to the Executive to parse finely the needed compromises; and in some instances it is the sole responsibility of the Executive to implement decisions. I am also not troubled by the President issuing Executive Orders using authority granted to him by the Constitution. And generally, I am not troubled by hortatory Orders, although most of these should be Proclamations.

Executive Orders may implement only the degree of power that has been delegated to the President by the Constitution or by statute. The ultimate decision about how much authority to delegate, and to which official in the Executive Branch, remains with Congress. In most instances, Congress delegates power to the head of a department or agency, rather than to the President. No matter how much he may wish he could, the President cannot overturn that delegation of power. Accordingly, the most frequent use of Executive Orders is to make a public statement from the President to his agency heads as to the lines along which he wishes them to exercise their discretion - but only to the extent, if any, that Congress has granted agency heads discretion in carrying out what Congress has delegated to them.

Except for that small number of Executive Orders that implement authority Congress has delegated directly to the President (Executive Orders implementing the Superfund statute are a good example), Executive Orders have no greater legal effect or force than other, less formal means by which a President may communicate with his agency heads - i.e., a written Presidential Memorandum; a statement in a press conference; a telephone call from an assistant to the President. From a public policy perspective, Executive Orders have one salient advantage over these other, less formal and invisible means of communication; they are published in the Federal Register, so that both the Congress and the public can understand what the President has done and can hold him accountable for his actions.

The Committee also should understand the severe limitation that Executive Orders have from the point of view of the President and his senior staff. Again, with the exception of that small number of Executive Orders that implement statutory authority granted directly to the President, Executive Orders are administratively enforceable only against agency heads. Executive Orders usually do not create legal rights that can be enforced in court by a private party. Rather, the enforcement device is political. If an agency head fails to comply with an Executive Order, the lapse will have no effect whatsoever unless brought to the attention of the President and the White House staff. As with any other White House policy, if the President finds that an agency head has not followed his policy preferences, the President may ignore the matter or may use any of his tools to induce compliance, from calling the agency head on the carpet, to cutting the agency's budget or, in severe case, dismissing the offending official. There frequently would be a political price to pay for any of these actions, including the expression of Congressional displeasure.

The result of the anomalous legal status of Executive Orders is that they often have more apparent than real effect. Many Executive Orders are quietly abandoned or modified in practice, without a formal amendment or repeal of the published text. A President may issue an apparently sweeping Executive Order directing his agency heads to do something or take something into account as they exercise their discretion, only to find that these Orders are routinely ignored by the agencies, and the White House staff is often powerless to prevent their evasion.

What impact has the issuance of Executive Orders had on the lawmaking authority and responsibility of Congress? In some instances, I believe that some Executive Orders have resulted in actions that are taken by the Federal Government that would not have been taken by Congress acting alone. (In most of these instances, however, I think there is a significant segment of the Congress that nonetheless agrees with the presidential action.) I am not troubled by this as long as the authority to do what is done is sufficient. Whether it is the right thing to do is another question, but the question of whether doing something that a President is authorized to do is inappropriate simply because it is done by an Executive Order is not a difficult issue for me as long as the authority to take the action is sufficient. When the authority for the Executive is sufficient, the effects upon Congress' authorities and responsibilities remain, in the legal sense, unaffected.

In reality, what the Executive Order process can provide to a President is a combination of the power of taking initiative, combined with the bully pulpit. In cases of inactivity or deadlock, the President may issue an Executive Order to announce his

policy preferences to Congress and the public and to instruct his agency heads that they should exercise their discretion, if Congress has given them any, to follow his policy to the extent they can. The President may or may not be able to make agency heads respond to his lead. For example, in the case of President Reagan, his Administration was able to induce compliance from most agencies with Executive Order No. 12291, requiring submission of proposed rules to the White House for pre-promulgation policy review. But despite their consistency with the President's overall policy goals, there was significantly less agency compliance with other Executive Orders.

As with other exercises of the Presidential power of initiative (such as statements at press conferences or calls from the Chief of Staff to an agency head), Congress may exercise effective oversight and lawmaking authority. For example, Congress may, and frequently has, attached appropriations riders to laws that prohibit affected agencies from spending any money whatsoever on implementing an Executive Order. In such cases, Congress has effectively removed all discretion from the agency, and there is nothing that its head can do to implement the Order, even if the political appointee wishes to follow the President's policy.

Accordingly, Executive Orders may be thought of as a particularly visible and transparent mechanism, among many similar mechanisms available to the President, by which he may announce a policy and attempt to rally public support behind it, in the hope that the policy will attract sufficient public support that by the time Congress exercises its power to review and modify the policy, the President's policy preference will have made sufficient headway that the status quo can never be re-instituted, and the ultimate policy outcome will be advanced somewhat along the lines the President prefers.

Again, from a purely legal standpoint, I think the issuance of Executive Orders has very little impact on the lawmaking authority and responsibility of Congress, especially when authority and responsibility mean the ability of Congress to act, not the likelihood that Congress will act in response to an Executive Order. On the other hand, I cannot recall an instance where Congress simply repealed an Executive Order outright. They may have changed how an Executive Order works, but I cannot recall that they have reversed one outright. I think that the reason Congress has not repealed many (if any) outright is because Congress is sufficiently divided on the substance of the Order to prevent it from taking action as a Congress.

