CENTER FOR ENERGY & ENVIRONMENTAL SECURITY
University of Colorado Law School

THE BOUNDARIES OF EXECUTIVE AUTHORITY

Using Executive Orders to Implement Federal Climate Change Policy

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CEES
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The Boundaries of Executive Authority:

Using Executive Orders to Implement Federal Climate Change Policy

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Chapter I. Introduction: Scope of Work and Overview of Report

The Presidential Climate Action Project (PCAP) has developed a comprehensive plan to address climate change nationally by drawing upon the combined expertise of various groups and individuals from science, policy, legal and other backgrounds. The plan has been developed for implementation at the federal level and is national in scope. It is anticipated that significant components of this plan will be implemented through both the executive and legislative branches at the federal level. As implied by the name of the Project, however, PCAP is giving special focus to those actions that the Chief Executive of the United States, namely the next President, may take with maximum certainty by using the authority of that office. The Center for Energy and Environmental Security (CEES)[1] has been asked to prepare a report on the legal boundaries of executive authority with emphasis on the use of executive orders to implement appropriate provisions of the Climate Action Plan.

The focus of this report is not what has been done in the past by presidential directive, or what might be "possible" to implement by executive order. Rather, the focus is on those actions that can be taken using executive authority, primarily executive orders, with credibility, integrity and within the legal parameters of our constitutional form of government, without regard to the probability that any particular action might go unchallenged. As noted throughout the literature addressing this issue, there are intentionally no hard and fast rules regarding the use of executive authority and when challenges are made the courts are quite deliberate and open that rulings in this area are very contextual. That is, the determination of whether the executive has the authority to take the action being challenged is very dependent on the details of the case and the rulings issued in this area are uniformly narrow in scope. However, this does not mean that there is no guidance at all in this matter, and to the extent that we could, we have attempted to summarize and bring together in one place the most applicable guidance with a focus on the use of executive orders to implement climate action policy. Within this analysis we highlight areas of "maximum certainty,"[2] essentially identifying the strongest starting points from which the President can claim authority.

Chapter 2 of this report gives an overview of the various tools available to the President to implement, influence or promote federal policy. Some of these instruments and powers are commonly known, while others are more obscure and in some cases misunderstood.

Chapter 3 provides a general legal analysis of executive authority with a focus on the use of executive orders and those issues most central to components of climate change policy. It is the result of a review of approximately 140 federal cases[3] and numerous scholarly articles that discuss the use of executive authority.[4] Section A includes an overview of the sources of authority for executive orders and a framework for the judicial review of challenges to executive orders. The spectrum analogy has been

adopted in terms of attempting to characterize certainty, as there are no bright-lines established in this area. The framework developed here is essentially the application of three overlapping continua: (1) the relationship of the executive order to legislation or the will of Congress (e.g., is the action pursuant to a statutory delegation or in contravention of a statutory provision); (2) the subject matter of the executive order (e.g., is the subject matter an area in which the President is traditionally given great deference such as foreign or military affairs); and (3) the context or external factors (e.g., are there circumstances that require immediate action and would there be a severe or irreversible impact in the event that the action by the executive order is not taken). Section B is a detailed review of the authority for executive orders including examples of how the courts treat various forms of authority; in which cases the greatest deference is applied; themes gleaned from the review of approximately 140 federal cases; and factors that can lead to an executive order being invalidated.

One of the central conclusions from the above analysis is that the greatest amount of certainty exists when an executive order is issued under the authority of a statutory delegation (assuming the delegation is proper). Thus, Chapter 4 is devoted to a more detailed review of statutory delegations and authority pursuant to these delegations. As part of our analysis, CEES extracted all executive orders dealing with environmental or energy policy since 1937 (370 executive orders). We reviewed the executive orders and then researched the statutory authorities cited in them. A compilation of 112 relevant statutory delegations have been compiled. A backend system has been developed and the executive order and delegation information is thus maintained in searchable form. In addition to the insights this research provided for this report, the delegation database provides a searchable repository for delegation provisions available to the President in environmental and energy related matters with a focus on those that provide for broader executive discretion. Further, the links between the delegations and the executive orders that cite them provide insight as to the prior use of each delegation. Section A describes the purpose and methodology of this research, information about the databases, and trends observed. Section B discusses two statutes with delegation provisions that have been used expansively by presidents over numerous administrations to promote environmental and social policy: the Antiquities Act and the Federal Procurement Act. Section C is essentially a case study of the executive and legislative branches operating in concert to address a crisis not centered on violent conflict. In the 1970's the OPEC Oil embargo and other reductions of fuel exports brought to the forefront the interconnection between energy and security and economic stability. A significant amount of legislation was enacted to move the country away from imported oil as a primary source of energy and to address the impacts caused by the embargo. As part of this process Congress recognized the need to provide the President with special authorities to take quick action under certain circumstances and a number of conditional emergency provisions were enacted related to energy and the environment. This case study is included because it serves as both a model for addressing a national crisis as well as period in which delegations were enacted that may be relevant to climate change.

In addition to legal limitations, there are a number of other considerations at issue when assessing the wisdom of using executive orders to implement policy. These

considerations are addressed in Chapter 5. Section A addresses some of these key issues such as the potential breakdown of the informal rules that keep the government operating smoothly, the lack of stability associated with this tool, i.e., Congress can block implementation in a number of ways and a future President can revoke the executive order by issuing an executive order; and the impact on the institution of the Office of the President, i.e., potential for congressional backlash. Further, presidential philosophy plays a very significant role in the use of executive authority. It may be the most significant factor. Section B pulls this together in a case analysis that reviews the philosophical and legal boundaries presented by the William Taft, Franklin D. Roosevelt and Theodore Roosevelt administrations. These administrations represent both ends of the continuum (restrictive and expansive philosophies) as well as a moderate position, respectively. A model is developed based on Franklin Roosevelt's presidency, which can only be considered a highly successful administration in terms of expanding executive authority. The model is based on the expansion of executive power through the enactment of statutory delegations of authority that the President would need to guide the country through a world war and economic depression.

In Chapters 6 through 10, topics of special interest are highlighted. These topics were chosen either because PCAP asked us to address the issue and/or it is relevant to furthering a key component of the PCAP Climate Action Plan. For example, a large number of PCAP proposals rely on presidential directives to agencies; therefore, the extent of the President's influence over agency operations is analyzed in Chapter 6. More than one proposal calls for significant agency reorganization; therefore, the authority to reorganize agencies is addressed in Chapter 7. A central component of the Climate Action Plan is to implement a cap-and-trade mechanism for greenhouse gas emissions (GHGs). In Chapter 8, we analyze whether the authority exists under the Clean Air Act (CAA) in its current form to implement such a scheme. In addition, Chapter 8 includes an overview of the regulatory process under the CAA and the impact of recent federal cases[5] on the use of the CAA to address climate change policy. Chapter 9 addresses the President's authority to promote, through federal procurement, action that is supportive of and consistent with climate action policies. Finally, emergency authority is addressed in Chapter 10. The continued inaction at the national level on implementing a plan to address climate change combined with the recent and more severe scientific conclusions regarding the impact of GHGs currently being emitted into the atmosphere has led PCAP to consider the possibility of an emergency condition developing, one that could require action by the executive based on "emergency" authority. In Chapter 10, we review the authority for emergency action, the limitations of this authority and the philosophical implications. This includes both "implied" authority as well as authority from statutory delegations. Chapter 10 also references a model for addressing national crises based on the enactment of conditional statutory authority to provide the President the authority needed to address emergencies rapidly as exemplified by the Franklin Roosevelt administration and the Carter administration.[6]

Finally, Chapter 11 concludes the report by pulling together the key findings from our research that are relevant to climate change policy and the PCAP plan. These points are brought together with a focus on: (1) the areas where executive authority is strongest

in terms of the types of proposals PCAP is recommending; and (2) the areas where the most significant progress in furthering climate change policy can be made by use of executive order.

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[1] Visit us at http://www.colorado.edu/law/eesi/.

[2] "Maximum certainty" does not guarantee that any executive order issued by the President would withstand a legal challenge. As set forth in this report, there are no bright-line rules and it should be clear that a number of factors specific to an action can impact the legality of an executive order, e.g., how it is applied to an individual, whether the statutory delegation is valid, etc. "Maximum certainty" indicates that the President begins with the assumption of maximum deference by the courts in taking a particular action.

[3] After reviewing the original set of approximately 140 cases, they were narrowed down to approximately 60 for analysis.

[4] Professor Howell provides a table of 83 primary federal cases that reviewed challenges to executive orders from 1943 through 1997. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 175 (2003). All of these cases were reviewed and slightly half were thoroughly analyzed after determining their significance and relevance to this research. In addition a sweep was made of federal cases from 1997 through 2007, approximately 55 were reviewed and 5 subjected to thorough analysis.

[5] *E.g.,* Massachusetts v. U.S. Environmental Protection Agency, 127 U.S. 1438 (2007); Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp.2d 295 (D.Vt. 2007).

[6] In modern times, with Congress having enacted legislation to deal with a plethora of exigent circumstances, emergency authority has become heavily statutory. That is, there is far less room for the President to act in instances where Congress has left a vacuum by not expressing its will.

Chapter II. Tools Available to the Executive[1]

There are a number of "tools" available to the U.S. President to implement policy, including:

1. Executive Orders;
2. Presidential Proclamations;
3. Presidential Memoranda;
4. Signing Statements;
5. National Security Directives;
6. Recommending Legislation: The Executive Communication;
7. Calling Congress into Special Session;
8. Veto Power;
9. Power to Execute Treaties;
10. International Agreements; and
11. Voice as Head of Party and Head of Executive Branch.

The first five of these tools fall generally within the rubric of "presidential directive." The definitions of these five tools are sometimes unclear and continue to evolve. Although technically not correct, executive orders, proclamations, memoranda, and national security directives are commonly referred to as executive orders.[2] Throughout this report executive order will be given its technically correct meaning unless otherwise indicated. A brief description of each of these instruments or powers follows here and a more detailed examination of the authority for issuing executive orders follows here.[3]

1. The Executive Order

Executive orders are directives issued by the President to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law.[4] The most commonly cited definition is as follows: "In the narrower sense Executive Orders are written documents so denominated as such. . . . Executive Orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals." [5] There is a tendency to use the term executive order broadly and generically to include the whole family of presidential "power tools," however, in this report executive order is given its technical meaning.

Since executive orders are directives or actions by the President, when such documents are founded on the authority of the President derived from the U.S. Constitution or a federal statute they have the force and effect of law. Executive orders may be repealed or modified by the President issuing them or by a following president, by an act of Congress or by a decision of the Judiciary. Some executive orders become

obsolete by the passage of time, as when they have an expiration date or when the purposes for which they were issued no longer exist. Otherwise, an executive order once issued remains in effect until it is repealed, is modified or expires.[6]

Executive orders today differ extensively in form and substance from those issued in the late eighteenth century, and since the 1920's the executive order has become a governmental instrument of broad and increasing importance.[7] It was not until 1936 that a consistent form for the executive order was established when President Franklin D. Roosevelt issued EO 7298. This executive order prescribed a uniform manner of preparing proposed executive orders and proclamations including their filing and publication. This executive order was later superseded by others; the most recent is EO 11030 issued on June 19, 1962 which remains in effect though it has been amended by a number of later executive orders issued during the Johnson, Carter and Reagan administrations.[8]

Prior to 1907, executive orders were numbered and stored in an inconsistent manner and there was no complete central file of all executive orders.[9] It was not until 1935 that Congress enacted the Federal Register Act.[10] The Act requires that every executive order be filed with the Division of the Federal Register (previously they were filed with the Department of State). Primary duty for custody of executive orders is with the Archivist of the U.S.; and the Public Printer with that office is required to undertake prompt and uniform printing and distribution of executive orders. Executive orders are now printed in the *Federal Register* and in the bound volumes of Title 3 of the *Code of Federal Regulations*. The requirements of the Federal Register Act also apply to proclamations.[11] EO 7316 dated March 14, 1936, is the first executive order to be published in the *Federal Register*. Since this time there have been virtually no unnumbered executive orders (with the possible exception of classified executive orders).[12]

Executive orders are used in a variety of ways and for a broad array of reasons. General categories for their use include: (1) vehicles for issuing binding pronouncements to units of the executive branch; (2) making policy in fields generally conceded to the President—fields largely ceded to the Administration to regulate by executive order include security classification, ongoing governance of civil servants, foreign service and consular activities, operation and discipline in the military, controls on government contracting, and until recently, the management and control of public lands;[13] (3) initiating or directing legislation; (4) delegating authority to other agencies or officers; (5) reorganizing agencies,[14] eliminating existing organizations or creating new ones; (6) managing federal personnel; (7) controlling the military, providing for its discipline, and managing its resources; (8) as an instrument of foreign policy; and (9) setting aside, managing, allocating resources or disposing of physical assets or real property.[15] The authority for the use of executive orders and the extent to which they can be used with maximum certainty in terms of valid executive authority is the subject matter of this report.

2. Presidential Proclamation

Very similar to an executive order and sometimes used interchangeably, the commonly understood significant difference between executive orders and proclamations is that executive orders are used internally, directed to officials within the government, while proclamations are issued to those outside of government.[16] However, in practice it is not so neatly defined. A proclamation is an instrument that states a condition, declares the law and requires obedience, recognizes an event, or triggers the implementation of a law (by recognizing that the circumstances in law have been realized).[17] As with executive orders, the process for promulgating proclamations is governed by the Federal Register Act[18] and EO 11030 as amended over the years. Further, beginning with Proclamation 2161 of March 19, 1936, all proclamations have been published in the *Federal Register* and the Title 3 compilations of the *Code of Federal Regulations*.[19] While most are ceremonial, others are substantive and they carry the force of law in the same sense as executive orders.[20]

There are essentially three varieties of proclamations: (1) hortatory proclamations that single out particular individuals, groups, or occasions for recognition and celebration (the most numerous); (2) those that are like presidential determinations and their domestic equivalent, used to invoke particular statutory or constitutional powers and can result in very significant actions;[21] and (3) policy pronouncements issued to those outside government that have the force of law.[22] Examples of the use of proclamations include requiring draft registration, declaring an emergency (which is also done by executive order), establishing the clemency program and granting pardons, and in prior years it has been used as the chief formal statement of U.S. foreign policy.[23] Today it is not uncommon for presidents to use several instruments together to implement a policy.

Precisely because proclamations are aimed at those outside of government, the President's authority to issue them is more limited than it is with executive orders or other directives addressed to persons in the executive branch and it is easier to obtain standing to challenge the directive. However, as with other executive directives they are usually upheld.[24]

3. Presidential Memorandum

In general, the presidential memorandum is a pronouncement by the Chief Executive nominally directed at executive branch officials and labeled as a memorandum by the White House. In earlier times, it was sometimes known as a presidential letter. As a practical matter, the memorandum is being used as the equivalent of an executive order but without fitting into its existing legal requirements.[25] There is no stated process for developing memoranda and no requirement that they be published in the *Federal Register* or anywhere else.[26] Presidents sometimes direct that particular memoranda be published in the *Register*, but most are published in the *Weekly Compilation of Presidential Documents* and *The Public Papers of the President*. They are not numbered or indexed, although presidential determinations that are foreign policy actions are generally numbered chronologically based on the fiscal year.[27]

Until recently presidents did not use this tool often, and most of the memoranda issued fit into three categories: (1) presidential determinations that typically stem from statutes that require the President to make findings concerning the status of a country or some activity in the foreign policy field; (2) memoranda of disapproval, which are public veto statements; and (3) hortatory declarations, which are sometimes the equivalent of presidential proclamations but are directed to executive branch agencies instead of the general public, reminders of previously issued administration policies such as civil rights commitments, or issued in an effort to "get the word out" on some policy.[28]

The use of memoranda for more substantial policy action has increased over time. They have become attractive to recent administrations because they are even simpler to issue than executive orders and they have no publishing requirement. Historically, apart from the foreign policy determinations, presidential memoranda were generally of limited importance and infrequently used. Since the Reagan administration they have been used with increasing frequency to modify significantly or even override policies issued through more standard devices, like executive orders or agency rules.[29] They have come to be used for all of the purposes of executive orders. They often contain binding pronouncements directed at various units of the executive branch, make policy in fields generally conceded to the President, delegate authority granted to the President to various agencies or offices of the executive branch, create new organizations or modify the obligations of existing offices, control military and foreign affairs units, manage the civil service, and reallocate assets.[30]

Some examples of the use of the presidential memorandum include: (1) directing the secretary of Health and Human Services to suspend the abortion gag rule imposed by the George H. W. Bush administration and to promulgate proposed new regulations within thirty days (Clinton); (2) lifting the moratorium on funding of fetal tissue experimentation (Clinton); (3) ordering the Secretary of Defense to reverse the existing ban on abortions in military hospitals so long as they were not paid for with Department of Defense funds (Clinton); (4) ending discrimination in the Armed Forces (Clinton); (5) freezing federal hiring (Reagan); and (6) issuing a 60 day moratorium on issuing new rules (George W. Bush).[31]

4. Signing Statement[32]

Prior to the Reagan administration, presidential signing statements were part of a relatively benign and largely ceremonial practice of issuing a statement on signing of legislation. In some cases they went beyond that to announce concern with interpretation of a particular provision of a statute before signing. Today, signing statements are announcements made by the President, usually prepared by the Justice Department, that go beyond merely lauding passage of some statute to identify provisions of the legislation with which the President has concerns. They provide the President's interpretation of the language of the law, announce constitutional limits on the implementation of some of its provisions, or indicate directions to executive branch officials as to how to administer the new law in an acceptable manner. Signing statements

have been used to nullify, or at a minimum to express a president's interpretation of, a statute; to trump congressional action; and to influence not only the implementation of law but also its legal interpretation.[33] Although technically not part of the legislative history, since 1986 signing statements have been included in the *U.S. Code Congressional and Administrative News* legislative histories. This arrangement was pursued by the Reagan administration in an attempt to give the statements some legal authority and to influence judicial interpretation of statutes through publication.[34]

5. National Security Directive (NSD)[35]

In general, NSDs are presidential directives that establish policy through the National Security Council and that are intended to implement and coordinate military policy, foreign policy, or anything else that is defined within the rubric of national security. The best definition of an NSD is "a formal notification to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs and generally requiring follow-up action by the department or agency addressed."[36] They have many of the same effects as executive orders but are not defined as such.[37] Therefore, NSDs are not covered by the Federal Register Act and there is no obligation to publish them.[38] The vast majority are classified. Most NSDs are aimed at foreign policy and military affairs; however, there is some indication that others have significant domestic impact. [39] They have been called by different names over the years, e.g., NSC Policy Papers, National Security Action Memoranda, National Security Decision Memoranda, Presidential Directives, Presidential Decision Directives, and National Security Presidential Directives. Most administrations to date have refused to notify Congress of the existence of NSDs, to provide copies if they are specifically requested by Congress, or to send witnesses to testify at hearings on the subject.