If the President has the authority to take action, it may take a two-thirds vote in each House to overturn his action, or a constitutional amendment if authorized by the Constitution. But this has nothing to do with Executive Orders. The President is either authorized or he is not. Acting by Executive Order neither adds or detracts from the question of authority.

What should be the role of Congress in guarding its legislative prerogatives and maintaining the proper balance between the executive and legislative branches of government? Even as a response to a question, it is somewhat presumptuous of me to advise the Congress on what it should do in this regard. Nonetheless, here's what I recommend:

- Be careful what you authorize the President to do in statutes that you pass. His exercise of that authority is likely to be sustained and political challenges will fall short;
- Pass laws on the subject of an Executive Order even if there's not much you can do about it because the President is exercising clear constitutional authority. These will have an effect because Congress will have spoken on the issue and perhaps pre-empted the issue;
- Require that the President describe what action he would recommend in Executive Order detail before you authorize him to act. For example, authorize the President to make specific recommendations after studying an issue and then provide further legislative authorization to proceed;
- Scrutinize every Executive Order issued and hold hearings on them on a regular basis;
- Require in the statute providing the President with the requisite authority to act by Executive Order, to consult in some meaningful way with Congress in formulating the Executive Order;
- Review the grants of authority of prior Congresses. Many of these are quite broad. For example, Presidents have been able to hook civil rights and wage and price rules to 50 year-old procurement laws. Although major changes were made in procurement authorities in the last 5 years, these provisions were not changed; indeed, authorities of the Executive Branch were increased.

This concludes my written testimony. I will try to answer any questions that the Subcommittee may have.

1. 44 U.S.C. 1505(a)
2. Id.
3. 49 Stat. 500, as amended; 44 U.S.C. 301, *et seq.*
4. 44 U.S.C. 1505(a)
5. The process for issuing Executive Orders is different from the process that a Federal agency will follow in promulgating regulations. The latter are usually governed by the procedures of the Administrative Procedures Act of 1946, as amended.
6. Executive Orders 10914-11127
7. Executive Orders 11128-11451
8. Executive Orders 11452-11797
9. Executive Orders 11798-11966
10. Executive Orders 11967-12286
11. Executive Orders 12287-12667
12. Executive Orders 12668-12833
13. Executive Orders 12834-13140
14. 27 FR 5847.
15. 3 CFR, 1959-1963 Compilation.

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U.S. House of Representatives
Committee on Rules

Hearing of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

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My name is Thomas Sargentich, and I am a professor of law at American University Washington College of Law. I co-direct our Program Law and Government, which focuses on the study of administrative law and regulatory policy as well as constitutional law and rights. I also am the director of our LL.M. Program on Law and Government. From 1978 until 1983, I worked in the Office of Legal Counsel of the U.S. Department of Justice. In OLC, I participated in the consideration of numerous issues involving constitutional and statutory powers of the President and executive agencies. Among other things, I participated in the review of a number of proposed executive orders and other presidential actions.

I am pleased to be here today to discuss presidential power under Article II and, in particular, the power to issue executive directives that constitute, in any colloquial sense, "lawmaking.""[1] There can be no doubt that presidential "lawmaking" by executive order is a central phenomenon in modern governance. Let me highlight my conclusions at the beginning.

I. Summary of Conclusions

First, the President is the federal official in whom the U.S. Constitution vests the executive power. The term, executive power, refers to the execution of the law, which includes the Constitution as well as the body of statutory law granting authority to the executive branch.

Second, there is an ongoing debate about the extent of executive power under the Constitution. Some have argued that the President has a vast reservoir of inherent executive power, whereas others believe that the President can do only what Congress specifically authorizes by statute.

In my view, the proper construction lies between these two extremes. On the one hand, the Supreme Court has questioned the theory of uncharted "inherent" executive power. The President does have to conform to constitutional and statutory limits. On the other hand, the President has broad power to oversee and supervise the execution of the law by executive officials."[2] Also, the President is one of the constitutionally

named repositories of governmental power, the others being Congress and the Supreme Court. It does not make sense to say that the President has only the authority provided specifically by statute, for that would reduce the President's role to being the implementor of express grants that Congress chooses to provide from time to time. Just as Congress has authority given to it by Article I, the President has power pursuant to Article II.

Third, some argue that the President has no "lawmaking" power. Such a claim is seriously overstated. It rests on an unworkably rigid, definitionalist distinction between "lawmaking" and "execution" of the law. To be sure, Congress is the national legislature, and must be respected as such. However, the courts have long accepted broad delegations of authority to the executive branch. Such delegations inevitably call for the interpretation and application of statutory provisions. Such interpretation and application, in any ordinary usage, is a form of lawmaking. In practice the President, through executive orders or other directives, does engage in what colloquially can be called "lawmaking" — although in constitutional terms, the President is executing some prior statute or constitutional provision."(3)

Fourth, it is worth underscoring that the President does not have unlimited power to issue executive orders that make law. In every instance, a reasonable connection with a constitutional or statutory grant of authority needs to be made. Consequently, each order should be viewed on its own terms."(4)

Fifth, Congress should protect its own power in this context. As Justice Jackson once stated, "only Congress itself can prevent power from slipping through its fingers.""(5) In particular, Congress has an important responsibility to help maintain a balance between the executive and legislative branches of government. The central prerogative of Congress, when it considers that an executive order or other presidential directive goes too far in policy or legal terms, is to exercise its oversight authority."(6) The key practical question is whether or not to engage in oversight of a particular presidential action. Case-by-case engagement between the legislative and executive branches is certainly consistent with our system of separation of powers and checks and balances.