6. Recommending Legislation: The "Executive Communication"[40]

It is commonly known that the President has the authority and duty to recommend legislation to Congress.[41] However, the process by which this is undertaken, using the "executive communication," is not as broadly understood. In modern times, the executive communication has become a prolific source of legislative proposals. The communication is usually in the form of a message or letter from a member of the President's Cabinet, the head of an independent agency, or the President himself, transmitting a draft of a proposed bill to the Speaker of the House of Representatives and the President of the Senate. Despite the structure of separation of powers, Article II, Section 3, of the Constitution imposes an obligation on the President to report to Congress from time to time on the "State of the Union" and to recommend for consideration such measures as the President considers necessary and expedient. Many of these executive communications follow on the President's message to Congress on the state of the Union. The communication is then referred to the standing committee or committees having jurisdiction of the subject matter of the proposal. The chairman or the ranking minority member of the relevant committee usually introduces the bill promptly either in the form in which it was received or with desired changes. This practice is

usually followed even when the majority of the House and the President are not of the same political party, although there is no constitutional or statutory requirement that a bill be introduced to effectuate the recommendations. The committee or one of its subcommittees may also decide to examine the communication to determine whether a bill should be introduced.

The most important of the regular executive communications is the annual message from the President transmitting the proposed budget to Congress. The President's budget proposal, together with testimony by officials of the various branches of the government before the Appropriations Committees of the House and Senate, is the basis of the several appropriation bills that are drafted by the Committee on Appropriations of the House. Many of the executive departments and independent agencies employ legislative counsels who are charged with the drafting of bills. These legislative proposals are forwarded to Congress with a request for their enactment. In some instances, a draft of a statute is the result of a study covering a period of a year or more by a commission or committee designated by the President or a member of the Cabinet. The Administrative Procedure Act and the Uniform Code of Military Justice are two examples of enactments resulting from such studies. In addition, congressional committees sometimes draft bills after studies and hearings covering periods of a year or more.

7. Call Congress into Special Session[42]

Pursuant to Article 2, Section 3 of the U.S. Constitution, the President "may, on extraordinary Occasions, convene both Houses, or either of them . . . ." Thus, if an emergency or other crisis occurs when Congress is not in session, the Constitution empowers the President to call Congress back into special, or extraordinary, session. Prior to 1933, Congress met for only a limited number of months each year. In 1933, the 20th Amendment was passed. It changed the opening date of Congress to January 3, and thereafter Congress began meeting for most of the year. Thus this provision is used less frequently in modern times. The last special session called was in 1948.

Up to 1933 presidents called the Senate into special session on 46 occasions, usually to confirm nominations to the Cabinet or to deal with important treaties. On 27 other occasions, presidents called both the House and Senate into special session. These special sessions responded to wars, economic crises, and important legislative proposals. Since 1933 presidents have called Congress back only four times. Franklin Roosevelt called Congress into special session in March 1933 to pass emergency banking and relief legislation during the Great Depression. This session became known as the "first hundred days of the New Deal." Roosevelt also called a special session in October 1937 to enact legislation that would establish minimum wages and maximum hours of work and again in September 1939 when Germany invaded Poland and triggered World War II. President Truman called Congress back in 1947 and 1948 to deal with unfinished domestic legislation. According to one source, these two sessions were called largely for political purposes.

8. Veto Power[43]

Although the word "veto" is not explicitly used in the Constitution, the veto power is established in Article I, Section 7. This provision describes the process by which legislation passed by Congress becomes law. All legislation passed by both houses of Congress must be presented to the President. If the President does not sign the legislation he must return the bill, unsigned, within 10 days (Sundays excepted) to the house of the United States Congress in which it originated. The President is required to state his or her objections to the legislation in writing and Congress must consider the objections and reconsider the legislation. The bill can still become law without the President's signature if Congress passes it by a two-thirds majority in each house. Thus Congress can override the President's veto. If Congress attempts to override presidential action or revoke a statutory delegation of authority by enacting legislation with that effect, in all likelihood a veto proof majority will be necessary.

9. Power to Execute Treaties

A treaty is one mechanism by which the United States enters into binding international agreements. Pursuant to Article II, Section 2 of the U.S. Constitution, "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ." Thus, the President has the constitutional authority to negotiate and choose the treaties into which the U.S. will enter; however, the Constitution requires ratification by two-thirds of the U.S. Senate. Once ratified by two thirds of the Senate, but not until, it becomes the "supreme law of the land."[44] Pursuant to Article VI, Clause 2 of the U.S. Constitution, federal statutes, U.S. treaties and the U.S. Constitution are "the supreme law of the land." Treaties must comply with the Constitution. However, the treaty-making power of the U.S. Government is broader than the law making power of Congress.[45] In addition a treaty binds the United States and all foreign states that are parties to that treaty. There is some debate regarding at what point and to what extent the Senate should be involved in the treaty negotiating stages to satisfy the "advice and consent" clause.[46] However, presidents have learned, by the failure to ratify or other actions taken by the Senate, that some form of early involvement may be a necessity.[47] This power is typically included in the aggregate argument made in favor of the President having almost exclusive authority in foreign affairs. [48]

10. Executive Agreements

Throughout U.S. history the President has also used the vehicle of "executive agreements" to create and enter into binding international agreements. An executive agreement is a kind of treaty peculiar to the United States. It is similar to a treaty in that it binds both the United States and a foreign state; however, unlike formal treaties, they do not become the "supreme law of the land," and the President of the United States can make them without the advice and consent of the Senate.

In general terms, an executive agreement can only be negotiated and entered into through the President's authority (1) in foreign policy, (2) as commander-in-chief of the armed forces, or (3) from a prior act of Congress. U.S. Presidents rely on a variety of methods to establish new international agreements. The most prominent of these are:

1. A "sole executive agreement" based on the President's independent Constitutional authority;[49]
2. An agreement preauthorized by Congress, such as one concluded pursuant to an existing treaty;
3. An agreement submitted to Congress for review and approval;
4. An agreement submitted by the President to the Senate for advice and consent (otherwise known as an Article II treaty).

Because Senate ratification is not required, U.S. law does not classify an international agreement that is created via an executive agreement as a "treaty." This does not mean that the executive agreement is not considered binding under U.S. law, but merely that it does not possess the full legal attributes of an Article II treaty. Under the international law expressed by the Vienna Convention on the Law of Treaties, an international agreement is considered a binding "treaty" regardless of whether it was created by an executive agreement or via ratification by two-thirds of the U.S. Senate.

Through its Circular 175 Procedure,[50] the State Department has issued guidelines to assist in determining whether a particular agreement should be in the form of an executive agreement or a treaty. It should be noted, however, that as the full scope of the President's authority to create and implement executive agreements remains a contentious issue around margins, these guidelines are helpful but not necessarily determinative. Circular 175's "Procedure on Treaties" sets forth the following considerations to guide the decision of whether a particular agreement is to be concluded as a treaty or an executive agreement:

a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
b. Whether the agreement is intended to affect State laws;
c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
d. Past U.S. practice as to similar agreements;
e. The preference of the Congress as to a particular type of agreement;
f. The degree of formality desired for an agreement;
g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
h. The general international practice as to similar agreements.

The Circular further provides that "[i]n determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a

treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President."

11. Voice as Head of Party and Head of Executive Branch

Obviously the President wields great influence in the position of head of his or her political party and as chief executive of the country. The President is in the national and international spotlight in terms of access to the media. The President can influence the policies of his or her party as well as the focus of the nation in terms of priorities and goals. Some argue that this role or "ministerial function" is one of the President's most important.[51]

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[1] Much of the material in this chapter is from the following resources: HAROLD BRUFF, BALANCE OF FORCES 154 (2006) (hereinafter "Bruff 2006"); PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION (2002) (hereinafter "Cooper"); HUGH C. KEENAN, EXECUTIVE ORDERS: A BRIEF HISTORY OF THEIR USE AND THE PRESIDENT'S POWER TO ISSUE THEM, CRS REPORT (revised February 26, 1974 by Grover S. Williams) (hereinafter "Keenan"); HAROLD C. RELYEA, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW, CRS REPORT 98-611 (Updated April 23, 2007) (hereinafter "Relyea 2007").
[2] Bruff 2006, *supra* note 1, at 154; *see also* Cooper, *supra* note 1, at 83, 91.
[3] Although this report focuses on executive orders, to the extent that this analysis addresses the boundaries of executive authority this is of course applicable to other forms of presidential directives.
[4] Cooper, *supra* note 1, at 16. There is no law or even an executive order which attempts to define the term "executive order." Essentially, an executive order is a written document issued by the President and titled as such by him or at his direction. Keenan, *supra* note 1, at 1.
[5] Cooper, *supra* note 1, at 16 (citing STAFF OF H.R. COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF THE USE OF PRESIDENTIAL POWER 1 (Comm. Print 1957)).
[6] Keenan, *supra* note 1, at 1.
[7] *Id.* at 1; Cooper, *supra* note 1, at 17.
[8] *See* Cooper, *supra* note 1, at 17 (citing Exec. Order No. 11,354, 32 Fed. Reg. 7,695 (May 23, 1967), Exec. Order No. 12,080, 43 Fed. Reg. 42,435 (Sept. 18, 1978), and Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987)). Pursuant to these executive orders, proposed executive orders originating outside of the White House are submitted to the director of the Office of Management and Budget (OMB). If approved by OMB the executive order goes to the attorney general for consideration of its legality and to the Office of the Federal Register for a review as to form. If these steps are cleared, the proposed executive order or proclamation goes to the President for signature. *Id.* at 17.
[9] The numbering of executive orders was not instituted until 1907. Keenen, *supra* note 1, at 5. For the history of the development of the form, numbering and storage system for executive orders; *see, e.g., id.* at 5-8; Cooper, *supra* note 1, at 17-21.
[10] 44 U.S.C. § 1501 et. seq.
[11] 44 U.S.C. § 1501.
[12] Keenan, *supra* note 1, at 7-8. For a good explanation of the earlier attempts at organizing and numbering executive orders, *see id.* at 5-7.
[13] Cooper, *supra* note 1, at 27.
[14] The Federal Reorganization Act authorized the use of executive orders for agency reorganization in conjunction with Congressional oversight in the form of a joint resolution approving the executive order. 5 U.S.C. §§ 901-912. Although still in the U.S. Code the Act became dormant in 1984. 5 U.S.C. § 908.
[15] Cooper, *supra* note 1, at 21-37.
[16] *Id.* at 16.
[17] *Id.* at 117.
[18] 44 U.S.C. § 1501.
[19] Relyea 2007, *supra* note 1, at 14.
[20] Cooper, *supra* note 1, at 118.
[21] Proclamations are sometimes specifically required by statutes to make a pronouncement, although a modern trend is for legislation to use the language to "make determinations" which allows the President to select the vehicle. *Id.* at 135.
[22] *Id.* at 112.
[23] *Id.* at 119-133; *see also* Relyea 2007, *supra* note 1, at 14. Proclamations have been largely replaced by presidential memoranda in the area of foreign policy. Cooper, *supra* note 1, at 122-23.

[24] *But see* Independent Gasoline Marketers Council v. Duncan, 492 F.Supp. 614 (D.D.C. 1980) (President Carter's proclamation implementing a fuel surcharge found to be invalid).
[25] Cooper, *supra* note 1, at 83.
[26] *Id.* at 118; *see also*, 15 U.S.C. §1501; Exec. Order No. 11,030, 27 Fed. Reg. 5,847 (June 19, 1962).
[27] Cooper, *supra* note 1, at 83-86.
[28] *Id.* at 86-90.
[29] *Id.* at 90-91.
[30] *Id.* at 91.
[31] *Id.* at 81-83.
[32] *Id.* at 200-203.
[33] For example of the use of signing statements, see *id.* at 203-13.
[34] *Id.* at 202-3.
[35] This section is largely based on *id.* at 141-45. For a more complete look at the use of NSDs over the years, see *id.* at 141-97; Relyea 2007, *supra* note 1, at 6, 9-12.
[36] Cooper, *supra* note 1, at 144 (citing a quote from President Johnson found in BROMLEY K. SMITH, ORGANIZATIONAL HISTORY OF THE NATIONAL SECURITY COUNCIL DURING THE KENNEDY AND JOHNSON ADMINISTRATIONS 23 (National Security Council 1988)).
[37] 44 U.S.C. § 1501.
[38] 44 U.S.C. § 1501 et. seq.
[39] Cooper, *supra* note 1, at 145 (citing a limited study of NSDs, *Presidential Directives and Records Accountability: Hearing Before a Subcomm. of the H. Comm. on Government Operations*, 100th Cong. (1988)).
[40] With the exception of the first sentence, this section is directly from Charles W. Johnson, *How Our Laws Are Made,* 4-5(23d ed. 2003), *at* http://thomas.loc.gov/home/lawsmade.bysec/sourceofleg.html.
[41] U.S. CONST. art. II, § 3.
[42]This section is primarily from, John J. Patrick, Richard M. Pious & Donald M. Ritchie, *The Oxford Guide to the United States Government* (2002), *at* http://www.answers.com/topic/special-sessions-of-congress.
[43] This section is largely from U.S. CONST. art. I, § 7.
[44] Pursuant to the Supremacy Clause of the U.S. Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.
[45]*See* Missouri v. Holland, 252 U.S. 416 (1920).
[46] *E.g.*, Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (May 1989) (hereinafter "Fisher"); Ronald A. Lehmann, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 YALE L.J. 885 (1989).
[47] Presidents who attempted to commit the nation unilaterally to international agreements discovered that the Senate has ample resources to retaliate by tacking on amendments, shelving treaties, or rejecting them outright. Fisher, *supra* note 46, at 1516-17.
[48] *See, e.g.*, U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[49] With respect to this type of executive agreement, the underlying assumption is that the President has the constitutional authority to conclude such agreements under his or her own powers, and thus is not required to submit them to the Senate as treaties or to Congress for approval. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, CRS REPORT (2001). Examples of significant sole executive agreements include the Yalta Agreement of 1945, the Vietnam Peace Agreement of 1973, the Iranian Hostage Agreement of 1981, and the Afghanistan Settlement Agreement of April 14, 1988.
[50] The State Department's Circular 175 review provides a formalized process by which many different forms of international agreements, with a wide variety of partners, can be assessed. INTERNATIONAL AGREEMENTS HANDBOOK II-6, U.S. DEPT. OF ENERGY (2000). The objectives of the Circular of December 13, 1955, as amended, are to ensure that the making of treaties and other international agreements are in accordance with legal authorities and to provide for appropriate review by the Department of State and Congress, as appropriate, to ensure that agreements are consistent with policy objectives.
[51]David W. Orr, *One Hundred Days of Climate Action*, 21 CONSERVATION BIOLOGY 907, 909, 910-911 (2007).

Chapter III. Analysis of the Authority for Executive Orders

This chapter reviews the legal framework for analyzing the authority of the President to issue executive orders. Part A provides an overview of the sources of authority upon which executive orders are issued and the framework applied by the courts in analyzing whether the authority is valid. In regard to the latter, a three-tiered framework is developed to describe the judicial analysis. The courts appear to consider three layers of attributes: (1) the relationship of the executive order to the will of Congress; (2) the subject matter of the executive order; and (3) the context or circumstances surrounding issuance of the executive order. Part B includes a more detailed look at the limits the courts have placed on the use of executive orders. It begins with a more detailed look at the relationship the executive order has to the will of Congress and the methods by which courts analyze this relationship in terms of sufficient authority to issue the executive order. It then goes on to review other factors that can lead to invalidation of an executive order.

A. Overview: Sources of Authority and Framework for Analysis

1. Sources of Authority for Executive Orders

Virtually all executive orders cite some authority upon which they are issued[1] and typically this is provided in the first paragraph of the executive order.[2] Some rely exclusively upon the general powers of the President, some cite specific federal statutes or specific provisions of the Constitution, while some, usually those that are transitory and noncontroversial in nature, fail to cite any authority. There have even been a few executive orders that cite the Charter to the United Nations for authority.[3] The key provisions within the Constitution most widely relied upon are found in Article II, which establishes the executive branch of the United States government and defines the powers of that branch, specifically Section 2 which enumerates a number of specific powers and duties including declaring the President to be Commander in Chief, and giving the President the power to make treaties and appoint ambassadors. Presidents also frequently cite Section 3, which assigns to the President the duty to "take care that the laws be faithfully executed." Citations to statutory sources of authority range from citations to provisions that specifically delegate duties or powers to the executive,[4] to less specific legislative authority in which case the reference can be couched in terms of "furthering the goals and purposes" of a particular statute.[5] Many cite more than one source of authority.[6]

An interesting observation from an analysis of energy and environmental executive orders since 1937 (see Chapter 4) is the difference between administrations in terms of presentation of authority for executive action in executive orders. For example, President Clinton relied heavily on statutory provisions and multiple sources of authority, meticulously citing statutes and sources at the beginning of most of his executive orders.[7]

On the other hand, President George W. Bush has relied more on the generic "Powers as the President." This observation is perhaps the result of differing philosophies,[8] or differing circumstances,[9] or both.[10] It might also reflect the fact that courts have been willing to find statutory sources of authority on a post-hoc basis after an executive order is challenged.[11]

2. Framework for Judicial Review of Executive Orders

Although some guidance can be gleaned from judicial opinions, it cannot be said that there is one consistent approach to challenges of executive authority. While there is a general theme of showing deference to executive decisions, there are purposefully no bright-line rules set by the judiciary in regard to the boundaries of executive authority.[12] This approach reflects the most elementary principle of constitutional law—separation of powers. The Constitution of the United States provides that the executive power shall be vested in a President,[13] the legislative power in a Congress,[14] and the judicial power in a Judiciary.[15] Succinctly stated by one legal author, "The separation of powers between the three branches of government is based largely on good faith, i.e., that each department will not infringe on areas reserved to the branches and will respect each other's decisions."[16] Quoting from Justice Rehnquist, ruling in favor of President Carter's and President Reagan's authority to take actions by executive orders and executive agreements during the Iran Hostage Crisis:

> We attempt to lay down no general "guidelines" covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case. . . . Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tri-partite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once.[17]

If one were to try to characterize the level of certainty with which a president could act in terms of issuing certain directives or implementing policy through executive orders, a continuum analogy would be the most fitting with three overlapping layers of attributes to consider.[18] The first layer would be the relationship between the executive action taken and the will of Congress. For example, the President acts with most certainty if he or she acts pursuant to a specific statutory delegation of authority from Congress and with least certainty if he or she acts in contravention of a provision of legislation. The second layer would be the subject matter of the executive order and whether it lies in an area in which the President is given great deference, such as foreign or military affairs. The third layer would be the circumstances surrounding issuance of the executive order,

or the outside context, for example, whether there are exigent circumstances that need to be addressed.

a. Relationship Between Executive Action and Will of Congress. The relationship of the executive order to legislation was set forth by Justice Jackson, in his often-cited concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[19] In that case, the Supreme Court found that President Truman exceeded his authority when he issued an executive order that authorized the federal government to take over operations of steel mills during the Korean conflict. Pursuant to this analysis, there are three categories in which an action might fall, with each "category" really representing an area of a continuum, from strongest to weakest authority, or said in another way, from the most to least amount of presumed judicial deference.[20]

1. When the President acts pursuant to an express or implied **authorization from Congress**, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." [21]

2. When the President acts in the absence of congressional authorization he may enter "a **zone of twilight** in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[22] In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the legislative branch toward such action, including "congressional inertia, indifference or quiescence."[23]

3. Finally, when the President acts in **contravention of the will of Congress**, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." [24]

Pursuant to this continuum analysis, the President acts with the most certainty when the action is authorized pursuant to a delegation from Congress, and acts with the least certainty when the action is contrary to the will of Congress. Between these extremes the President will be in a gray area if Congress has not addressed the issue or act being directed. This analysis is probably one of the most common applied by federal courts when reviewing the use of executive authority. However, it is not used exclusively but rather in conjunction with a review of other factors. Although the analysis has been characterized as "analytically useful,"[25] Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping:"

> [A]nd it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.[26]

Ascertaining congressional intent, or the will of Congress, is not always straightforward. Congressional intent can be gleaned from: statutes that authorize an act or power; statutes that prohibit an act or power; the interaction between various provisions of legislation when more than one provision is applicable;[27] inaction by Congress (acquiescence which can be implied over time);[28] an act by Congress ratifying an executive order after the fact directly[29] or indirectly;[30] legislative history; and in one case congressional intent was gleaned from the act of Congress voting against a measure (thus implying the intent to prohibit the President from taking a particular action).[31] Ascertaining congressional intent is addressed more thoroughly in Part B of this chapter.

Even if an executive order appears to fall within category 3 of the Jackson framework, in contravention of legislation, the courts may still find that the President has authority without "disabling Congress." Generally, if there is conflict with a statute the executive order would be outside of the executive's authority. There are exceptions, however:

> The refusal of Congress to recognize a problem and act upon it invites action by the President. In addition, emergencies sometimes exist which require immediate action. In these instances the President must act, sometimes in violation of prior congressional legislation and sometimes without congressional authorization.[32]

Further, acquiescence over a significant period of time can be found as justification for presidential action (although this can also be interpreted as congressional intent in support of the action).[33]

b. The Subject Matter of the Executive Order. The second layer of the analysis would be the subject matter of the executive order in terms of whether it falls within an area in which the executive has traditionally been given great deference such as powers that are enumerated in the Constitution. Some specific examples of areas in which the President has traditionally been given great deference include: military and foreign affairs; operation of the executive branch of the federal government including federal procurement and federal employment practices; management of federal lands; emergency situations (most often international conflict or economic crises); and fields largely ceded to the government by executive order such as security classification. In these circumstances, the action by the President is said to be given the greatest deference. However, again this is one layer of the analysis and there are still limits as discussed in this report.

Pursuant to Article II, Section 2 of the U.S. Constitution: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ." It is said that the Commander in Chief power "approaches absolute power."[34] Further, the Commander in Chief authority is often used in conjunction with emergency situations and foreign affairs. However, it is not without its limits. Congress is specifically given the power to declare war, to raise and support armies, to provide and maintain a navy as well as a number of other specific powers and duties that relate to

conflict.[35] In addition, Congress has authority over taxing and appropriations.[36] Thus the legislative branch has significant power to check the executive authority in terms of carrying out military actions. However, in terms of the use of the Commander in Chief authority, the courts are very deferential to presidential actions carried out under its auspices especially in times of international conflict, which is when it is primarily used. During WWII, Franklin Roosevelt issued EO 9066 which served as the basis for the exclusion and later incarceration of Japanese Americans during WWII. Franklin Roosevelt claimed no other authority for this order other than his power as the U.S. President and as Commander in Chief,[37] although the order was ratified by statute approximately one month after it was issued. Exclusion orders issued pursuant to the executive order were challenged but upheld by the U.S. Supreme Court.[38] The actions that were challenged and upheld took place while the U.S was fully engulfed in a world war.

On the other hand, President Truman under the auspices of Commander in Chief did not fare as well when he attempted to give the federal government authority to take over operations of steel mills during the Korean conflict with an executive order.[39] There is some indication that the Justices did not believe that the circumstances equated to an emergency[40] or that a severe and/or irreversible impact would ensue without the implementation of the executive order. Thus, the Commander in Chief power did not prevail over the other factors in the constitutional analysis of this case.

It is generally conceded that the President is given traditional deference in international matters. [41] Again, many scholars also believe this power approaches absolute power. The Supreme Court indicated that, in the field of foreign relations, the President possesses certain inherent powers, apart from grants of power by the Constitution, so that delegations of legislative power by Congress to the President to place embargoes on foreign commerce will be more liberally construed by the courts than if the field of foreign relations were not involved.[42] In dicta, Justice Sutherland states that: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[43] This is often referred to as the sole organ theory. Although the sole organ theory has been criticized for a number of reasons[44] and it is often not noted that it is dicta,[45] it is widely recognized that when the President acts in the arena of foreign affairs he is given the utmost discretion by the courts.[46]

There are certain fields in which the President has traditionally used the executive order to promote the welfare of the community. Executive orders have been used extensively in the following areas: (1) the development of public lands and natural resources;[47] (2) the regulation of administrative and executive departments of the government[48]; (3) the field of civil rights and combating discrimination.[49] Each of these is discussed later in this report. And another author identifies "fields largely ceded to the government by executive order," such as, security classification; ongoing governance of civil servants; Foreign Service and consular activities; operation and discipline in the military; controls on government contracting; and until recently, the management and control of public lands. Although there are statutes in all of these areas, there has been a

tradition over many administrations to use executive orders as the primary, or at least as an important, policy and management tool.[50]

c. Circumstances. The third layer of the analysis is a look at context. The most significant factor affecting the deference given by the courts in terms of context, or outside conditions, is the claim of an emergency or crisis. An emergency traverses all three categories. First, there are numerous statutory provisions delegating authority to the president that become active in the event of an emergency. Thus the relationship of the action to legislation would be important if it is undertaken pursuant to such a statutory provision. Second, there is a debate regarding "implied emergency authority" outside of any statutory delegation. Whether or not the courts agree that the President technically has such a "power" or whether emergencies are folded into the analysis by looking at outside circumstances, there is deference given to the President under such conditions.[51] Emergency authority is addressed in Chapter 10.

It is clear, however, that courts look at the conditions under which the executive order is issued and are more deferential when the country is undergoing a crisis or emergency and the executive order is issued to address this. Typically, subsequent to the Civil War, claimed emergencies involve international conflict or economic crisis. It appears, however, that the magnitude of the emergency, whether the circumstances require immediate action, and if there would be a severe or irreversible impact in the event that the action by the executive order is not taken, may affect the measure of deference. A comparison of an executive order issued during WWII by President Roosevelt and one issued by President Truman during the Korean conflict as discussed above is an indicator of this.[52]

Finally a few words about the prerogative argument:

> The prerogative theory is the idea that the chief executive is not limited to delegations of authority from the Constitution or statutes. The argument is not merely about what the president may be able to do politically but claims that there is formal authority for broad action and apparent legal warrant for it. The prerogative idea derives from the British royal prerogative under which the monarch issued a variety of orders and proclamations, citing the authority of the Crown as the basis for action.[53]

There is much debate over the prerogative theory and its application as a source of authority for executive action.[54] This theory, most commonly made in conjunction with emergencies and an expansive philosophy towards the practice of executive legislation, is misunderstood and sometimes misapplied by presidents as a formal constitutional claim to authority for issuance of executive orders.[55] Reliance on the prerogative theory is not advisable as a solid source of authority.

B. The President's Authority to Issue an Executive Order: Guidance from a Review of Federal Case Law

Executive orders and proclamations have been used since the very first President. While they have been used to implement major policies for just as long, many commentators suggest that their use to effect major policy changes expanded significantly throughout the twentieth century. As one legal author writes, "The purely administrative function originally played by the orders . . . has been largely supplanted by uses which have the same net effect as legislation."[56] This is not to say that executive orders meant to serve an administrative function have not been significant, however, the scope of using executive orders has expanded. Presidents have helped define federal policies in such areas as civil rights, the environment, health care, and social welfare with executive orders.[57]

Given the desire of presidents to expand their authority to implement policy through executive orders, it is important to understand what limits the courts have imposed on this practice. Overall, presidents tend to do fairly well when their executive orders are challenged in court. A study by Howell, which evaluated challenges to executive orders in federal courts between 1943 and 1997, found that "Presidents won 69 percent of the cases at the Supreme Court, 86 percent in appellate courts, and 85 percent in district courts. Overall, the president lost only fourteen of eighty-three court challenges."[58] Comparatively, "federal administrative agencies historically have won 73 percent of cases brought before the Supreme Court, and 58 percent before appellate courts."[59] Part B of this chapter will analyze methods courts use to decide whether an executive order is valid, and discuss various factors the courts evaluate to make these determinations.

Sections 1 through 4 address the sources of authority accepted for valid use of executive action and the framework for court review. Although the methods of court review are not uniform, ultimately the President must have constitutional or statutory authority to issue an executive order. Even when there is authority for an executive order, there are a number of ways the order can still be found invalid. These are addressed in sections 5 through 8. For example, the President can overstep the bounds of a statutory delegation or authority under one statute can be insufficient based on the provisions of another statute (section 5); an order can be implemented in an invalid manner by an executive agency (section 6), an order can violate the Fifth Amendment of the Constitution when applied to a particular person or entity (section 7); or an order can usurp any of Congress's specific Article I constitutional powers (section 8). Section 9 addresses exogenous factors that could affect the outcome of a court challenge, and section 10 concludes with a summary of this chapter.

1. The Overarching Framework

a. The *Youngstown* Framework. *Youngstown Sheet & Tube Co. v. Sawyer* has been widely adopted as the springboard for analyzing the validity of executive action.[60] First, the Court stated the baseline rule that "[t]he President's power, if any, to issue the

order must stem either from an act of Congress or from the Constitution itself."[61] That is, the President needs either constitutional authority or statutory authority for a particular action in order for it to be valid. In his concurring opinion, Justice Jackson established the now-famous three-category framework for analyzing the President's authority to issue executive orders.[62]

Jackson Category 1: Express or Implied Authorization of Congress. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."[63] The President's action will be accorded "the strongest of presumptions and the widest latitude of judicial interpretation . . . ."[64]

Jackson Category 2: "Zone of Twilight." "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . ."[65] Either, the President and Congress "have concurrent authority," or the "distribution [of authority] is uncertain."[66] Here, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[67]

Jackson Category 3: Action Against the Will of Congress. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power . . . must be scrutinized with caution . . . ."[68] In other words, the President's action must be "within his domain and beyond control by Congress."[69]

b. The Youngstown Void. Unfortunately, Jackson's concurrence begs one important question to which it provides no answer: How does one determine which category the President is in? As pointed out by Kevin Stack, an expert in administrative law, presidential power, and statutory interpretations, "[*Youngstown]* offers a framework for constitutional review of presidential action but is silent on how a court is to judge when a president acts pursuant to a statute."[70] Even Jackson referred to this three-category framework as a "somewhat over-simplified grouping of practical situations" in which the power of the President may be challenged.[71] More recently, the Supreme Court has recognized that the framework may be more appropriately visualized as a continuum rather than three discrete categories. "[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[72]

Under Jackson's framework, if the President has the implied consent of Congress, he or she is entitled to "the strongest of presumptions," but if the action is met with the implied disapproval of Congress, the courts will "scrutinize with caution." In either case, the court will be searching for the implied will of Congress, but what the court finds (either implied consent or implied disapproval) significantly impacts their review of the

President's authority to act. Thus, if the statute provides no express authority, how the court determines whether the President has implied authority, implied disapproval, or anything in-between becomes extremely important. Even if there is an express source of authority, the question remains whether the presidential action is within the scope of that express authority. There is no universal approach to the question of executive authority, although some general guidance can be ascertained as set forth in the following sections.

2. Constitutional Authority

When the President tries to justify action solely on inherent power derived from the Constitution, usually the power as Commander in Chief,[73] or the foreign affairs power is invoked. Two recent Supreme Court cases affirmed the breadth of the President's authority over foreign relations. Both dealt with the question of whether this authority preempted action by one of the states. In *American Insurance Association v. Garamendi,*[74] even in the absence of express preemption, the Court found that a provision of California's Holocaust Victim Insurance Relief Act interfered with the President's conduct in the realm of foreign affairs, and it was thus preempted. Similarly, in *Crosby v. National Foreign Trade Council*,[75] the Court held that a Massachusetts state law that imposed an *absolute* ban on state agencies doing business with entities that did business with Burma was preempted. The President had issued an executive order relating to Burma that included *conditional* economic sanctions. As the "President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the *entire* national economy,"[76] the Court held that "the state Act undermine[d] the President's capacity . . . for effective diplomacy."[77] That is, the state's *absolute* economic sanction eliminated the President's ability to use his *conditional* ban as a bargaining chip with regards to one section of the national economy. Thus, the President's inherent authority over foreign affairs preempted the state law.

The ability of a president to rest on inherent constitutional authority is much more limited when dealing with domestic matters during peacetime than when handling foreign affairs or a military conflict. Some commentators have suggested that for the President to act in the domestic arena without congressional approval, at the bare minimum he or she needs an emergency which Congress does not have the ability to respond to in a timely manner.[78] *Youngstown Sheet & Tube* illustrates the Court's reluctance to grant the President broad inherent powers in the domestic arena. Therefore, when the President wants to act in the domestic arena, it is likely that he or she is going to need some type of statutory authorization.

3. Statutory Authority

As pointed out by a prominent legal authority, "Statutory interpretation lies at the heart of judicial decision making in cases involving presidential power . . . . As long as the president can demonstrate that his actions comply with the expressed or implied will of Congress, then the courts will deem his actions constitutional."[79] But the question left unanswered by *Youngstown* still remains, how do the courts interpret the "will of Congress?" Unfortunately, methods of determining congressional intent can be as

numerous as the amount of judges or Justices deciding a case. On one end of the spectrum, some judges "[confine] their inquiry to the actual language of [the] enacted law."[80] On the other end, some justices will wade through various types of materials that make up the legislative history of the statute, including speeches, evidentiary documents, committee reports, votes on proposed amendments, and iterative drafts.[81]

The most important theme to glean from a review of presidential assertions of statutory authority is that courts have tended to be president-friendly. As noted by Stack, "[C]ourts generally have treated the president's assertions of statutory authority with 'deference and restraint.'"[82] This analysis has been confirmed by empirical research, such as that conducted by Howell discussed earlier. However, the courts "have not settled on the character or scope of this deference."[83] Thus, the question that *Youngstown* left unanswered is still awaiting a definitive answer.

a. Stack's Three-Category Framework. Kevin Stack has broken down the various methods that the courts have used to determine whether the President had statutory authority to act. Although he notes incoherence in the standard of review, he develops three general categories.

The first category of cases includes those where the court engages in "statutory interpretation without deference."[84] In these cases, the court gives no deference to the President's interpretation of the statute. Instead, the court determines "for itself what [is] the best reading of the Act."[85] The most prominent example is the case of *Cole v. Young*.[86] That case turned on the interpretation of what Congress meant by the term "in the interest of national security." Congress did not provide a definition in the statute. Normally, this is a situation where the court will accord great deference to the President's interpretation. Instead, the Court provided its own definition, which was different from the President's, and "supported its construction with a variety of tools of statutory interpretation. . . ."[87] This level of scrutiny is rarely seen. Cases in which the court does not provide any deference to the President's interpretation of a statute are exceptional.

The course usually taken by the courts is to grant the President some type of "unstructured deference," where they "generously [construe] grants of authority in the president's favor."[88] This is Stack's second category. While most courts treat the President's assertions of statutory authority with deference, they have not settled on a framework for review. The two lines of cases that Stack identifies as exemplifying this deference are those reviewing executive action taken pursuant to the Antiquities Act and to the Procurement Act.