Having stated my general conclusions, let me hasten to add I am aware that there have been controversies about President Clinton's use of executive orders. I would simply comment that such controversies are not unusual. Debates about executive orders have occurred with respect to every President in modern times."(7) We should remember that vigorous give-and-take between the executive and legislative branches is precisely what is contemplated by our system of separation of powers. It is natural and appropriate that there will be bargaining and negotiation between the two political branches in the development of national policy. To be sure, a certain degree of self-restraint on both sides is necessary in order for the process of checks and balances to work effectively.

I will now discuss two leading Supreme Court decisions dealing with the President's power to issue executive orders: *Youngstown and Dames & Moore*. I will continue to develop the theme that case-by-case investigation of presidential action is the appropriate way to review executive orders.

II. Main Cases Dealing with Executive Orders

The leading case on presidential power to issue executive orders remains *Youngstown Sheet & Tube Company v. Sawyer*, 343 US 579 (1952). By a vote of 6 to 3, the Court struck down President Truman's executive order seizing private steel mills. The President had acted in anticipation of a strike by steel workers that he believed would cripple the country's efforts in the Korean conflict. The President had issued an executive order instructing the Secretary of Commerce to take possession of and to operate most of the nation's mills. The President gave notice to Congress of this action, but Congress did nothing specific in response. The President's lawyers argued that although there was no statutory authority for this action, the President had inherent constitutional power as Chief Executive as well as authority as Commander-in-Chief to take this step, relying upon an historical practice of executive seizures of property.

Justice Black wrote the main opinion, which concluded that the issuance of an executive order in this context amounted to unauthorized lawmaking by the President. One of Justice Black's notable statements was that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.""[8] Certainly, the President must respect the role of Congress as the national legislature. However, in any ordinary sense, executive branch rule making is lawmaking when it establishes new, binding norms, even though as a constitutional matter, rule making is seen as executive action. As one commentator has stated, "all statutory delegations of power to the executive confer at least some discretion to define the law with greater particularity -- and thus to 'make law' -- through its execution.""[9] Accordingly, a highly abstract, definitionalist argument that only Congress can make law does not stand up to scrutiny as a way to distinguish between legislative and executive power."[10]

Of critical importance in *Youngstown* was the fact that the executive order altered the legal status of private property in the United States. Justice Black noted that this is the sort of thing that Congress can do by statute, as long as it complies with any applicable limits such as the Takings Clause."[11] But in general, the President needs some kind of authority in order to take the action. Justice Black rejected the ideas that the President has "inherent" power in this situation, or that the Commander-in-Chief Clause provides authority in a context which is not at all near a theater of war."[12]

Of note in *Youngstown* are the concurring opinions that go beyond a formalistic definition of legislative versus executive power. Justice Frankfurter suggested that longstanding executive practice, when there is silent acquiescence by Congress, might provide some basis for executive action."[13] However, in this case, Frankfurter did not find such a practice. Also, he stressed that Congress specifically rejected a seizure provision during debate on the Labor Management Relations Act of 1947."[14] Moreover, there were statutes on the books that provided for the President to take specific steps to accomplish a seizure."[15] The President chose not to follow these statutes, but instead sought to rely on general claims of power under Article II.

Justice Robert Jackson wrote the most famous opinion in *Youngstown*. In his separate

concurrence, he noted that there is a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.""[16] He referred to the well-known fact that the framers said little about executive power. He also noted that subsequent authorities provided "more or less apt quotations . . . on each side of any question.""[17]

Justice Jackson established a useful, widely-followed framework for analyzing issues of presidential power."[18] He distinguished among three different situations. The first is where the President acts with all his own Article II power as well as an express or implied authorization by Congress. Here, the President is at his height of power. The second is where the President acts under Article II, but without any authorization or any contradiction by Congress. Congress is silent on the matter at issue. Here, Justice Jackson pointed out, one is in a kind of "zone of twilight""[19] in which the imponderables of the moment are likely to count as significant factors in an analysis of presidential power. This second category reflects the ambiguity of what it can mean to be chief executive. In the third situation sketched by Justice Jackson, the President claims to take action based on Article II, but the action seems to contradict either an express or implied limitation or direction established by Congress. Here, there is direct tension between the competing claims of Article II and of Article I. Justice Jackson doesn't say that in every case in situation three, the President will necessarily lose, presumably because there may be circumstances in which the President has some express constitutional authority that Congress cannot cut off. However, it seems plain from his opinion that the presumption in situation three is strongly against the legality of presidential behavior."[20]

In *Youngstown* itself, Justice Jackson concluded that the President's executive order was promulgated in a context properly characterized as situation three. First, Congress had not authorized the seizures, as the government admitted. Second, it would be difficult to claim that Congress had been silent or had left the field open. In fact, there were statutes dealing specifically with seizures of military production facilities, which the President decided not to invoke."[21] Furthermore, in the legislative debate about the Labor-Management Relations Act of 1947, Congress rejected a provision that would have included plant seizure as a tool for ending labor-management disputes, thereby indicating an intent not to give the President seizure power in labor controversies. Accordingly, Justice Jackson placed the steel seizure case in his third category, in which "severe tests" are applied in reviewing the constitutionality of a presidential decision.