Stack's final category illustrates the most deferential treatment of the President's assertions of statutory authority by the courts—those where statutory authority is implied. The cases in the second category required the President to point to a specific source of statutory authority, but granted broad deference to the President's interpretation of the statute. However, in this third category of cases, courts are willing to "[treat] indications of likely congressional consent as statutory authorization."[89] The most prominent case that uses this approach is *Dames & Moore v. Reagan*.[90] In that case, the President

asserted statutory authority based on two statutes: The International Emergency Economic Powers Act and the Hostage Act. The Court found that neither of these statutes on its own was enough to authorize the President's action. Nevertheless, the Court found "both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action."[91] The Court also stated that a history of congressional acquiescence to the type of action taken by the President was "crucial" to its holding.[92] The fact that the order involved national security and foreign relations also appears to have been relevant to the Court's holding.[93]

In *Dames & Moore*, the Court found that congressional silence does not necessarily mean congressional disapproval.[94] By aggregating the "general tenor" of two statutes that on their own would not authorize the action,[95] the Court slid the executive action from Justice Jackson's second category of congressional silence into his first category of implied authorization. While this holding seemingly set a new precedent that greatly expanded the power of the President to act unilaterally, the emphasis that the Court placed on congressional acquiescence seems to imply that without acquiescence, the Court may not be so willing to imply congressional authorization. In other words, when the President has engaged in a "long-continued practice, known to and acquiesced in by Congress,"[96] the courts will be more likely to find authorization by aggregating various independent statutes that on their own are not enough to support the presidential action. The aggregate theory is also discussed in Chapter 10.

b. The President is Not Held to the Same Standards as Administrative Agencies. In *Franklin v. Massachusetts*, the Supreme Court held that "the President is not an agency within the meaning of the Administrative Procedures Act (APA)."[97] Thus, as the Court states, "Although the President's actions may still be reviewed for constitutionality . . . they are not reviewable for abuse of discretion under the APA."[98]

However, the APA can still come into play if someone challenges an agency action that is taken pursuant to an executive order. In *City of Albuquerque v. U.S. Department of the Interior*,[99] the Department of the Interior carried out an action pursuant to an executive order. The government argued that the plaintiff had no standing because neither the statute that provided authority for the executive order, nor the executive order, created a private right of action. The court disagreed and found that the plaintiff had standing through the APA.

Not being subject to the same standard as administrative agencies benefits the President in a variety of ways. As, constitutional and administrative law expert, Harold Bruff notes, Presidents can make rules by issuing executive orders "without any prior public procedure and often without any accompanying explanation."[100] Unlike administrative agencies, the President does not have to insert findings of fact when engaged in rulemaking.

Also, the President does not need to state the purpose for the executive order at the time it is executed. Of course, when an executive order is challenged, the federal government may be forced to provide a rationale for the executive order, but courts tend

not to limit the government to what is in the text of the executive order, or in the record leading up to its execution. For example, in *Perko v. United States*,[101] individuals challenged EO 10092, which restricted air travel below 4000 feet above sea level over roadless area in the Superior National Forest. They claimed the order was "not a valid and enforceable order because it does not state the purpose for which an airspace reservation was set apart in the roadless area of the forest."[102] The court rejected this contention based on the fact that the President expressly cited a valid delegation of authority from Congress to create the airspace reservation, and the government provided a purpose for the order in response to a pretrial interrogatory.[103]

In *Kaplan v. Corcoran*,[104] the plaintiff challenged EO 10096, which related to rights of government employees in their inventions. In the order, President Truman only cited his authority under "the Constitution and statutes." He did not cite to a specific statute. Nevertheless, the court, in *Kaplan*, cited three relevant sections of the U.S. Code and held that "there was statutory authority from Congress to authorize the President to promulgate Executive Order 10096."

The circumstances in *Kaplan* were the opposite of those in *Perko*. In *Perko*, the order in question expressly cited specific statutory authority, but did not state a purpose. The court then allowed the government to assert a post-hoc purpose. In *Kaplan*, the order did not cite a specific source of authority, but it did state a purpose. The court then allowed a post-hoc citation to a specific authority. It is unclear from these cases whether, if the President failed to state a purpose and cite to specific statutory authority, the court would allow post-hoc assertions of both. The cases do show, however, that courts have been willing to fill in the gaps during trial left by some potential defects in executive orders.

Nevertheless, it would be prudent for the President to cite one or the other, or preferably both, when issuing an executive order. If the President does not cite a specific source of statutory authority in the order, it is likely he or she will have to do so at trial. *Liberty Mutual Insurance, Co. v. Friedman* was another case where the court was confronted with a challenge to an executive order that did not cite a specific source of statutory authority.[105] The court rejected the claim that the government bore no burden of identifying a particular delegation of authority. The court went on to analyze a few possible legislative sources of authority before finally concluding that "none of the statutes reasonably contemplate[d]" the action taken by the executive branch.[106]

The best course of action is to cite as many plausible sources of authority as possible. In *Gordon v. Blount*, the court held that although "the statutory authority which provided the primary support for Executive Order 10450 as originally promulgated . . . have been declared unconstitutional, ample statutory authority exists to support Executive Order 10450 as a valid exercise of authority."[107] Thus, even if one source is found to be invalid, the order can stand based on the other sources of authority. Further, notwithstanding any legal requirements, this practice would also serve to give the executive order an extra level of legitimacy, maximize the President's credibility and potentially ward off challenges to the order.

Review of a president's discretionary actions is generally not available outside of the APA either. This was the position adopted by the Court in *Dalton v. Specter*.[108] However, according to Stack, "courts still may review a President's assertion of statutory power to determine whether it is authorized by statute."[109] That is, once the court finds that the President's action was authorized by statute, it will not second guess his discretionary decisions. However, the court may invalidate the President's action if the court finds that Congress provided some limits on the President's discretion and the President stepped outside those limits. In another federal case, the court found that although the President gets preferential treatment in some respects, "Consistency with the authorizing statute is as much a predicate for validity for an Executive Order as for an agency regulation."[110]

4. Intersection of Constitutional and Statutory Authority

Sometimes it is not clear if the subject matter is within the constitutional power of the President or that of Congress. For example, Congress has the power to regulate foreign commerce, but the President has inherent power over foreign affairs. "In the field of foreign affairs, the President has broad inherent powers to take the initiative in defining national policy." [111] However, "the power to regulate foreign commerce is vested exclusively in the hands of the Congress by the Constitution, so Congress must delegate such authority to the President."[112]

It is a rare case when the courts find that the President was authorized to act purely by inherent constitutional powers. This is primarily the result of two factors working together. First, presidents rarely rest solely on inherent constitutional power when issuing executive orders. Most executive orders cite some statutory authority, and in addition provide a general assertion of constitutional authority. Second, courts have a prudential doctrine of avoiding constitutional questions if possible. If the court finds that the President had statutory authority, they tend to avoid addressing the issue of constitutional authority. However, there have been instances where courts will address the issue of constitutional authority and in two cases the courts have entered into the statutory authority analysis. In these two cases, the executive order involved subject matter connected to one of the President's areas of constitutional power and the courts weighed this in the President's favor when analyzing whether or not he has statutory authorization.

In *National Treasury Employees Union v. Regan*,[113] plaintiffs claimed that EO 12171 exceeded the authority delegated by Congress. The Civil Service Reform Act of 1978 (CSRA) provided benefits to government employees, such as the right to collective bargaining, but it excluded some agencies from its coverage. It also authorized the President to exclude other agencies when he "determines that the agency in question has a primary function of intelligence, counterintelligence, investigative, or national security work," and that certain provisions of the CSRA "cannot be applied to that agency . . . in a manner consistent with national security requirements . . . ."[114] Pursuant to this grant of authority, President Carter issued EO 12171, which excluded a number of agency subdivisions from the provisions of the CSRA. The court found that "Congress granted

the President complete discretion in determining the agencies to be excluded . . .” and that in general, “in such situations, discretionary acts are not reviewable.”[115] While the court could probably have stopped there, it buttressed its decision not to review the President’s discretionary action. The court recognized that the executive order was concerned with national security. Observing that courts generally recognize the President’s authority in this area, the court concluded, “Second-guessing by the courts should be avoided.”[116]

It seems clear that the President would not have been able to exclude agencies from the coverage of the CSRA without the express delegation of authority provided in the CSRA. Thus, while his inherent constitutional powers would have been insufficient to validate the action on their own, they were a factor in the court’s analysis of his compliance with a statutory delegation of authority. Although the language of the opinion suggests the court was generally reluctant to review discretionary action by the President when broad statutory authority is given, it also seems to suggest that the court felt it would have had more latitude to question the President’s action had it not been within the realm of national security.

That the subject matter of the executive order can influence the amount of deference the court grants the President is also seen in *Florsheim Shoe Company v United States*.[117] In that case, the plaintiff challenged a series of executive orders that excluded from duty-free status certain kinds of leather from India. After holding that “Congress granted the President broad discretion to take the described actions,”[118] the court also stated that it “must also bear in mind that the subject matter of [the authorizing statute] is intimately involved with foreign affairs, an area in which congressional authorizations of presidential power should be given a broad construction . . . .”[119]

5. Going Against the “Will of Congress”

We have already stated the requirement that an executive order be issued pursuant to either statutory or constitutional authority. If the order lacks one of these, it can fall back on the other. Beyond the rare case where the President clearly has no statutory or constitutional authority, there are a few other factors that can lead to an executive order being invalidated. This section addresses action that is found to violate the will of Congress, what Justice Jackson was referring to as implied disapproval.

a. Congress Grants Some Authority, but the President Oversteps that Authority. In *Jennings v. Connally*,[120] the plaintiffs challenged a ruling by the Cost of Living Council (COLC) that was issued pursuant to authority delegated by EO 11640.[121] The President issued the executive order pursuant to authority delegated to him in the Economic Stabilization Act (ESA). While the ESA gave the President the ability to freeze wages, there were some limits. Section 203(d) of the Act stated, “wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner . . . .” The problem was that Congress did not define “substandard earnings” or “working poor” in the ESA,[122] and the plaintiffs did not agree with the executive branch’s determination that the definition should be those individuals

who earn less than $1.90 per hour. The court had to determine, "Whether the President (COLC) has any discretion under section 203(d), and if so, whether that discretion has been abused in exempting from wage controls those individuals whose earnings are below $1.90 per hour."[123]

The court found that the President did have discretion in implementing the ESA, but that discretion in setting the cutoff for exemption from wage controls could not be "unreasonably inconsistent with the purposes of the Act [ESA]."[124] To determine what Congress intended by "substandard earnings" and "working poor," the court turned to the legislative history of the ESA. While the President did have some discretion, the court found that the legislative history revealed that "Congress has provided a mandatory level of exemption which should not be undermined."[125] The discretion granted to the President by the Act was bounded, and the President (through the COLC) overstepped that boundary. Thus, his action was not in accordance with the will of Congress (i.e. it was issued without statutory authority), and therefore the action was invalidated.

In *Levy v. Urbach*,[126] the court heard another challenge to an executive interpretation of a statute. The Career Compensation Act provided for special incentive payments to members of the uniformed services engaged in duty "involving intimate contact with persons afflicted with leprosy."[127] EO 11157 implemented this provision. The court found the President's definition of the term "involving intimate contact with persons afflicted with leprosy" [128] to be inconsistent with what Congress intended, because it "predicate[d] eligibility for leprosy incentive pay upon the place of duty, rather than the nature of the duty."[129] The court did not need to look into the legislative history because, "the plain language of the statute creates an entitlement based on the nature of the duty,"[130] not on the place of the duty. Even though the provision authorizing the incentive pay included the phrase, "subject to regulations prescribed by the President," the President did not have unbounded discretion in interpreting the statute. The phrase gave the President the ability to create regulations implementing the Act, not the ability "to alter the plain meaning of the language."[131]

b. Action Contrary to the Manifest Intent of Congress as Evinced by Another Statute. When the President cites a delegation of authority from a particular statute, courts do not limit their review to that specific delegation language when searching for the "will of Congress." It is possible that the President's discretionary power to act as authorized by one section of a statute is severely constrained by another section of the same statute, or even a completely different statute.

In *Independent Gasoline Marketers Council, Inc. v. Duncan*,[132] the court was confronted with a challenge to a proclamation by President Carter that established a program to reduce consumption of gasoline. The court found that the two statutory sources of authority cited by the President were insufficient to justify the program that the President created. The court then rejects the idea that the President had inherent constitutional authority to issue the proclamation based on some connection between the consumption of imported oil and national security.[133] The court did not reject the idea that dependence on foreign oil could create national security problems, but they

concluded that even though the proclamation pertains to national security, the President still needed statutory authority: "Congress, not the President, must decide whether the imposition of a gasoline conservation fee is good policy."[134]

After finding that the President had no express statutory or inherent constitutional authority to issue the proclamation, the court went on to find that another statute, the Energy Policy and Conservation Act (EPCA),[135] proscribed the actions called for by the proclamation.[136] It is possible, if not likely, that the court could have invalidated the proclamation based on the lack of authority without referencing the EPCA. However, by finding express language in a statute that was contrary to the action called for in the proclamation, the court eliminated the possibility of the executive branch claiming authority based on acquiescence or implied authorization. The court made the following clear: "Existing statutes cannot be used for purposes never contemplated by Congress and in ways contrary to congressional intent."[137] *Independent Gasoline* is discussed further in Chapter 4.

Chamber of Commerce v. Reich involved a challenge to EO 12954 issued by President Clinton.[138] That order authorized the Secretary of Labor to restrict employers who replaced lawfully striking workers from receiving government contracts over $100,000. As authority to issue this order, the President cited the Federal Property and Administrative Services Act,[139] also known as the "Procurement Act." This Act gives the President broad discretion to take actions that promote economy and efficiency in the procurement of goods and services for the government. Indeed, in the order, President Clinton stated that the replacement of striking workers "adversely affect[s] federal contractors' ability to supply high quality and reliable goods and services."[140] While the Procurement Act has been broadly interpreted by the courts, which has allowed presidents to achieve broad policy goals while citing it as authority, this particular order by President Clinton ran afoul of another statute: The court found that the order was prohibited by the National Labor Relations Act (NLRA),[141] "which guarantees the right to hire permanent replacements."[142] It is important to note that the NLRA did not trump the Procurement Act by coming after, and thereby superseding, the Procurement Act. In fact, the Procurement Act came after the NLRA. The government actually argued that the Procurement Act superseded the NLRA. However, the court rejected this argument based on canons of statutory construction that "repeals by implication are not favored,"[143] and, in general, "a specific statute will not be controlled or nullified by a general one."[144]

The courts in *Reich* and *Independent Gasoline* took somewhat different approaches in their analysis, but the lesson to be learned is the same in both cases. Courts will analyze relevant statutes that are not cited in the executive order to find whether the executive order is contrary to the will of Congress. In *Reich*, the court decided that because the executive order violated the will of Congress as evinced in the express language of the NLRA, there was no need to analyze whether or not the executive order would have been valid under the Procurement Act if the NLRA did not exist. In *Independent Gasoline*, the court found that neither the statutory authority cited by the President, nor the President's constitutional powers, was sufficient to validate the order. Then the court went on to find that the order also violated the will of Congress as

evinced in another statute. Thus, even when a president is granted a broad delegation of authority to act, his or her discretion may be limited by another statute.

6. Implementation by the Executive Agency

a. A Valid Executive Order is Implemented in an Invalid Manner. Even when Congress makes a valid delegation of authority (i.e. without violating the non-delegation doctrine) and the President issues a valid executive order, implementation of the executive order by the administrative agency can still be found to be invalid.

Such a situation arose in the case of *Joint Anti-Fascist Refugee Committee* (*JAFR*) *v. McGrath*.[145] In *JAFR*, the plaintiffs challenged an action by the Attorney General, who claimed to derive authority for the action taken from EO 9835. Neither the congressional delegation of authority, nor the validity of the order was questioned. The issue was whether or not the Attorney General overstepped the authority conferred on him by the order. The order gave authority to the Attorney General to supply a list of "totalitarian, fascist, communist or subversive . . ." organizations to the Loyalty Review Board, "after appropriate investigation and determination."[146] The Court held that "if the allegations of the complaints are taken as true (as they must be on motions to dismiss), the executive order does not authorize the Attorney General to furnish the Loyalty Review Board with a list containing such a designation as he gave to each of these organizations without other justification. Under such circumstances his own admissions render his designations patently arbitrary . . . ."[147] The order required an "appropriate investigation," but accepting the relevant facts from the pleading as true would have implied that an "appropriate investigation" did not take place.

The case of *Liberty Mutual Insurance Co. v. Friedman*, illustrates how an executive order and the regulations issued pursuant to it can be valid on their face, but still be invalid as applied to a particular entity.[148] This case involved the application of EO 11246 to Liberty. Other cases had already found that the order was valid when applied in other circumstances. The order stated that "contractors and subcontractors with the government are . . . required to take affirmative action to ensure equal employment opportunity."[149] Liberty "underwrites workers' compensation insurance for many companies that contract with the government."[150] The government contended that this qualified Liberty as a sub-contractor and brought them within the reaches of the order. After examining possible sources of statutory authorization for this determination, the court held that "none of the statutes reasonably contemplates that Liberty, as a provider of workers' compensation insurance to government contractors, may be required to comply with Executive Order 11246."[151] There was no problem with applying the order to sub-contractors, but the court found that the executive branch was not authorized to include workers' compensation insurance providers as sub-contractors. In other words, by extending the application of the executive order to a type of entity that Congress never contemplated when it created the statute, the executive branch breached the will of Congress and this particular application was invalidated.

b. Executive Orders Can Limit Agency Discretion. In *Conservation Law Foundation of New England v. Secretary of the Interior*,[152] the plaintiffs alleged that an agency action was contrary to an executive order. They challenged the National Park Service's 1985 Management Plan (Plan) that regulated the use of off-road vehicles (ORVs) on the Cape Code National Seashore (Seashore),[153] on the grounds that the Plan did not go far enough to protect the Seashore. They alleged that the Plan violated the Cape Cod National Seashore Act (Seashore Act),[154] and alternatively that it violated EO 11644. The court determined that the APA governed the standard of review of the agency's action under both the Act and the executive order. (The Plan would be entitled to a presumption of validity, and only a rational basis is required to sustain the agency action.)[155] The court found that although the Act called for the Seashore to be "permanently preserved in its present state . . . . Under the express language of [the Seashore Act] development of the Seashore is permissible where it is ecologically compatible and where it is for an 'appropriate' public use."[156]

The court then analyzed EO 11644, which regulated the use of ORVs on public lands, and determined that its provisions "restrict[ed] the Secretary's discretion regarding ORV use on the Seashore along with . . . the Seashore Act."[157] The court ultimately concluded that there was a rational basis for the Secretary's conclusion that the plan would be in compliance with the requirements of the order, as well as the requirements of the Act. Although this case did not go the way the environmentalists would have liked, it illustrates an important principle that could be useful to a president that wanted to protect the environment: the President appears to have some latitude in restricting the discretion of agencies beyond the restrictions placed on them by Congress. In this case, the Seashore Act imposed certain restrictions on the agency's discretion as it related to protecting the Seashore. EO 1644, which was authorized by the National Environmental Protection Act (not the Seashore Act), imposed different restrictions on the agency's discretion as it related to regulating ORV use on public lands. The combined effect was that there were two sets of restrictions imposed on the agency's discretion as it related to ORV use on the Seashore.

7. Violating Other Constitutional Provisions

Even when the President has either inherent constitutional authority or valid statutory authority, an executive branch action can still be invalidated for violating other constitutional provisions. Just as legislation can be challenged on grounds such as the Equal Protection clause or the Due Process clause, so too can actions of the President. Executive orders have been challenged on a variety of constitutional grounds. While orders have been challenged on First Amendment grounds,[158] and Fourth Amendment grounds,[159] it is highly unlikely that any of the PCAP proposals would invoke challenges on these grounds, therefore discussion of these cases is omitted.

a. Standard of Review. For most challenges to executive orders on these grounds, the court will apply the same test as they would apply to an act of Congress. However, this is not always the case. In the recent Supreme Court case of *Hein v. Freedom from Religion Foundation, Inc.*,[160] the Court determined that the plaintiff had

no standing to challenge the President's "Faith-Based Initiatives" program (EO 13199) based on taxpayer standing. The general rule is that individuals have no standing, based solely on their status as taxpayers, to challenge actions of the federal government.[161] One exception was carved out for this rule in *Flast v. Cohen*.[162] "Under Flast, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause."[163] The Court distinguished *Hein* from *Flast* because the exception created by *Flast* is limited to acts of Congress that allegedly violate the Establishment Clause. In *Hein*, the act of Congress was a general executive branch appropriation, which the executive branch chose to apply in a manner that allegedly violated the Establishment Clause. Even though the net effect on the plaintiff would be the same in either scenario, the Court declined to expand the narrow *Flast* exception beyond acts of Congress.

b. Fifth Amendment Takings Clause. Regulatory takings claims are typically very hard to sustain. Takings claims based on executive order are no exception. However, this does not stop plaintiffs from using it as a basis for challenging executive orders from time to time, and it is possible that an executive order can run afoul of the Takings Clause.

Cases that have analyzed whether or not an executive order amounted to a regulatory taking have applied the same analysis that is used in other regulatory takings cases. For example, in *Chang v. United States*,[164] the court applied the three-factor *Penn Central* analysis to analyze whether or not EO 12345 amounted to a compensable taking.[165] Plaintiffs alleged that the order, which imposed trade sanctions on Libya, impaired a contract to conduct business there. The court found that no taking had occurred.

The *Penn Central* analysis is the bedrock of modern takings cases where the regulation does not result in a physical taking or a complete diminution of value. The three determinative factors are: (1) the extent of the economic impact of the regulation on the claimant; (2) the extent of the regulation's interference with the claimant's distinct investment-backed expectations; and (3) the character of the government action.[166] Of the three factors, only the third, regarding the character of the government action, could possibly be altered when the test is applied to presidential action, and even that would be unlikely. In *Chang*, the "character of government action" analysis was used to distinguish between government regulations that flatly proscribe conduct and those that "appropriate to the public use" the claimant's property.[167] The government "only prevented the plaintiffs from marketing their services in Libya,"[168] it did not require the plaintiff to provide services to the United States free of charge. There was nothing unique about the Office of the President that altered this analysis. It should be noted that "character of government action" does not mean "validity of government action." If the government action is invalid, it is struck down and the question of a regulatory taking should not be addressed. In essence, analysis of a takings claim presupposes a valid government action, albeit one that requires compensation. Therefore, any special treatment that the President receives when the courts question whether an executive order is valid should not factor into the takings analysis.

However, while the involvement of presidential action in a takings claim will not alter the takings analysis, it may impact whether the court will actually undertake the takings analysis. In *Belk v. United States*,[169] the court addressed whether or not the executive orders that settled the Iranian hostage crisis amounted to a taking. The plaintiffs were seeking "just compensation for the alleged taking by the United States of their property right to sue Iran for injuries sustained while held hostage-a right the United States extinguished in connection with obtaining the release of the hostages."[170] The court provided two alternative grounds for dismissing the claim. First, the claim failed to satisfy the three-factored test for a compensable regulatory taking. Second, the court held in the alternative that it could not adjudicate the takings claim because doing so would involve resolution of a political question,[171] as the settlement of the Iranian hostage crisis was in the realm of foreign relations, over which the President has exclusive dominion.

c. Fifth Amendment Due Process Clause. Executive orders have been challenged on substantive due process, and procedural due process grounds. While "[d]ue process arguments have not . . . been a successful strategy for challenging executive orders,"[172] these challenges do occasionally succeed. Therefore, a review of the major due process claims that can invalidate an order is useful.

One of the more common due process challenges to laws in general is asserting that the law is unconstitutionally vague. In *United States v. Hescorp*,[173] the defendant appealed a conviction for violation of regulations issued pursuant to an executive order that imposed a trade embargo on Iran. Among other things, the defendants alleged that EO 12211 and the Treasury Department regulations prescribed by it were void for vagueness. The court recited the rule from *Rowan v. United States Post Office Department*,[174] that "regulations are unconstitutionally vague 'only when [they] expose a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct.'"[175] The court found that "the Executive Order and the Regulations gave [the defendant] fair notice that its [conduct was] prohibited . . . . [The] regulations were [not] so vague as to unfairly put [the defendant] at risk."[176]

In *Hinton v. Devine*, [177] the plaintiff challenged EO 10422 on a variety of grounds, including that it was unconstitutionally vague. The order established the International Organizations Employees Loyalty Board to evaluate the loyalty of United States citizens who were employed, or being considered for employment, by international organizations.[178] Unlike in *Hescorp*, a criminal conviction was not at stake. In this case, the court was concerned with the chilling effect that a vague law might have on "an individual's legitimate exercise of First Amendment rights."[179] However, the test for vagueness was similar to the one in *Hescorp*: "For the plaintiff to prevail on a claim that a law is unconstitutionally vague, the Court must conclude that the challenged law fails to give fair notice of its proscriptions or requirements."[180] The court found that a number of terms used in the order, including what was meant by "derogatory information" that could be gathered on an employee, were inadequately defined, or not defined at all. Because the order "fail[ed] to give fair notice to a person targeted for investigation,"[181] it was found to be unconstitutionally vague. The language of the order was "akin to a law

proscribing the undefined term 'bad acts,' leaving to those charged with enforcing the law the responsibility to define, interpret and apply that term on an ad hoc basis."[182]

The most recent examples of using the Due Process clause to challenge the actions of the executive branch involve the cases relating to the detainment of individuals in the "war on terror." A plurality decision in the 2004 case of *Hamdi v. Rumsfeld* concluded that the executive branch's practices violated the due process rights of an American citizen being detained.[183] Because none of the PCAP proposals will relate to detaining enemy combatants, an in-depth analysis of these cases is not warranted here. But the *Hamdi* case does illustrate that the Due Process clause can still be used to challenge actions of the President.

8. Usurping Congress's Inherent Power

As discussed in prior sections, presidential action without statutory authorization can be invalidated. Presidential action without statutory authorization can be viewed as usurping Congress's inherent constitutional power to legislate. It is also possible for the President to have an executive order invalidated for usurping one of Congress's other inherent powers such as the power to regulate interstate commerce. However, because the Article 1 powers are so clearly delegated to Congress in the Constitution, it is not common for executive orders to cross this line.

One case that illustrates a challenge based on these grounds is *Utah Association of Counties v. Bush*.[184] In that case, plaintiffs alleged that a proclamation issued by President Clinton, which reserved federal land to create the Grand Staircase-Escalante National Monument, violated the Spending Clause.[185] The claim was based on a misunderstanding that the proclamation included private lands in the monument, which would have required compensation that would have to be authorized by Congress per the Spending Clause. The court rejected the claim of a Spending Clause violation because "Nothing in the Proclamation or in the record supports plaintiffs' contention that federal monies were expended to acquire private land."[186] The awareness of presidents regarding limits placed on their action by other provisions of the Constitution is illustrated by the fact that the Proclamation, in an number of places, clearly indicated that land privately owned or controlled does not pertain to the Monument.[187] The Takings Clause would require compensation for such an action, and the Spending Clause would require Congress to authorize such an action. Therefore the proclamation simply stated, "private land may become part of the Monument *if it is acquired by future action*."[188]

9. Exogenous Variables

Howell's examination of court cases reviewing executive orders yielded some interesting results that suggest that certain exogenous factors may influence whether or not a court will sustain or invalidate a challenged executive action. Variables that Howell studied include the following: the President's popularity with the public and with Congress (strong public approval ratings improve the executive action's chances); the subject matter of the executive action (action involving foreign affairs has a better chance

of survival); the age of the statute cited by the President for authority (executive action supported by a recently enacted statute has a better chance of being sustained); a shared ideology with the majority of the judges hearing the challenge (the action has a better chance of survival when the President and a majority of the judges are from the same political party); and when in the President's term he took the action being challenged (actions taken in the last year of a President's term appear more likely to be invalidated).[189]

10. Conclusions

Presidents must have statutory or constitutional authority to take action through an executive order or proclamation. As the President's strongest constitutional authority is mostly limited to foreign relations, and his power as Commander in Chief, action taken in the domestic arena during peacetime will almost certainly require some type of statutory authorization.

When it comes to analyzing presidential claims of statutory authorization for their actions, the courts have not yet settled on a clear set of rules for the analysis. However, some boundaries are established and guidance provided by an analysis of court opinions on the topic. While the most common theme is for the courts to show deference to a president's interpretation of statutes, even this general rule has its exceptions. In addition to deferential treatment of presidential interpretation of statutes, courts have found a variety of other ways to avoid invalidating actions of presidents. They can choose simply to not hear a case based on standing doctrine or one of the other justiciability limits. The *Hein* case shows how even strict adherence to *stare decisis* can be used to uphold a presidential action. Nevertheless, executive orders issued under the auspices of constitutional or statutory authority can still be invalidated. Some of the most relevant reasons include: (1) the President oversteps the authority in a statutory delegations; (2) although the order is issued pursuant to a valid statutory delegation, there is another statutory provision that prohibits the action; (3) although the executive order is valid on its face, it is implemented by an agency in an invalid manner; (4) implementation of the executive order runs afoul of the Takings Clause or violates the Due Process Clause of the Constitution; and (5) the order usurps one of Congress's specific Article I constitutional powers (this very uncommon).

The lack of a clear standard for evaluating executive action, and the apparent influence of exogenous variables, may indicate that courts are perhaps, in part, working backwards from a preferred substantive outcome. While this cannot be relied upon as a legal argument, it is worthwhile for a president to consider his or her own popularity, Supreme Court ideology, and public opinion on a given issue before implementing policy via executive order.

Overall, presidents have a history of faring well when their executive orders are challenged in court. Cases that have resulted in major defeats for the President, such as *Youngstown*, are "remarkable principally because they are so exceptional."[190] This track record should not be taken to automatically suggest that presidents should implement all

of their policies through unilateral action rather than seeking authorization from Congress. Howell has noted, "Presidents are powerful to the extent that they can drive their legislative agendas through Congress, bargain with bureaucrats, and breed loyalty within their administrations . . . ."[191] He has also observed, "Not once in the modern era have the courts overturned a president who enjoys broad-based support from Congress, interest groups, and the public."[192] It seems that the same factors that increase the President's chances of success in the courtroom when a unilateral action is challenged are the same factors that increase his chance of achieving his agenda through the traditional bilateral legislative process. While unilateral action offers the promise of avoiding the delays of waiting on the legislature, it has its drawbacks. This is discussed in Chapter 5.

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[1] HUGH C. KEENAN, EXECUTIVE ORDERS: A BRIEF HISTORY OF THEIR USE AND THE PRESIDENT'S POWER TO ISSUE THEM, CRS REPORT 30 (revised February 26, 1974 by Grover S. Williams) (hereinafter "Keenan").

[2] If an executive order is challenged, however, the President is not limited to relying on the authority cited in the executive order in defense of his or her authority to issue the directive. In one case the court provided the additional authority to uphold an executive order. *See* Kaplan v. Corcoron, 545 F.2d 1073 (7th Cir. 1976).

[3] *E.g.,* Exec. Order No. 10,422, 18 Fed. Reg. 239 (Jan. 9, 1953) (issued by President Truman prescribing certain procedures for making available information about U.S. citizens seeking employment with the U.N.).

[4] *E.g.*, Exec. Order No. 13,112, 64 Fed. Reg. 6,183 (Feb. 3, 1999).

[5] *E.g.*, Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 16, 1999).

[6] *E.g.*, Exec. Order No. 13,196, 66 Fed. Reg. 7,395 (Jan. 18, 2001).

[7] This practice was followed by other presidents as well, including Franklin D. Roosevelt. *See* Chapter 5(B) of this report.

[8] President Bush may rely more heavily on the presidential prerogative theory. This is discussed more fully in Chapter 10. President Clinton may have seen his authority anchored more in statutory delegations.

[9] President Clinton had an antagonistic Congress for the length of his term in office while President Bush has enjoyed a congressional majority of the same political party for most of his tenure and great congressional deference typical in times of international conflict.

[10] It is also possible that in some cases there may not have been any specific authority to cite in addition to that as "the President" generally.

[11] *See Kaplan*, 545 F.2d 1073.

[12] *See, e.g.,* Springer v. Philippine Islands, 277 U.S. 189, 209, 48 S.Ct. 480, 485, 72 L.Ed. 845 (1928) ("[t]he great ordinances of the Constitution do not establish and divide fields of black and white.") (Holmes, J. dissenting opinion), cited in Youngstown Sheet & Tube Co. v. Sawyer, 343U.S. 579, 597, 72 S.Ct. 863, 890, 96 L.Ed. 1153 (1952) (Frankfurter, J. concurring opinion).

[13] U.S. CONST. art. II, § 1.

[14] U.S. CONST. art. I, § 1.

[15] U.S. CONST. art. III, § 1.

[16] William D. Neighbors, *Presidential Legislation by Executive Order,* 37 U. COLO. L. REV. 105, 112 (1964) (hereinafter "Neighbors").

[17] Dames & Moore v. Regan, 453 U.S. 654, 656 (1981).

[18] This is consistent with court decisions in this area. *See, e.g., Youngstown*, 343 U.S. at 635 (Justice Jackson describing his three categories for analyzing executive authority as a spectrum) (concurring opinion); *Dames*, 453 U.S. at 669 (Justice Rehnquist adopts this characterization).

[19] *Youngstown*, 343 U.S. at 634-655.

[20] *Id.* at 634-639.

[21] *Id.* at 636-637.
[22] *Id.* at 637 (emphasis added).
[23] *Id.*
[24] *Id.* at 638-639.
[25] *Dames*, 453 U.S. at 669.
[26] *Youngstown*, 343 U.S. at 635.
[27] If there is one legislative provision that supports the action and another that prohibits it an analysis must be done to determine which takes precedence. This is addressed in the following section of this chapter.
[28] For example, President Theodore Roosevelt had been withdrawing land from entry and location by executive order despite not being given the explicit power to do so by Congress. In *U.S. v. Midwest Oil Company et al*., 236 U.S. 459, 35 S.Ct. 309 (1915), Mr. Justice Lamar wrote, "Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly **acquiesced** in the practice. . . ." (emphasis added). In this case, the congressional acquiescence was used as support of the legality of Roosevelt's withdrawals.
[29] For example, in President Taft's message of January 14, 1910, he asked Congress to validate the land withdrawals that he and the Secretary of the Interior had been making without explicit congressional authority. In the Act of June 25, 1910 they addressed Taft's message by giving the President the power to make future withdrawals but they refused to ratify the withdrawals made prior to the Act. For another example, President Kennedy initially established the Peace Corps by executive order. Exec. Order No. 10924, 26 Fed. Reg. 1789 (1961). He relied on some general authority in the Mutual Security Act of 1954. Within the next year Congress passed the Peace Corps Act (75 Sat. 612, as amended: 22 U.S.C. 2501-2523). President Kennedy subsequently issued a new executive order under the authority of the Act. Exec. Order No. 11603, 36 Fed. Reg. 12675 (1971).
[30] For example, *Midwest Oil* cites *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264 (1839), in which Congress had directed a military post, trading house, and lighthouse be built but left the exact location up to the discretion of the President. They did not explicitly give the President the power to withdraw land for that purpose, but the President withdrew the land necessary for the establishment of the military post, trading house, and lighthouse and Congress indirectly supported the withdrawal by appropriating $5,000 dollars for the erection of the lighthouse.
[31] The Justices in *Youngstown* concluded that both houses of Congress had actively considered and had rejected proposals to authorize presidential seizures of the kind that Truman ordered. This conclusion is not quite accurate. The House had defeated an amendment to supply the needed authority, but the amendment had died in committee in the Senate, leaving some question about the full Senate's views. HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 111 (2006) (hereinafter "Bruff").
[32] Neighbors, *supra* note 16, at 115; *see also*, "The Prize Cases," 67 U.S. 635 (1863) (President Lincoln declared a blockade of Southern ports during a congressional recess when war had not been declared. The Supreme Court declared the action constitutional.).
[33]Neighbors, *supra* note 16, at 115; *see also*, *Midwest Oil*, 236 U.S. 459 (President Taft withdrew government-owned oil lands from the public domain in direct contravention of a statute. Supreme Court held that the action was constitutional saying Congress has implicitly consented to Taft's actions.); Arizona v. California, 373 U.S. 546 (1963) (executive orders issued from 1870-1907 reserving navigable waters were challenged in 1963. The Supreme Court upheld the executive orders stating they would not invalidate them at such a late date based upon the argument that they were originally set apart by the Executive.); "The Prize Cases," 67 U.S. 635(President Lincoln declared a blockade of Southern ports during a congressional recess when war had not been declared. The Supreme Court declared the action constitutional.) .
[34] *E.g.*, Neighbors, *supra* note 16, at 114.
[35] U.S. CONST. art. 1, § 8.
[36] U.S. CONST. art. 1.
[37] Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).
[38] Korematsu v. United States, 323 U.S. 214 (1944). The executive order did not mention internment camps; it created "military zones" on the coast. Pursuant to the executive order, a military general issued the order for moving Japanese-Americans to internment camps. The executive order was subsequently

ratified by statute, the Act of Congress of March 21, 1942, 56 Stat. 173, 18 U.S.C. § 97a. Prosecution was undertaken pursuant to the Act. *Korematsu,* 323 U.S. at 216.