It is important to see that Justice Jackson assumed that, in many instances, the President and Congress will have concurrent authority over some subject matter. Congress could act and bind the executive branch, but often a field is left open for executive behavior. At the same time, there is presumably some limit on Congress' ability to restrict the President, for the President needs to retain core executive authority in order to be an adequately functioning Article II entity.

Most centrally, *Youngstown* establishes that executive orders should be grounded in constitutional or statutory provisions. Executing the law means implementing legal norms found in either source. The Court showed justifiable suspicion of a free-floating theory of inherent executive power that cannot be traced to some discernable

constitutional or statutory source."[22]

Another leading Supreme Court decision dealing with presidential power to issue executive orders is *Dames & Moore v. Regan*, 453 US 654 (1981). In this 9 to 0 decision, the Court found authority for actions taken by President Jimmy Carter in January 1981 to settle the controversy resulting from the 1979 capture of hostages in the American Embassy in Tehran. In particular, the President issued a series of Executive orders that terminated legal proceedings against Iran in United States courts involving U.S. nationals. The orders also nullified attachments against Iranian property entered by United States courts to secure judgements against Iran. Furthermore, the orders transferred claims from United States courts to a newly-created arbitration tribunal. The result of these presidential decisions was to limit the ability of U.S. companies to receive judgements and payments with respect to their disputes with Iran.

The Supreme Court, in an opinion by then-Justice Rehnquist, explicitly invoked the analytical framework set up by Justice Jackson in *Youngstown*, distinguishing cases in which the President acted with authority, with silence by Congress, or in contradiction to congressional intent."[23] Among other things, the Court concluded that the International Emergency Economic Powers Act (IEEPA) authorized the President to nullify attachments and to transfer Iranian assets."[24] The Court also held that the President was authorized to suspend claims filed in United States courts. In reaching its conclusion about claims suspension, the Court took account of what it called "congressional acceptance of a broad scope for executive action in circumstances such as those present in this case.""[25] The Court stressed "a history of congressional acquiescence in conduct of the sort engaged in by the President.""[26] The Court also relied on prior decisions recognizing presidential power to enter into executive agreements that are not submitted to the Senate for ratification as treaties."[27] Overall, *Dames & Moore* reflects a tendency by courts to give broad deference to the executive branch in matters relating to foreign affairs and foreign policy."[28]

Youngstown and *Dames & Moore* confirm that different legal results can flow from divergent circumstances. Observers of *Youngstown* have noted that a critical development in the litigation was the government attorney's claim, in response to questioning by the lower court, that the President's power in emergencies was essentially unlimited by the Constitution."[29] Although this argument was softened later, the government's initial claim led to considerable public alarm at the potential scope of presidential power as envisioned by the executive branch."[30] Moreover, the case dealt with the control of domestic private property, a subject as to which rights are clearly implicated. Since *Marbury v. Madison*"[31], courts have seen themselves as the institution best attuned to protect rights against governmental power.

On the other hand, the settlement of the Iranian hostage crisis was made possible by the series of executive orders challenged in *Dames & Moore*. As a legal matter, the claim of presidential authority was not an easy one. However, under the circumstances and considering the extent to which courts defer to Presidents in the area of foreign relations, it may not seem surprising that the Court upheld the

presidential action. These two cases, viewed together, support the proposition that the courts will look individually at the circumstances involved in determining whether there is authority for an executive order."(32)

III. What Congress Should Do

I will return to the question what Congress should do when it is concerned about a presidential order or other action. The core legal principle is clear enough: the inquiry is whether an executive order is grounded on constitutional or statutory authority. Frequently, the answer will not be obvious, given the ambiguity that can surround executive power and statutory interpretation."(33) Yet Congress has one clear avenue to follow as a practical matter when it is concerned about the use of presidential power for legal or policy reasons. It can, and in my view should, use its oversight authority.

In aid of its legislative function, Congress is a critical overseer of the execution of the law. In addition, its oversight power has its own value as a way of engaging in a dialogue with the executive branch in general and the President in particular. A system of separation of powers and checks and balances requires ongoing deliberation between the two branches in order for the government to work effectively.

Perhaps the main message to draw as a member of Congress from general consideration of the law relating to executive orders is that when a question arises, the relevant Committee or Subcommittee should consider having an exchange of views with appropriate executive officials. That is a process our framers had in mind when they spoke of checks and balances as a way to maximize accountability, prevent factional capture of government, and advance the public interest.