[39] *Youngstown*, 343 U.S. 579.

[40] Henry P. Monaghan, *The Protective Power of the Presidency,* 93 COLUM. L. REV. 1, 37 (1993):

> An analysis of the concurring and dissenting opinions indicates that a majority of the justices embraced the existence of some residual presidential emergency power. They divided on the question whether Congress nonetheless had impliedly prohibited the President's conduct. Moreover, despite the government's argument and President Truman's statement, no emergency existed. Ample time existed for congressional action, both before and after the seizure, yet Congress did nothing. To transform political deadlock into an emergency would drain the concept of emergency of all content.

[41] *See, e.g.*, PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002) (hereinafter "Cooper").

[42] Keenan, *supra* note 1, at 16 (citing U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (dicta)).

[43] *Curtiss-Wright Export Corp,* 299 U.S. at 319.

[44] *E.g.,* Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989) ("In *Curtiss-Wright*, Justice Sutherland attempted to bolster his argument that the President alone negotiates by developing the now-famous 'sole organ' theory. He quoted a sentence from John Marshall on March 7, 1800, made during debate in the House of Representatives. While Marshall said that '[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,' Sutherland took the sole-organ theory a step further by using it to advocate inherent powers for the President in foreign affairs. He speaks of the President's power 'as the organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress . . . .'") (footnotes omitted).

[45] If something is said in dicta it is a comment by a judge in a decision or ruling which is not required to reach the decision, but may state a related legal principle as the judge understands it. While it may be cited in legal argument, it does not have the full force of a precedent (previous court decisions or interpretations) since the comment was not part of the legal basis for judgment.

[46] *See, e.g.,* Neighbors, *supra* note 16, at 113.

[47] *See* Chapters 4(B) and 5(B) of this report.

[48] *See* Chapter 6 of this report.

[49] Neighbors, *supra* note 16, at 109-112. *See* Chapter s 4(B) and 9 of this report.

[50] Cooper, *supra* note 41, at 27.

[51] *See, e.g.*, Neighbors, *supra* note 16, at 115.

[52] *See also*, *Independent Gasoline*, 492 F.Supp. 614.

[53] Cooper, *supra* note 41, at 5 (footnotes omitted).

[54] *E.g., id.* at 4-8.

[55] *Id.* at 5.

[56] Neighbors, *supra* note 16, at 112.

[57] WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 175 (2003) (hereinafter "Howell").

[58] *Id.* at 154-5.

[59] *Id.*

[60] 343 U.S. 579 (1952).

[61] *Id.* at 585.

[62] While the framework was established in a concurring opinion, it has since been used widely in majority opinions of the Court. For example, see *Dames & Moore v. Reagan,* 453 U.S. 654, 669 (1981).

[63] *Youngstown,* 343 U.S. at 635-7.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 637-8.

[69] *Id.* at 640.

[70] Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 541 (2005) (hereinafter "Stack").

[71] 343 U.S. at 635.
[72] *Dames & Moore,* 453 U.S. at 669.
[73] As none of the proposals seem to relate to war powers, this topic will not be covered any further.
[74] 539 U.S. 396 (2003).
[75] 530 U.S. 363 (2000).
[76] *Id.* at 381.
[77] *Id.*
[78] Bruff, *supra* note 31, at 98-102.
[79] Howell, *supra* note 57, at 147.
[80] *Id.* at 150.
[81] *Id.* at 160.
[82] Stack, *supra* note 70, at 561.
[83] *Id.*
[84] *Id.* at 562.
[85] *Id.* at 563.
[86] 351 U.S. 536 (1956).
[87] Stack, *supra* note 70, at 562.
[88] *Id.* at 563.
[89] *Id.* at 568.
[90] 453 U.S. at 677.
[91] *Id.*
[92] *Id.* at 680.
[93] *Id.* at 679.
[94] *Id.*
[95] *Id.* at 678.
[96] *Id.* at 686 (citing *Midwest Oil*, 236 U.S. at 474).
[97] 505 U.S. 788, 797 (1992).
[98] *Id.* at 801.
[99] 379 F.3d 901 (10th Cir. 2004).
[100] Bruff, *supra* note 31, at 149.
[101] 204 F.2d 446 (8th Cir. 1953).
[102] *Id.* at 449.
[103] *Id.*
[104] 545 F.2d 1073 (7th Cir. 1976).
[105] 639 F.2d 164 (4th Cir. 1981).
[106] *Id.* at 168-9.
[107] 336 F. Supp. 1271 (D.D.C. 1971).
[108] 511 U.S. 462 (1994).
[109] Stack, *supra* note 70, at 555.
[110] Levy v. Urbach, 651 F.2d 1278, 1282 (9th Cir. 1981).
[111] Neighbors, *supra* note 16, at 113.
[112] *Id.*
[113] No. 80-606, 1981 WL 150530 (D.D.C. Sept. 3, 1981).
[114] 5 U.S.C. § 7103(b)(1).
[115] 1981 WL 150530.
[116] *Id.*
[117] 744 F.2d 787 (Fed. Cir. 1984).
[118] *Id.* at 793.
[119] *Id.*
[120] 347 F. Supp. 409 (D.D.C.1972).
[121] Executive Order 11615 placed a 90-day freeze on wages and prices, established the Cost of Living Council, and delegated to it the powers that were granted to the President under the Economic Stabilization Act.
[122] *Jennings,* 347 F. Supp. at 412.
[123] *Id.* at 411.

[124] *Id.* at 412.
[125] *Id.* at 414-5.
[126] *Levy,* 651 F.2d 1278 (9th Cir. 1981).
[127] 37 U.S.C. § 301(a)(7).
[128] Executive Order 11,157 defined the term to mean "duty performed by any member who is assigned by competent orders to a leprosarium for the performance of duty for a period of 30 days or more or for a period of instruction, whether or not such leprosarium is under the jurisdiction of one of the uniformed services."
[129] *Levy,* 651 F.2d at 1281.
[130] *Id.* at 1283.
[131] *Id.* at 1284.
[132] 492 F. Supp. 614 (D.D.C. 1980).
[133] *Id.* at 619.
[134] *Id.* at 620.
[135] 42 U.S.C. §6201 et seq.
[136] *Independent Gasoline,* 492 F. Supp. at 620.
[137] *Id.*
[138] 74 F.3d 1322 (D.C. Cir. 1996).
[139] 40 U.S.C. § 471 et seq.
[140] Exec. Order No. 12,954 §1, 60 Fed. Reg. 13,023 (1995).
[141] 29 U.S.C. §151 et seq.
[142] *Chamber of Commerce,* 74 F.3d at 1339.
[143] *Id.* at 1333.
[144] *Id.*
[145] 341 U.S. 123 (1951).
[146] Exec. Order No. 9,835, 12 Fed. Reg. 1,935 (1947).
[147] *JAFR,* 341 U.S. at 126.
[148] 639 F.2d 164 (4th Cir. 1981).
[149] *Id.* at 165-6.
[150] *Id.* at 166.
[151] *Id.* at 169.
[152] 864 F.2d 954 (1st Cir. 1989).
[153] *Id.* at 955-6.
[154] 16 U.S.C. §§ 459 et seq.
[155] *Conservation Law Foundation,* 864 F.2d at 957.
[156] *Id.* at 958.
[157] *Id.* at 959-60.
[158] *See, e.g.*, NAACP v. Devine, 727 F.2d 1237 (D.C. Cir. 1984), *rev'd*, Cornelius v. NAACP, 473 U.S. 788 (1985).
[159] *See, e.g.*, United States v. New Orleans Public Service, Inc., 723 F.2d 422 (5th Cir. 1984).
[160] 127 S.Ct. 2553 (2007).
[161] *Id.* at 2559.
[162] 392 U.S 83 (1968).
[163] 127 S.Ct. at 2559.
[164] 859 F.2d 893 (Fed. Cir. 1998).
[165] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).
[166] *Chang,* 859 F.2d at 895.
[167] *Id.* at 896.
[168] *Id.*
[169] Belk v. U.S., 858 F.2d 706 (Fed. Cir. 1988).
[170] *Id.*
[171] *Id.* at 710.
[172] Stack, *supra* note 71, at 553.
[173] 801 F.2d 70 (2d Cir. 1986).
[174] 397 U.S. 728, 740 (1970).

[175] *Hescorp,* 801 F.2d at 77.
[176] *Id.*
[177] 633 F. Supp. 1023 (E.D. Pa. 1986).
[178] *Id.* at 1025.
[179] *Id.* at 1030.
[180] *Id.*
[181] *Id.* at 1033.
[182] *Id.*
[183] 124 S.Ct. 2633 (2004).
[184] 316 F. Supp. 2d 1172 (D.Utah 2004).
[185] U.S. Const., Art. I, § 8, cl. 1 (Spending Clause).
[186] *Utah Association of Counties,* 316 F. Supp. 2d at 1191.
[187] *Id.*
[188] *Id.*
[189] *See* Howell, *supra* note 57, at 151-64.
[190] *Id*. at 155.
[191] *Id.* at 175.
[192] *Id.* at 174.

Chapter IV. A Closer Look at Statutory Delegations

A. Review and Compilation of Delegation Authority in Energy and Environmental Executive Orders (1937-2007)

A key conclusion from the previous analysis is that the President has maximum certainty in implementing actions and policies with executive orders when he or she acts pursuant to a statutory delegation from Congress.[1] Thus a review of existing statutory delegations would be central to work in this area. It is beyond the scope of this project to identify every delegation in the U.S. Code (USC); therefore, we targeted those delegations that would be most applicable to implementation of climate change policy. We reviewed all published executive orders from 1937 through January 2007[2] and extracted all of those relating primarily to environmental or energy issues (370 executive orders). We then extracted and analyzed the statutory authorities cited from each of the executive orders in this group, expanding our review into other areas of the USC as appropriate. A compilation of 112 statutory authorities resulted from this research. This is discussed further in the methodology section below. A table of these statutory delegations as they are found in the USC is attached as Appendix A. We developed a database for storing and accessing this information. The database consists of two tables—one contains information relating to each executive order, the other contains information relating to each of the sources of statutory authority. The tables were linked and forms were created for viewing a statute with all of the executive orders that reference it, or for viewing an executive order and all of the statutes that it cites to. The database is described in more detail below. The information in the two tables is provided in summary form in Appendix B and C. In addition we obtained a list of 470 statutory provisions compiled in 1973 by the Special Committee on National Emergencies and Delegated Emergency Powers that delegate extraordinary authority to the executive in time of national emergency.[3] Emergency authority is discussed in Chapter 10.

This research and analysis was undertaken for the following purposes:

- Provide an overview of historical executive action by executive order regarding environmental and energy policy
- Identify existing statutory delegations that would be most useful to implement climate change policy
- Understand the types of actions that were undertaken under the auspices of specific delegations and authorities
- Provide a quick reference to existing energy and environmental related delegations
- Provide a quick reference to historical executive orders regarding energy and environmental issues
- Identify any informative trends or practices that are observed during the analysis

- Provide a keyword searchable repository for relevant executive orders and delegations

The remainder of Part A describes the methodology used to acquire the executive order and delegation information; the information that was extracted, the form in which it is stored and how it can be accessed; and trends observed during the analysis.

1. Methodology

Pursuant to the Federal Register Act, beginning with EO 7316 dated March 14, 1936, executive orders have been filed with the Division of the Federal Register and published in the *Federal Register* and in Title 3 of the *Code of Federal Regulations*.[4] This information is accessible online through subscriber based legal library services such as Westlaw and Nexus and free on the internet at the Federal Register web site maintained by the National Archives. [5] The review done for this report includes all executive orders published between 1937 and January 2007. Every executive order in this range was reviewed for any of a number of key words relating to environmental or energy issues.[6] These executive orders were then extracted and included in the energy or environmentally related compilation along with key data such as the issuing President; the executive order number; the date issued; the title of executive order; the disposition (if it has been revoked or amended by subsequent executive order or judicial decision and if it revokes or amends a prior executive order); and all authority, including any statutory delegations, cited at the beginning of the executive order.[7] A group of 370 executive orders was complied in this manner beginning with EO 7532 issued by President Franklin D. Roosevelt on Jan. 8, 1937, to establish the Shinnecock Migratory Bird Refuge in New York and ending with EO 13423 issued by George W. Bush on Jan. 24, 2007, to strengthen federal environmental, energy, and transportation management.

A compilation of authorities was then produced from the above executive order compilation. Every type of authority used in the executive orders was extracted, including "by authority as President" as well as specific statutory citations. Each of these authorities was associated with all of the executive orders, by executive order number, which cites it for authority. Each authority that referenced legislation was then researched, i.e., general statute citations, USC citations, or the popular name of an Act, for specific delegation provisions. The primary focus was to find delegations specifically to the President, rather than to an agency, and that use permissive, discretionary granting language, for example providing that the executive "may" do something, has "the authority," is delegated a power to act "in their discretion," is "hereby delegated," or the like. [8]

Initially we determined the USC cite for all of the authorities.[9] These statutory provisions were then reviewed to determine: (1) if it is a citation to a delegation provision and if so, the disposition of the provision (revoked, amended or effective and unaltered); (2) if it is a citation to a larger body of provisions, such as an entire act (if so the body of the act was searched for any delegation provisions). Our research then expanded out into other areas of the USC. When the citation was to a specific section, the entire title or

subtitle in which it is located was searched for additional delegations. Not infrequently, a referenced act would serve amendatory purposes, and therefore its codified sections would be scattered across the USC. In these cases a table of the locations of each active section of the amendatory act was produced and searched.

Once the full length of the act was identified, it was searched in its entirety for all delegating language using a keyword search.[10] The search captured any language in which the President or heads of agencies were mentioned within the same sentence as key delegation language (and permutations of that language). In addition, the table of contents of each act was scanned to double check for sections that appeared relevant.

Language from provisions with direct delegating language to the President was extracted. However, if the language in the provision was minimal it was not extracted, for example, the ability to appoint a member to a commission which itself did not have seemingly relevant duties. The focus was on extracting language that granted clear and useful delegations of discretionary power. In addition, the language of delegations to heads of agencies was extracted. Here, however, inclusion was more restrictive in terms of the language of the provision. If, for example, an act dealt almost entirely with assigned duties of an agency head or Cabinet member, it would not be useful to extract the entire act. In such instances, a note in the database would be made that the act contained delegations to the agency head or Cabinet member. Even if the agency delegations were not overly numerous, extraction of the actual delegation language was still more selective. Again, delegation language for minor appointment powers, abilities to approve small grants/loans, etc. was not usually extracted.

There were no determinative patterns that emerged from the research, i.e., researchers did not observe any hard and fast rules in regard to placement, wording or indicative titles for delegations of authority. However, more often than not the delegation occurred earlier in the statute, rather than later, and this placement was noticed more frequently for the clear, pristine, unquestionable grants of authority. Further, if a delegation was specifically to the President, rather than to an agency, the language would be to the "President" not to "the Executive."

2. Database

The information on delegations and executive orders has been compiled into a database consisting of two tables. Additionally, there is an interface that connects each executive order in the executive order table to specific information about the delegations associated with it and connects each delegation in the delegation table with the specific information about the executive orders that cite it for authority. For each executive order the following information is maintained in the executive order table: (1) executive order number; (2) executive order title; (3) issuing President; (4) date signed; (5) disposition; and (6) each authority cited at the beginning of the executive order. For each statutory authority the following information is maintained in the delegation table: (1) the authority as it is referenced in the executive order; (2) the correct USC citation for the authority; (3) the disposition of the authority (revoked, amended or effective and unaltered); (4) the

language of the delegation portion of the provision; (5) relevant notes; and (6) the executive order number for all of the energy and environmental executive orders in the executive order database that cite the provision for authority.

The interface allows the user to connect the information in the two databases. For example, for each provision in the delegation database all executive orders that cite it for authority are associated, and by clicking on an executive order number the detailed information about the executive order in the executive order database is accessed. For each executive order the same can be done for the authorities it cites. Further, both databases are searchable by field and key word.

The delegation database provides a searchable repository for delegation provisions available to the President in environmental and energy related matters with a focus on those that provide for broader executive discretion. The actual language of each delegation is included for quick reference as to the extent of the delegation. Further, the link to the executive orders provides insight as to the prior use of each delegation.

A hardcopy of selected data in the two tables is attached as Appendix B and C.

3. Trends

While reviewing the energy and environmental executive orders for the above compilations, trends in the use of cited authority in executive orders and types of executive orders issued by each administration were noted where applicable. The following reflects observations by the research team.