1. For general discussions of presidential lawmaking through executive orders, see William Neighbors, *Presidential Legislation by Executive Order*, 37 U. Col. L. Rev. 105 (1964); Joel Fleishman & Arthur Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 Law & Contemp. Probs. 1 (1976).
2. The President's power to supervise and guide the execution of the law is generally grounded on Myers v. United States, 272 U.S. 52 (1926). *See* also Humphrey's Executor v. United States, 295 U.S. 602 (1935)(upholding independent agencies whose members are not removable at will by the President).
3. I return to this point in discussing *Youngstown*, at page 6 below.
4. Compare American Federation of Government Employees v. Reagan, 870 F. 2d 723 (D.C. Cir. 1989) (holding that relevant statute did not require President to incorporate written findings into an executive order implementing his statutory authority to exempt certain agencies from coverage by the statute) with Reyes v. U.S. Dept. of Immigration and Naturalization, 910 F. 2d 611 (9th Cir. 1990) (invalidating executive order imposing restriction on geographical areas within which Philippine national who had served in the U.S. military could serve and be eligible for naturalization, for the statute authorized no such limitation).
5. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952)(Jackson, J., concurring).
6. Executive orders are publicly available once issued. *See* 44 U.S.C. § 1505 (requiring orders and proclamations to be published in the Federal Register); Exec. Order No. 11,030, 27 Fed. Reg. 5847 (1962) (dealing with preparation, filing, and publication of executive orders).
7. *See* generally Louis Fisher, *Executive Orders and Proclamations, 1933-99: Controversies with Congress and in the Courts*, CRS Report for Congress, Order Code RL 30264 (July 23, 1999).
8. *See* 343 U.S. at 587.
9. See Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va.L.Rev. 1, 6

(1982).
10. See Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 Cornell L.Rev. 430, 431-432 (1987)("[A]gency rulemaking obviously shares the core characteristics — prospectivity, generality, policy-making force — ascribed to legislated norms. As the Supreme Court acknowledged in a classic delegation decision, *United States v. Grimaud*, it has become "difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." In *Amalgamated Meat Cutters v. Connally*, a leading statement of modern delegation doctrine, the late Judge Leventhal noted that 'no analytical difference, no difference in kind' exists between the legislative function 'of prescribing rules for the future' and what agencies do by rulemaking pursuant to statute.")(footnotes omitted).
11. *See* 343 U.S. at 588.
12. *See id.* at 587.
13. *See id.* at 610-611 (Frankfurter, J., concurring).
14. *See id.* at 599 (Frankfurter, J., concurring)("A proposal that the President be given powers to seize plants to avert a shutdown where the 'health and safety' of the nation was endangered was thoroughly canvassed by Congress and rejected.").
15. *See id.* at 597-98 (Frankfurter, J., concurring)("Congress has frequently — at least 16 times since 1916 — specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards.").

16. *See id.* at 634 (Jackson, J., concurring)
17. *See id.* at 634-635 (Jackson, J., concurring)
18. *See id.* at 635-638 (Jackson, J., concurring)
19. *See id.* at 637 (Jackson, J., concurring)
20. *See id.* at 638 ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").
21. Justice Burton, in his own concurring opinion, usefully summarized these statutes. *See id.* at 663-664 (Burton, J., concurring). The two seizure statutes were the Defense Production Act of 1950 (which "grants the President no power to seize real property except through ordinary condemnation proceedings, which were not used here, and creates no sanctions for the settlement of labor disputes", *id.* at 663) and the Selective Service Act of 1948 (which authorizes the President to seize plants that fail to fill the orders for goods, within a certain period of time, when the goods are required by the armed forces or for national defense, *see id.* at 664).
22. For Justice Jackson's discussion of the inherent powers argument, *see id.* at 647-655 (Jackson, J., concurring).
23. *See* 453 U.S. at 668-669. The Court added that "it is doubtless the case that executive action in any particular instance falls . . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Id.* at 669.
24. *See id.* at 674.
25. *Id.* at 677.
26. *Id.* at 678-679.
27. *See id.* at 682.
28. The Court's opinion quoted the leading case on judicial deference to presidential action in foreign relations, United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). See 453 U.S. at 661.
29. *See* Maeva Marcus, Truman and the Steel Seizure case: the limits of presidential power 121 (1994, Duke University Press)("The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say? Mr. Baldridge: That is the way we read Article II of the Constitution.").
30. *See id.* at 125 ("Newspapers across the country carried headlines to the effect that the Justice Department asserted that the President's power was unlimited. The friendly New York Post declared, "President Truman can usually deal with his enemies, but who will protect him from his Justice Department . . . The reaction in Congress was equally severe.").
31. 5 U.S. (1 Cranch) 137 (1803).
32. For another example of a case invalidating an executive order, see Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)(holding that National Labor Relations Act provision preempted executive order barring the government from contracting with employers who hired permanent replacements during a lawful strike).
33. For a case exemplifying the ambiguities that can surround statutory interpretation in this context,

see AFL-CIO v. Kahn, 618 F. 2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979) (upholding President Carter's executive order directing the establishment of voluntary wage and price standards).

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Committee on Rules

U.S. House of Representatives

106th Congress

Hearing of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

Mr. Chairman and members of the Subcommittee, I want to thank you for this opportunity to testify before you regarding the impact of Executive Orders on the legislative process and the very real problem of presidential lawmaking by fiat.