Over time there have been some major shifts in the type of things presidents accomplished with executive orders that relate to energy or the environment. Presidents Franklin Roosevelt, Truman, Eisenhower, and Kennedy primarily furthered environmental conservation by creating or changing the boundaries of nature preserves and forests. President Johnson continued to change the boundaries of national forests, but also issued executive orders which controlled the production of air pollution by federal actions and he established a few commissions and committees to study environmental subjects. After Johnson, each president continued to create or abolish commissions and committees to study energy or the environment and they each issued executive orders to reduce federal pollution or increase the energy efficiency of federal buildings, but the trend of reserving land by executive order to further environmental conservation had ended. In part, this is due to the fact that presidents have delegated their authority to reserve lands to the Secretary of the Interior, the Secretary of State, and others. So the executive branch may reserve land without using executive order to do so. Carter was the first president to use executive orders to conserve energy resources like oil and gas. Both Carter and Clinton used executive orders to promote alternative sources of energy.

The presidents took different approaches to how much authority they cited when issuing each executive order. Clinton, George H.W. Bush, Ford, and Nixon consistently

based their executive orders on several grants of authority. Reagan, Carter, Johnson, Kennedy, Eisenhower, and Truman usually provided one or two grants of authority for each executive order. Most of George W. Bush's executive orders rely only on the general authority "as President." The difference in their approaches may be attributed, in part, to the different relationships they had with Congress. For example, George W. Bush had a Congress that was supportive of his policies in general (through 2007). On the other hand, Clinton was more environmentally progressive than the majority of his Congress, so he generally provided multiple grants of authority for each of his executive orders to insulate the executive order from challenge.

From our database, we made a table of the top 12 most cited acts:

Statute	# of EOs citing it	Current Status	Last used
Migratory Bird Conservation Act	51	Valid	1941
Act of June 25, 1910 (authorizes the President of the United States to make withdrawals of public lands)	50	Repealed	1941
Act of June 4, 1897 (authorizes the President to amend or revoke previous executive orders to change the boundaries of forest reserves)	46	Valid	1965
Act of March 3, 1891, as amended (authorizes the President to establish national forests)	22	Repealed	1965
National Environmental Policy Act of 1969	18	Valid	2001
Bankhead-Jones Farm Tenant Act (authorizes the President to create wildlife refuges)	15	Valid	1962
Water Resources Planning Act	12	Valid	1979
Endangered Species Act of 1973	9	Valid	2000
Emergency Petroleum Allocation Act of 1973	8	Expired in 1981	1981
Federal Advisory Committee Act (authorizes the President to delegate his power to committees)	8	Valid	1999
Clean Air Act	7	Valid	1973
Act of March 1, 1911 (the "Weeks Law" for the conservation of watersheds and navigable waters)	6	Valid	1965

The large use of the first 4 acts on this list is primarily due to the fact that these were statutes commonly used by President Franklin Roosevelt, who issued executive orders more frequently than any other president by far. Roosevelt used these acts to withdraw land to protect migratory birds and waterfowl and to create national forests.

It is interesting to see the kinds of things that presidents have done with authority from these acts which are relevant to climate change policy. For example, presidents have cited the Clean Air Act (CAA) and the National Environmental Policy Act of 1969

(NEPA) to order the prevention, control, and abatement of pollution at federal facilities.[11] In these executive orders they order federal facilities to reduce their harmful emissions and comply with tighter air and water quality standards. Both of these acts have also been used by presidents to order federal agencies to initiate measures needed to direct their policies, plans and programs so as to meet the goals in the CAA and NEPA.[12]

B. When Delegations Are Given Their Broadest Interpretation: The Antiquities Act and the Federal Procurement Act

Two statutes referenced regularly by legal writers as examples of the most expansive use of a congressional delegation of authority are the Antiquities Act and the Federal Property and Administrative Services Act (FPASA).[13] The Antiquities Act says that the President may designate monuments "in his discretion," but that the lands so designated "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[14] Under this statute, parcels of land hundreds of thousands of acres large have been designated by executive order; several parcels in Alaska were millions of acres.[15] Under the FPASA, the President is authorized to pursue "economy" and "efficiency" in government procurement.[16] Under this provision presidents have issued a series of executive orders promoting civil rights, such as imposing anti-discrimination requirements on government contractors, prior to the enactment of federal civil rights legislation. With only one exception, these executive orders have been upheld by the courts when challenged. We review these two acts to determine what gives a statutory delegation such an expansive reading and any guidelines applicable to statutory delegations generally. We address the Antiquities Act here; the FPASA is addressed in Chapter 9.

1. History of the Antiquities Act

Around the turn of the century, archaeological organizations demanded that Congress pass an act to protect antiquities on federal lands from theft and destruction. The US Department of the Interior wanted the act to include protection of scenic and scientific resources. While Congress was in favor of the narrower archaeologists' bill, they would not include the Department of the Interior's extension. However, because the museums and universities could not agree on who would have the authority to excavate the various ruins, Congress was unable to pass the act for six years.[17]

In 1906, Edgar Lee Hewitt, a prominent archeologist, drafted the bill that finally became the Antiquities Act that year. The Department of the Interior convinced Hewitt to include the phrase "other objects of historic or scientific interest" and to extend the maximum reservation size from 640 acres to "the smallest area compatible with the proper care and management of the objects to be protected."[18] Thus making the final language of the Act broad:

> The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest

> that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. [19]

The wording of the Act does not specifically authorize presidents to create national monuments for general conservation purposes. However, Theodore Roosevelt, the first President to withdraw land under the Act, furthered his conservation agenda by creating several large scenic monuments.[20] In 1908, Roosevelt used the Act to create his largest national monument, the Grand Canyon, totaling more than 800,000 acres. With his broad interpretation and the subsequent congressional acquiescence, Roosevelt paved the way for future presidents to use the Act broadly.

Presidents Taft,[21] Wilson,[22] Harding,[23] Coolidge,[24] and Hoover[25] followed Theodore Roosevelt's expansive use the Act without significant congressional opposition. On March 15, 1943, Franklin Roosevelt created the Jackson Hole National Monument in Wyoming by Proclamation No. 2578 against the explicit wishes of Congress. John D. Rockefeller, Jr. had aquired land in Wyoming and wished to add it to Grand Teton National Park. Congress refused to authorize this park expansion, so Franklin Roosevelt used the Antiquities Act to set aside and preserve the land without congressional action. This prompted the first congressional challenge to a president's use of the Antiquities Act. In 1944, Congress passed a bill abolishing Jackson Hole National Monument, but Franklin Roosevelt vetoed the bill. In *State of Wyoming v. Franke*, the State of Wyoming challenged the Jackson Hole Monument. Wyoming was unsuccessful and the action was dismissed because there was substantial evidence that the President had satisfied the requirements of the Antiquities Act.[26] In 1950 Congress passed a bill that incorporated most of the monument into Grand Teton National Park, but also amended the Antiquities Act so that future presidents were barred from withdrawing land in Wyoming without express authorization from Congress.[27]

During the next three decades, every president (other than Nixon) used the Antiquities Act, but not as expansively and typically with advance congressional support.[28] The next great challenge to the Antiquities Act came when President Carter withdrew 56 million acres of land in Alaska to create 15 national monuments despite Alaska's strong opposition. The state of Alaska officially challenged Carter in *Alaska v. Carter*,[29] but lost on the grounds that the President is not subject to the requirements of the National Environmental Policy Act when proclaiming national monuments under the Antiquities Act.[30] In 1980 Congress passed a bill incorporating most of the Alaskan national monuments into national parks and preserves and further amending the Antiquities Act by prohibiting presidents from making withdrawls in Alaska of more than 5,000 acres without congressional approval.[31]

The next President to use the Antiquities Act was Clinton.[32] He used the Act expansively and without state support. As a result, bills were introduced in Congress to further restrict the President's abilities under the Antiquities Act, but none passed. The

Utah Association of Counties, the Mountain States Legal Foundation, and Tulare County, et al., all filed lawsuits against the President.[33] In each case, the courts found in favor of the President. Since then, the Antiquities Act has not been used.[34]

2. Court Deference Generally

Every challenge to a president's use of the Antiquities Act has been unsuccessful. The Act requires that the President only reserve the "smallest area compatible with the proper care and management of the objects to be protected." Yet presidents have reserved massive amounts of land under this statute. Whenever the size of a national monument has been challenged, the courts have shown deference to the President. The Act requires that the President only reserve "objects of historic or scientific interest." Yet presidents have made reservations that seemed motivated by a general conservationist agenda. Whenever the type of object has been challenged, the courts have shown deference to the President. *Utah Association of Counties v. Bush* explains this deference:

> Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go. Dalton v. Specter, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994); Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). ***When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.*** See United States v. George S. Bush & Co., Inc., 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940). To do so would impermissibly replace the President's discretion with that of the judiciary.[35]

The constitutional principle of separation of powers guides court deference. In reviewing challenges to the Antiquities Act the courts find that they cannot do more than check whether the President invoked his powers under the Antiquities Act. As stated by the Supreme Court, "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."[36] *Utah Association of Counties,* which adopts this standard, goes on to state, "For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains."[37] It is therefore completely up to the President to determine the type of object being reserved and the size of the reservation. Plaintiffs have brought scientific evidence showing that a smaller area of land is compatible with proper care and maintenance of a site. They have brought expert testimony saying that an object or area of land is not of historic or of scientific interest, but this has not been persuasive. Experts can disagree with the President, but ultimately the President has the authority to determine whether something falls under the Act. To invoke executive powers under the Antiquities Act, essentially all a president

has to do is include language in the executive order or proclamation that, as the court in *Utah Association of Counties* states, "clearly indicates that the President has considered the principles that Congress required him or her to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects."[38]

3. Analysis of Delegation

The three issues most relevant to the analysis of the delegation in the Antiquities Act are: (1) the language of the delegation (i.e., whether it is a proper delegation by Congress and how broad it is to be interpreted); (2) congressional acquiescence to actions taken by the President under the delegation; and (3) stare decisis (i.e., how the initial court ruling can impact future use of a delegation).

The Antiquities Act has been challenged based on the argument of an improper delegation by Congress. Plaintiffs contended that Congress violated the Property Clause or the delegation doctrine by giving the President virtually unfettered discretion to regulate and make rules concerning federal property.[39] Although the Property Clause gives Congress the express authority to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[40] pursuant to Supreme Court opinion, the Constitution allows Congress to delegate its authority as long as Congress provides "standards to guide the authorized action such that one reviewing the action could recognize the will of Congress has been obeyed."[41] The courts have found that the Antiquities Act sets clear standards and limitations (even though they are broad), thus it is a proper delegation of Congress's authority under the Property Clause. Although the statutory terms have been interpreted to allow almost anything to be designated a national monument, this is sufficient to satisfy the "standard to guide" test for a proper delegation.[42] Thus Congress can make very broad delegations to the President allowing significant discretion by the chief executive, and this is the case under the Antiquities Act.

After finding that the delegation is clear enough to be proper, the language must be interpreted to find that the act or acts taken by the President are in fact sanctioned or permitted by the delegation. First, the courts tend to show general deference towards presidential actions taken pursuant to broad delegations of statutory authority. As at least one legal expert has noted, while courts apply the relaxed "rational-basis" review to agency decisions, they apply an even more relaxed "rationality" review to presidential action.[43] "Rational basis" review requires showing a "rational connection between the facts found and the choice made."[44] This former standard necessarily requires digging into the administrative record. "Rationality" review, on the other hand, only requires showing an "imaginable" rational reason for taking the action in question. There is no probe of the record behind the decision for a "rational basis in fact." The courts have treated the broad delegation as "one step short of unreviewable."[45] That is, the courts accept recitals in the proclamations connecting the actions taken by the President to the act's purposes and do not probe the assertions for abuse of discretion by comparing them to the administrative record. [46]

The relaxed standard of review certainly has helped presidents defend their actions under the Antiquities Act—one can speculate on whether declaring the Grand Canyon to be the "smallest area compatible with the proper care and management of the objects to be protected" would survive a heightened standard of review. However, the relaxed standard alone cannot explain why presidents have enjoyed so much freedom under the Antiquities Act but have failed to do the same every time a statute says "in his discretion." As explained in Chapter 3, the words "in his discretion" in a statutory delegation do not guarantee that the courts will accept as valid the President's action. Although the court will not second guess the President's discretionary decisions, it must find that the President's action was authorized by the statute.[47] Therefore, there must be a combination of factors that account for rulings that suggest presidential action under the Antiquities Act is virtually unassailable. At least one legal scholar suggests that the doctrines of acquiescence and stare decisis are the two other key factors that have contributed to courts declining to rein in the liberal application of authority under the Antiquities Act.[48]

The first case to challenge a designation of a monument under the Antiquities Act was *Cameron v. U.S.* In that case, only one paragraph of the opinion discusses the defendant's claim that the President had no authority to create the monument.[49] The Court found the Grand Canyon to be an "object of unusual scientific interest," based on its status as "one of the great natural wonders," a place that "affords an unexampled field for geologic study."[50] The Court never even considers that the large size of the monument should be a variable in the analysis. The initial favorable ruling for the President regarding Antiquities Act power owed itself to the principle of granting extreme deference to presidential decisions made pursuant to broad grants of authority (and possibly to a situation where the equities appeared to favor the government).[51] Building on *Cameron,* the principles of stare decisis and acquiescence impacted the outcome of later decisions.

Stare decisis is the principle that courts will stand by the decisions of earlier cases. As explained by Harold Bruff, a noted constitutional and administrative law expert, "The Supreme Court ordinarily applies a strong policy of stare decisis to its statutory interpretations, leaving corrections to Congress.[52] Since the Court is applying it strictly in this line of cases, once *Cameron* set the ball in motion, the Court, under stare decisis, would not change its analysis unless Congress stepped in and amended the underlying authorizing statute. On a related note, acquiescence is the doctrine of inferring congressional assent from congressional silence. Despite making amendments to the Antiquities Act, Congress has not amended the delegation of authority to the President in the Act a single time in the Act's century of existence. All else being equal, the implication is that this silence is a sign that presidents' past actions have been within the will of Congress. Essentially, the combined effect of stare decisis and acquiescence has resulted in forming the Court's position: If Congress does not like how the courts have interpreted the President's power under the Antiquities Act, Congress must amend the delegation of authority to narrow the President's discretion.

4. Conclusions

The courts' pattern of extreme deference to the President regarding actions under the Antiquities Act over the last 80 years[53] is largely the result of three factors: (1) the general deference that the courts tend to show towards presidential actions taken pursuant to broad delegations of statutory authority; (2) acquiescence; and (3) stare decisis. Thus once a delegation is enacted using the language "in his discretion" courts apply the "rationality review" standard, giving the greatest deference to the President's actions. In addition, presidential acts pursuant to the delegation that go unchallenged by Congress create the presumption that the President's actions fall within the will of Congress. Congressional acquiescence is implied from lack of action or silence by Congress. Finally, if an executive order is challenged, the final decision in the first challenge will apply to future action by presidents. That is, the Court will stand by decisions of earlier cases. Thus the first court ruling can set the stage for future actions. In analyzing delegations in other statutes, these factors should be addressed in ascertaining the extent to which the delegation can be used.

C. Response to the 1970's Energy Crisis and the Carter Administration

The Carter administration presents a useful case study in terms of executive action relevant to climate action policy for a number of reasons. First, James Earl Carter served as President during a national energy shortage, and although he was not operating under a declared emergency, the country was operating under both an energy crisis and strained economic conditions as a result of the 1973-74 OPEC Oil Embargo and other fuel export reductions imposed by OPEC. As a result, in the mid- and late 1970's Congress passed a significant amount of legislation to address the energy shortage including legislation that promoted conservation measures and attempts to promote alternative fuels (although coal was considered an "alternative fuel" at that time). Among these statutes were a number of delegations of authority to the President, some for emergencies and emergency-like situations. In addition, Carter was followed by Reagan. Reagan's administration was the first to make a systematic process of revoking orders from the previous administration. This illustrates one of the shortcomings of legislating by executive order. Finally, one of President Carter's declarations (a proclamation) was the rare subject of judicial review with a ruling by the federal district court against executive authority, *Independent Gasoline Marketers Council v. Duncan.*[54] The proclamation that was found to be invalid established a program that would set a fuel tax.

The background, or historical context, for the Carter administration and the congressional response, including an analysis of seven pieces of legislation are addressed in the first two sections. The third section reviews the executive orders issued by President Carter and the fourth section reviews the actions taken by President Reagan in terms of revoking the policies of President Carter. The fifth section reviews *Independent Gasoline Marketers*.