From the standpoint of my participation, the timing of your hearing is providential, in that many months ago I was asked to undertake a study of this very subject by Roger Pilon, director of the Cato Institute's Center for Constitutional Studies. The paper which I co-authored with Alan Woll, an associate in our law firm, was finalized just last week. It is now back from the printer and today receiving its first public release. The Cato paper has a title somewhat more flamboyant than that of this hearing — "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power." I greatly appreciate the opportunity to testify about the matters discussed at length there, and I understand that copies of this paper have been made available to the Subcommittee, and otherwise are available on Cato's website at www.cato.org.

On January 30, 1788, in Federalist 47, James Madison observed that Montesquieu's warning — "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" — did not apply to our constitution because "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law...." Despite Madison's predictions, our government quickly strayed from its principles and our chief magistrate has, in fact, again and again, legislated by fiat. In fact, in our research on presidential directives (such as executive orders and proclamations), I learned that from its beginning, American political history has been marked by efforts of many presidents to define the extent of their power and authority in ways violative of the U.S. Constitution.

As early as 1792, according to Thomas Jefferson: "I said to [President Washington] that if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved, if the Legislature could be kept independent, I should never fear the result of such a government; but that I

could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch."

Congress and the courts have taken action from time to time to examine and, at times, challenge presidential exercises of authority perceived to be unconstitutional: from President Washington's declaration of neutrality to the Louisiana Purchase, Jefferson's embargo, Jackson's removal of federal funds from the Second Bank of the United States, Polk's sending of Gen. Zachary Taylor's troops into contested territory before the declaration of war with Mexico, Lincoln's conduct of the Civil War without calling Congress into session, Lincoln's amnesty and reconstruction plans, the Tenure of Office Act and Andrew Johnson's impeachment ... and the list goes on and on.

But the Constitution anticipated that the Congress and the Court would jealously guard their prerogatives, and, setting power against power, unconstitutional excursions by the executive would be met with fierce resistance. Sadly, neither the Congress nor the Court have acted boldly in defense of the Constitution, particularly in the recent past.

My first personal experience with an unconstitutional exercise by the executive of a legislative power arose in the mid-1980's, shortly after I completed serving three part-time positions in the Reagan Administration, when I filed suit against the Reagan Administration for usurping the Senate's power to ratify treaties before they became effective. The case was The Conservative Caucus v. Reagan, litigated in the U.S. District Court for the District of Columbia. Our client had sought to prevent Secretary of Defense Casper Weinberger from ordering the Pentagon to unilaterally implement the SALT II treaty — which the Senate had thus far refused to ratify. President Reagan had announced his determination to implement the treaty, notwithstanding the Senate's constitutional role. Unfortunately, we were unable to obtain a review on the merits, as the suit was dismissed, as so many similar suits have been, on the theory that our client lacked standing to bring suit.

The simple truth is that the courts cannot be counted upon to check Presidential power — our research has been able to identify only two cases in the history of the country in which the courts have struck down completely an executive order. The first of these was in 1952, when the U.S. Supreme Court negated the seizure of the steel mills ordered by President Truman, observing that:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States ...." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any

Department or Officer thereof." [Youngstown Sheet & Tube v. Sawyer.]

Notwithstanding this U.S. Supreme Court decision, presidents of both parties continued to implement controversial initiatives using presidential directives — often in the face of Congressional opposition. The other time the court struck down completely an executive order was President Clinton's executive order relating to the hiring of permanent striker replacements by federal contractors, and the decision of the U.S. Court of Appeals for the D.C. Circuit was not appealed to the U.S. Supreme Court. Chamber of Commerce of the U.S. v. Reich.

Congress has done little more than the courts in restricting presidential lawmaking. Nevertheless, Congress did make one bold step to check executive powers in the related arenas of executive orders, states of emergency and emergency powers. The Congressional concern led to the creation of a Special Senate Committee on the Termination of the National Emergency, co-chaired by Sens. Frank Church (D-ID) and Charles Mathias, Jr. (R-MD), more than 25 years ago. The diligent efforts of this committee resulted in the successful codification of efforts to restore the Constitutional separation of powers, through a check on the presidential exercise of "emergency powers," by means of the National Emergencies Act. Other contemporaneous statutory efforts to check presidents' unconstitutional exercise of power include the War Powers Resolution, the International Emergency Economic Powers Act, and the amendment of the Trading with the Enemy Act of 1917.

Unfortunately, these 1970s efforts to impose restraints on unconstitutional exercises of power by presidents have been ineffective — witness the inability of Representatives and Senators to obtain judicial review of President Clinton's war upon the Federal Republic of Yugoslavia pursuant to the terms of the War Powers Resolution. Likewise, notwithstanding the National Emergencies Act and the International Emergency Economic Powers Act, the number of presidentially-declared national emergencies has exploded. Since then, although individual members of Congress have spoken out, the Congress has failed to act.

I commend the efforts of this Subcommittee to take a new look at the issue of executive lawmaking, urge you to expand the scope of your investigation to focus on emergency powers, and in both cases to begin your investigation where Senators Church and Mathias left off, and to act boldly to curtail Presidential lawmaking.

Two proposals are currently before the House which would address this concern. First there is Rep. Metcalf's H. Con. Res. 30, which would express:

the sense of the Congress that any Executive order issued by the President before, on, or after the date of the approval of this resolution that infringes on the powers and duties of the Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the Executive order, is advisory only and has no force or effect unless enacted as law.

This proposal has been useful in focusing attention on the problem, but the solution it proposes would be cosmetic only. First, as a concurrent resolution, even upon passage, it will not enjoy the force of law. If a resolution passed into law by both Houses of Congress over a presidential veto, such as the War Powers Resolution, cannot be enforced in the courts, then passage of a resolution with no legal effect is essentially a symbolic gesture. Second, it is unclear what constitutes an infringement of the powers and duties of Congress, or a specific appropriation for the purpose of the executive order. And third, even if it were an effective limitation on executive orders, it could be evaded easily by entitling the directive as a proclamation (or some other directive). Rather than truly solve the problem, I fear passage of this proposal would be counterproductive in that it would give Members of Congress and the public the false impression that the problem had been solved.

By contrast, H.R. 2655, Rep. Paul's and Rep. Metcalf's approach holds great hope to solve this recurrent problem. This bill, which, as a proposed statute, would become legally binding, would:

- establish the first statutory definition of "presidential directive" (it uses the term "presidential order");
- expand access to the courts to challenge the legality of presidential orders;
- define the constitutional powers which the president may exercise by presidential order; would require any statutory authority for the presidential order to be express for the order to be valid;
- terminate the powers and authorities possessed by the president, executive agencies, or federal officers and employees, that are derived from the currently existing states of national emergency;
- vest the authority to declare future national emergencies in Congress alone; and
- repeal the ineffective War Powers Resolution.

Lastly, I would say that concerns about presidential lawmaking must not be written off as attacks on the policies underlying the executive orders. This is not partisan politics masquerading as separation of powers issues. It is true that it finds fault with President Clinton, but it is also finds fault with Presidents Reagan, Bush, and others. As a review of the above-mentioned CRS report will demonstrate, presidential directives were used to legislate to accomplish political objectives which could be viewed as "liberal" and political objectives which could be viewed as "conservative." No constitutional power should be misused, irrespective of the benefit perceived for a political objective. If constitutional processes are violated, in the end, we all lose.

In his concurring opinion in *Youngstown Sheet and Tube*, Justice Frankfurter observed:

The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. **The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement.** Some future

generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. **Such a step would most assuredly alter the pattern of the Constitution.** [Emphasis added.]

The problem before you is extremely serious, but solvable. The U.S. Constitution charges you with the duty to protect it from assault, and the American people look to you to do just that. Thank you.

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Committee on Rules

U.S. House of Representatives

106th Congress

Hearing of the
Subcommittee on Legislative and Budget Process

The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?

Ray Mosley, Director, Office of the Federal Register, National Archives and Records Administration

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Mr. Chairman and members of the Subcommittee:

My name is Raymond A. Mosley. I am the Director of the Office of the Federal Register, which is a component of the National Archives and Records Administration (NARA). I have been the Director of the Federal Register since November, 1996. Prior to that time, I worked for NARA in a number of different capacities as a senior manager.

Thank you for inviting me to testify today on the manner in which the Office of the Federal Register processes Executive orders and makes them available in our publications. In my testimony today, I will describe the role of the Federal Register under the applicable law and procedures. My statement will also include a summary of our recent efforts to broaden public access to Executive orders and other Presidential documents.

Background

The Office of the Federal Register (OFR) was established in 1935 for the purpose of creating a centrally located system for filing and publishing Presidential documents, as well as agency regulations and administrative notices. The Federal Register Act (44 U.S.C. Chapter 15) governs the operations of the Federal Register publication system. The statute specifically requires that Executive orders and Presidential Proclamations must be published in the *Federal Register*, except for those that do not have general applicability and legal effect, or those that only affect Federal agencies, officers, agents or employees (44 U.S.C. 1505(a)). In practice, most Executive orders are published in the *Federal Register* regardless of subject matter.

The Federal Register Act does not define Executive orders or Proclamations. Under a well-established tradition, Executive orders relate to domestic matters, and Proclamations relate either to foreign affairs and trade matters or to ceremonial functions. The President may also issue certain directives characterized as "Determinations" or "Memoranda." The Federal Register Act

does not require publication of these other types of Presidential documents, but the President may direct that they be submitted for publication in the *Federal Register*.

The President does not submit any classified orders to the Office of the Federal Register. Classified documents, such as Presidential Decision Directives, are maintained at the White House and eventually transferred to the National Archives' Presidential Library system.

Procedure for Processing and Publishing Executive Orders

The Office of the Federal Register does not currently have any responsibility for reviewing the substance or form of Executive orders prior to issuance. E.O. 11030 of June 15, 1962, as amended (see http://www.nara.gov/fedreg/eos/e11030.html), specifies a standardized format for Executive orders and the procedures for proposal and review within the Executive branch. Those requirements are also codified in Federal Register regulations in 1 CFR part 19. Under these provisions, the Director of the Office of Management and Budget and the Attorney General review and approve the format and substance of Executive orders prior to signature. The Attorney General also has the option of routing draft Executive orders through the OFR to check for typographical and clerical errors, but has not followed that practice for more than 20 years.

Once the President signs an Executive order, the Office of the Executive Clerk in the White House submits the document to the OFR by messenger. When a messenger delivers an Executive order, our Presidential and Legislative Documents Unit verifies that the Executive order meets the following basic requirements. Our Staff confirms that we have received a signed and dated original, along with two certified copies. We check the order of pages and numbered sections and the continuity of the text to ensure that the document is intact. It is also customary for the Executive Clerk to include a computer disk and a letter certifying the file on the disk as a true copy of the original. Once we have completed our initial review, we sign a receipt and give it to the messenger to return to the White House.

We begin processing the document for public filing and publication in the *Federal Register* by assigning it the next available number in the Executive order series. A staff member hand writes the series number on the original and certified copies. On the rare occasions when we receive more than one Executive order, we assign the series numbers by signature date, then by relative importance, and then by alphabetical order if the documents are of equal importance. After initial processing, we secure the originals of Executive orders and other Presidential documents in a safe for eventual transfer to the National Archives.

To prepare an Executive order for publication, our editorial staff enters information into our document tracking system, marks up an editorial copy for *Federal Register* style, converts the word processor file into publishing software, and adds typesetting codes. We print out the typeset file to check the

appearance of the document and to review for typographical errors. Very rarely, our editors will find an error or omission in the text of the Executive order. In those instances, we contact the Executive Clerk for authorization to make a correction. When we complete our editorial review, we transmit the finished electronic file to the Government Printing Office (GPO). GPO's production staff completes the processing necessary for the Executive order to appear in the printed and on-line editions of the Federal Register.

Executive orders are published in the *Federal Register* on an expedited schedule. If the OFR receives an Executive order before noon, we publish it in the next issue of the daily *Federal Register*. If it arrives after noon, we will publish it within two days. If an Executive order addresses an emergency situation, we will instruct our editors and the Printing Office to include it in the next day's issue regardless of the time we received it during the working day.

Our responsibility for processing Executive orders also includes making a copy available for public inspection. Under the Federal Register Act, documents published in the *Federal Register* must be placed on file for public inspection during official hours, at least one business day before the date of publication. Executive orders scheduled for the next day's *Federal Register* are filed as soon as possible. Those scheduled for publication within two days are filed at 8:45 a.m. on the day after submission. Our staff time-stamps the file copy to record the time of day, and files the document in our public inspection area, which is open to any member of the public. To alert our customers to newly filed documents, including Executive orders, we update our "List of Documents on Public Inspection," which is posted on our NARA Web site.

Access to Presidential Documents and Federal Register Information

The Federal Register publication system is the product of a unique partnership between our parent agency, NARA, and the GPO. The support of these two institutions helps guarantee the public's right to know about the actions of their Government. In recent years, the OFR/GPO partnership has developed on-line editions of every major Federal Register publication and posted them on the *GPO Access* service to make it easier for citizens to gain access to essential legal information.

The on-line edition of the daily *Federal Register* is available at 6 a.m. (ET), making new Executive orders accessible to the American people on a very timely basis. We also compile each year's Executive orders in title 3 of the *Code of Federal Regulations* (CFR), as required under the Federal Register Act. The 1997 through 1999 editions of the CFR are available on-line on the *GPO Access service*. Some of the Presidential Memoranda and Determinations that are not published in the *Federal Register* and CFR, are released by the White House Press Secretary and carried in the OFR's *Weekly Compilation of Presidential Documents* and the *Public Papers of the Presidents of the United States*. These Federal Register publications are available in printed editions and on-line formats that we have recently developed for the *GPO Access service*.

To help the public sort through these various sources of information, we use our

NARA Web site to direct customers to the text of Executive orders and other Presidential documents (see http://www.nara.gov/fedreg/presdoc.html). We also provide other information services, such as our historical *Codification of Proclamations and Executive Orders* and an on-line index of Executive orders, which tracks dates of issuance, amendments, revocations and dates of publication in the *Federal Register*. During the first nine months of calendar year 1999, our customers retrieved a total of 557,657 documents from these pages.

The Federal Register publication system also depends on its partnership with the Government Depository Library program to ensure that all citizens have equal access to Government information. More than 1,350 Depository Libraries throughout the United States and its Territories provide free public access to Federal Register publications in print, and on-line via the *GPO Access* service.

The Superintendent of Documents at GPO reports that Federal Register publications are among the most frequently used databases on the *GPO Access* service, accounting for 79 per cent of total usage. In fiscal year 1998, the public retrieved more than 102 million individual documents from our publications. At the end of the third quarter of fiscal year 1999, that figure had already had been surpassed by 9 million and was headed for a projected year-end total of 145 million retrievals of information. About one-third of those retrievals are from the daily on-line Federal Register and two-thirds from the 200-volume *Code of Federal Regulations*. During the same time period, our customers retrieved 138,000 individual documents from the *Weekly Compilation of Presidential Documents*, and 367,000 from *The United States Government Manual*. Overall, public use of on-line Federal Register publications has increased by more than 1000 per cent since free on-line service began in late 1995.

I believe these figures demonstrate that Federal Register publications and information services are helping to build a "digital democracy" by providing the American people with direct access to essential Government information and the opportunity to express their views on the various programs and policies of Federal agencies.

This concludes my testimony. I thank the Chairman for this opportunity to address the Subcommittee, and I would be pleased to take any questions that you may have.

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