1. Background: OPEC and the 1970's Energy Crisis

In the1970's, the country became acutely aware of how our reliance on imported fuel impacts national security and the economy. The Organization of Petroleum Exporting Countries (OPEC) was formed in 1960, to coordinate the petroleum policies of its members in response to Western oil companies keeping oil prices artificially low through bilateral agreements with producer states.[55] Initially, it had operated as an informal bargaining unit for the sale of oil by Third World nations and confined its activities to gaining a larger share of the revenues produced by Western oil companies and greater control over the levels of production.[56] However, on October 17, 1973, OPEC members announced that as a result of the ongoing Yom Kippur War they would no longer ship petroleum to nations that had supported Israel in its conflict with Syria and Egypt (i.e., the United States, its allies in Western Europe, and Japan).[57] The embargo continued until March of 1974.[58] At about the same time, OPEC members agreed to use their leverage over the world price-setting mechanism for oil in order to raise world oil prices by cutting back on world supply.[59] Although there is some debate about the primary cause—the OPEC embargo, the OPEC supply reductions, U.S. price controls and/or the 1979 Iranian revolution—in the 1970's the U.S. economy was set on a path of recession and high inflation until the early 1980's and elevated oil prices that would persist until 1986.[60]

Due to the dependence of the industrialized world on crude oil, and the predominant role of OPEC as a global supplier, these price increases were dramatically inflationary to the economies of the targeted countries, while at the same time suppressive of economic activity.[61] Oil consumption in the United States increased while domestic reserves were dwindling. This, combined with the devaluation of the U.S. dollar caused a series of recessions and high inflation that would persist until the early 1980s, and elevated oil prices through 1986.[62] In the United States, the retail price of a gallon of gasoline rose from a national average of 38.5 cents in May 1973 to 55.1 cents in June 1974.[63] The world price of oil reached a peak in 1979 at US$35 a barrel (that would be about US$80 today given inflation).[64] This represented a quadrupling of world oil prices from 1973 to 1974[65] and prices rose significantly again (150%) in 1979 in the wake of the Iranian Revolution.[66]

In addition to dramatic price hikes in fuel, inflation and economic recession, other impacts felt in the United States included fuel shortages, gas rationing and long lines at gas stations. The U.S. responded with a wide variety of new initiatives to contain further dependency on imported fuels by encouraging energy efficiency and alternate energy sources: a National Maximum Speed Limit of 55 mph was imposed; President Nixon named an official "energy czar;" in 1977, a cabinet-level Department of Energy was created, leading to the creation of the United States' Strategic Petroleum Reserve; the National Energy Act of 1978 was enacted; in response to statutory Corporate Average Fuel Economy (CAFE) standards the largest three automakers in the U.S. downsized existing automobile categories; year-round daylight saving time was implemented, clocks were advanced one hour across the nation; a campaign was undertaken by the Advertising Council using the tag line "Don't Be Fuelish;" and fuel restrictions were

imposed in the U.S. (e.g., drivers of vehicles with license plates having an odd number were allowed to purchase gasoline for their cars only on odd-numbered days and even-numbered license plates on even numbered days).[67]

President Carter's term ran from 1977 to 1981. His administration spanned some of the worst years of the 1970's energy crisis in terms of nationwide energy and economic hardships. It was just prior to and during his administration that Congress passed some key legislation to address the crisis, and President Carter was the first President to use the authority delegated by a number of those statutes.

In 1976, the National Emergency Act (NEA) was passed[68] requiring the President to specifically declare all national emergencies and identify the provisions of law (extraordinary powers) under which he or she proposes to act.[69] The NEA is discussed in Chapter 10. President Carter issued two declarations of emergency during his term: (1) Proclamation 4485, Natural Gas Emergency issued on February 2, 1977;[70] and (2) EO 12170, Blocking Iranian Property, issued November 14, 1979.[71] The first declaration was in response to abnormally cold weather conditions in the East and Midwest that year. Many interstate natural gas pipelines and local natural gas distribution companies did not have sufficient supplies of flowing or stored gas to meet demand. It was issued pursuant to the powers authorized under the Emergency Natural Gas Act passed that year. The second declaration was in response to the taking of American hostages in Iran.

2. Congressional Reaction to the Oil Embargo and Energy Crisis: New Delegations

During the 1970's Congress passed a significant amount of legislation in response to the crisis created by OPEC's actions and subsequent energy shortages and dramatic increases in energy costs. The overarching purpose of the relevant legislation was to reduce U.S. dependence on imported sources of energy.[72] In an effort to achieve this goal, the focus of this legislation was placed on encouraging conservation and efficiency measures, and developing sources of domestic energy.[73] In promoting the latter, a number of the statutes encouraged use of renewable energy but also placed a premium on coal, as coal is a plentiful domestic source of energy.[74] Thus, although much of this legislation can be used to support climate change policies, some of it is limited by the mandate to promote coal use.

In addition, the country faced conditions that required immediate action. The country was experiencing dramatic and immediate shortages of fuel and increased costs of energy. As a result, Congress passed a number of "emergency" provisions delegating authority for the President to act in an expedited manner. These provisions, in large part, are directed towards addressing shortages of energy (e.g., rerouting energy supplies, stopping use of certain forms of energy, prioritizing energy usage, and rationing energy); thus they are not directly applicable to climate change policy. However, Congress's reaction serves as a model for addressing emergency-like situations. As will be seen again in Chapter 5, which discusses Franklin Roosevelt's administration which spanned the latter part of the Great Depression and World War II, an effective model for dealing

with emergency conditions has been for Congress to establish, by statute, delegations of authority for the President that are activated by emergency conditions. The delegations provide for the type of undelayed action not possible by a deliberative institution such as Congress.

The following statutes are reviewed here:

a) Pub. L. 94-613, Energy Policy and Conservation Act of 1975;
b) Pub. L. 95-619, National Energy Conservation Policy Act of 1978;
c) Pub. L. 96-102, Emergency Energy Conservation Act of 1979.
d) Pub. L. 95-617, Public Utilities Regulatory Policy Act of 1978;
e) Pub. L. 95-618, Energy Tax Act of 1978;
f) Pub. L. 95-620, Powerplant and Industrial Fuels Act of 1978; and
g) Pub. L. 95-621, Natural Gas Policy Act of 1978, Emergency Provisions.

These statutes represent the type of action taken by Congress during this period. Many of the statutory provisions, including delegations of authority, continue in effect and can be applicable to climate change policy. When considering whether a delegation is directly applicable to climate change policy two issues are key: (1) are the goals of the statutory provision consistent with the actions being taken pursuant to that authority (that is, did Congress intend to authorize the actions being taken); and (2) are the actions authorized by the delegation helpful to furthering climate change policy.

a. Energy Policy and Conservation Act of 1975 (EPCA)[75]

The EPCA comprises the vast majority of the Energy Conservation chapter of Title 42 in the U.S. Code. The purposes of the EPCA are as follows:

> **(1)** to grant specific authority to the President to fulfill obligations of the United States under the international energy program;
>
> **(2)** to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;
>
> **(4)** to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;
>
> **(5)** to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;
>
> **(7)** to provide a means for verification of energy data to assure the reliability of energy data; and

> **(8)** to conserve water by improving the water efficiency of certain plumbing products and appliances. [76]

The EPCA includes numerous provisions that are relevant to climate change policy and that can provide support for executive authority to implement climate action proposals by executive order. These provisions include, but are not limited to establishing the following: the strategic petroleum reserve;[77] authorities with respect to the international energy program;[78] an energy conservation program for consumer products;[79] state energy conservation plans;[80] and an energy database.[81]

The purpose of the State Energy Conservation Plans (SECPs) is: "to promote the conservation of energy and reduce the rate of growth of energy demand by authorizing the Secretary to establish procedures and guidelines for the development and implementation of specific State energy conservation programs and to provide federal financial and technical assistance to States in support of such programs."[82] There are also emergency provisions in regard to SECPs[83] that were passed as part of the Emergency Energy Conservation Act (EECA) of 1979. With respect to any energy source for which the President determines a severe energy supply interruption exists or is imminent or that actions to restrain domestic energy demand are required in order to fulfill the obligations of the United States under the international energy program, the President may establish monthly emergency conservation targets for any such energy source for the Nation generally and for each state.[84] A state must design an emergency conservation plan to meet or exceed the emergency conservation targets.[85]

b. National Energy Conservation Policy Act of 1978 (NECP)[86]

The NECP is a comprehensive statute with the following goals: (1) improve energy efficiency in all sectors of the economy; (2) become increasingly independent of the world oil market, less vulnerable to interruption of foreign oil supplies, and more able to provide energy to meet future needs; and (3) continue to reduce significantly the demand for nonrenewable energy resources such as oil and natural gas by implementing and maintaining effective conservation measures for the efficient use of these and other energy sources.[87] It amends a number of provisions of the EPCA; adds a number of new parts to the Energy Conservation chapter of Title 42; and adds several new parts to other chapters of Title 42, such as Chapter 81, Energy Conservation Standards for New Buildings, Chapter 84, Department of Energy; and Chapter 91, National Energy Conservation Policy.

The Act is quite comprehensive with separate titles addressing: residential energy conservation (Title II); energy conservation programs for schools and hospitals and buildings owned by units of local governments and public care institutions (Title III); energy efficiency of certain products and processes (Title IV); federal energy initiatives (Title V); and state energy conservation plans (Title VI). It is another excellent source of authority for executive action to support climate change policy, as many of the provisions

are directly applicable to climate action proposals and the goals of the Act are largely consistent with those of climate action policy.

c. Emergency Energy Conservation Act of 1979[88]

The purpose of this statute is to conserve energy sources in short supply.[89] It specifically lists gasoline, diesel fuel, and home heating oil as energy sources that are covered and also includes a catchall "other energy sources which may be in short supply." The findings and purpose indicate that it is largely directed at imported fuels and is likely not directed at coal (i.e., coal is not in short supply). Pursuant to the statute, the President's authority is activated whenever the President finds, "with respect to any energy source . . . a severe energy supply interruption exists or is imminent or that actions to restrain domestic energy demand are required in order to fulfill the obligations of the United States under the international energy program."[90] In addition to the SECPs discussed above, it has provisions for minimum automobile fuel purchase measures (odd-even purchasing measures).[91]

d. Public Utilities Regulatory Policy Act of 1978 (PURPA)[92]

The purposes of PURPA are to encourage:

(1) conservation of energy supplied by electric utilities;
(2) the optimization of the efficiency of use of facilities and resources by electric utilities; and
(3) equitable rates to electric consumers.[93]

Among the goals of the Act are the protection of the public health, safety, and welfare, and the preservation of national security, by requiring: a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers; a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power; and a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable.[94]

PURPA sets forth electric utility service and rate-making standards for consideration by state regulatory authorities and non-regulated utilities. The Act tasks state regulatory authorities and non-regulated utilities with considering whether the adoption of the proposed standards would further the Act's objectives. Thus, the decision on whether to implement innovative rates to meet these goals was turned over to state public service commissions, but not all states implemented the rates. There are provisions for the Secretary of Energy to provide matching grants and technical assistance to states acting pursuant to PURPA.[95]

Examples of the standards states are to consider include:

> The rates charged by any electric utility shall be such that the utility is encouraged to make investments in, and expenditures for, all cost-effective improvements in the energy efficiency of power generation, transmission and distribution. In considering regulatory changes to achieve the objectives of this paragraph, State regulatory authorities and non-regulated electric utilities shall consider the disincentives caused by existing ratemaking policies, and practices, and consider incentives that would encourage better maintenance, and investment in more efficient power generation, transmission and distribution equipment.[96]
>
> Each electric utility shall develop a plan to minimize dependence on 1 fuel source and to ensure that the electric energy it sells to consumers is generated using a diverse range of fuels and technologies, including renewable technologies.[97]
>
> Each electric utility shall develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation.[98]
>
> Each electric utility shall make available upon request net metering service to any electric consumer the utility serves . . . .[99]

One of the most important effects of the law was to create a market for power from non-utility power producers, which now provide seven percent of the country's power. Before PURPA, only utilities could own and operate electric generating plants. PURPA required utilities to buy power from independent companies that could produce power for less than what it would have cost for the utility to generate the power, called the "avoided cost."[100]

e. Energy Tax Act of 1978[101]

The Energy Tax Act provided for a number of taxes, credits and exemptions such as: a residential energy credit, a "gas guzzler tax," exemptions from motor fuels excise taxes for certain alcohol fuels, removal of excise taxes on buses and bus parts, full investment credit for certain commuter vehicles, and changes in business investment credits to encourage conservation of, or conversion from, oil and gas or to encourage new energy technology.[102] Tax policy is a proven method for affecting change, however, in terms of unilateral executive action, under the U.S. Constitution the taxing power lies with the legislative branch.[103]

f. Powerplant and Industrial Fuels Act of 1978 (PIFU)[104]

There are two overarching purposes of the Powerplant and Industrial Fuel Use Act (PIFU): (1) to convert power utilities away from fuels that we largely imported (petroleum and natural gas), primarily by converting power utilities to use "coal and other

alternative fuels;" and (2) to conserve petroleum and natural gas.[105] The Act is still in effect including the provisions that promote the use of "coal and other alternative fuels," in lieu of natural gas or petroleum, by electric power plants.[106] Section 403(b) of PIFU, relates to conservation of petroleum and natural gas. Section 403(b) of PIFU requires the President to "issue an order" to require each federal agency authorized to extend federal assistance (grant, loan, contract or other) to effectuate the purposes of PIFU relating to the conservation of petroleum and natural gas. President Carter issued EO 12185 pursuant to this provision, it follows closely the details of 403(b).

Section 403(a) of PIFU contains provisions relating to conversion of power plants owned or operated by the federal government to "coal or other alternative fuels." Pursuant to section 403(a) of PIFU, "Each Federal agency owning or operating any electric powerplant, major fuel burning installation, or other unit shall comply with any . . . requirement under this Act, to the same extent as would be the case if such . . . installation were owned or operated by a nongovernmental person." Therefore, the provisions of PIFU requiring conversion to coal or other alternative fuels apply to government installations. President Carter issued EO 12217 which orders the heads of executive agencies to comply with the applicable requirements governing the construction or conversion of power plants.[107] PIFU does not require an executive order to implement this provision. President Reagan later issued EO 12437, revoking EO 12217.[108]

Originally PIFU applied both to "electric powerplants" as well as "major fuel-burning installations." However, in 1987 the Act was amended and no longer covers "major fuel-burning installations." PIFU is still in effect today (with some amendments over the years). The stated purpose remains the promotion of "coal and other alternative fuels" by power plants:

> The purpose of this chapter, which shall be carried out in a manner consistent with applicable environmental requirements, are—
>
> **(1)** to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;
>
> **(2)** to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source;[109]
>
> [(3) through (10) omitted]

There are, however, provisions for exemptions from this statute[110] and all power plants must still comply with all applicable environmental laws and regulations. There

are also emergency authorities delegated to the President by the Act regarding coal allocation and the use of natural gas or petroleum during a "severe energy supply interruption."[111] For coal, the President may, by order, allocate coal (and require the transportation thereof) for the use of any electric power plant or major fuel-burning installation, in accordance with such terms and conditions as he or she may prescribe, to insure reliability of electric service or prevent unemployment, or protect public health, safety, or welfare. For natural gas or petroleum the President may, by order, prohibit any electric power plant or major fuel-burning installation from using natural gas or petroleum, or both, as a primary energy source for the duration of such interruption.

g. Natural Gas Policy Act of 1978, Emergency Provisions[112]

Under these emergency provisions the President may declare a natural gas supply emergency (or extend a previously declared emergency) if he or she finds that—"a severe natural gas shortage, endangering the supply of natural gas for high-priority uses, exists or is imminent in the United States or in any region thereof . . . ."[113] Pursuant to this declaration, the President can purchase and allocate natural gas to address the emergency.[114]

3. Summary of President Carter's Use of Executive Orders

Jimmy Carter served as President from 1977-81. He signed 320 executive orders, not an inordinate number for modern presidents.

- 1977 - EO 11967 - EO 12032 (66 executive orders signed)
- 1978 - EO 12033 - EO 12110 (78 executive orders signed)
- 1979 - EO 12111 - EO 12187 (77 executive orders signed)
- 1980 - EO 12188 - EO 12260 (73 executive orders signed)
- 1981 - EO 12261 - EO 12286 (26 executive orders signed)

After reviewing all of President Carter's executive orders published in the *Federal Register*, 35 were identified as relating to energy or the environment:

1. EO 12286 (Jan 19, 1981)—Responses to environmental damage (revoked)
2. EO 12261 (Jan 5, 1981)—Gasohol in Federal motor vehicles
3. EO 12247 (Oct 15, 1980)—Federal Actions in the Lake Tahoe region
4. EO 12235 (Sept 3, 1980)—Management of natural gas supply emergencies
5. EO 12231 (Aug 4, 1980)—Strategic petroleum reserve
6. EO 12229 (July 29, 1980)—White House Coal Advisory Council (revoked)
7. EO 12217 (Jun 18, 1980) —Federal Compliance with Fuel Use Prohibitions (revoked)
8. EO 12189 (Jan 16, 1980)—Definition of heavy oil (revoked)
9. EO 12186 (Dec 21, 1979)—Change in definition of heavy oil (revoked)
10. EO 12185 (Dec 17, 1979)—Conservation of petroleum and natural gas
11. EO 12176 (Dec 7, 1979)—President's Commission on the coal industry (revoked)
12. EO 12153 (Aug 17, 1979)—Decontrol of heavy oil (revoked)

13. EO 12142 (June 21, 1979)—Alaska natural gas transportation system
14. EO 12141 (June 5, 1979)—Independent water project review (revoked)
15. EO 12140 (May 29, 1979)—Delegation of authorities relating to motor gasoline end-user allocation (revoked)
16. EO 12130 (April 11, 1979)—President's Commission on the Accident at Three Mile Island (revoked)
17. EO 12129 (April 5, 1979)—Critical Energy Facility Program (revoked)
18. EO 12123 (Feb 26, 1979)—Offshore oil spill pollution (revoked)
19. EO 12121 (Feb 26, 1979)—Energy Coordinating Committee (revoked)
20. EO 12114 (Jan 4, 1979)—Environmental effects abroad of major Federal actions
21. EO 12113 (Jan 4, 1979)—Independent water project review (revoked)
22. EO 12103 (Dec 14, 1978)—President's Commission on the Coal Industry (revoked)
23. EO 12088 (Oct 13, 1978)—Federal Compliance With Pollution Control Standards (revoked)
24. EO 12083 (Sept 27, 1978)—Energy Coordinating Committee
25. EO 12062 (May 26, 1978)—President's Commission on the Coal Industry (revoked)
26. EO 12040 (Feb 24, 1978)—Relating to the Transfer of Certain Environmental Evaluation Function (revoked)
27. EO 12038 (Feb 3, 1978)—Relating to Certain Functions Transferred to the Secretary of Energy by the Department of Energy Organization Act
28. EO 12020 (Nov 8, 1977)—Payment of educational benefits to veterans and dependents when schools are temporarily closed to conserve energy
29. EO 12009 (Sept 13, 1977)—Providing for the effectuation of the Department of Energy Organization Act (revoked)
30. EO 12003 (July 20, 1977)—Relating to energy policy and conservation
31. EO 11991 (May 24, 1977)—Relating to protection and enhancement of environmental quality
32. EO 11990 (May 24, 1977)—Protection of Wetlands
33. EO 11988 (May 24, 1977)—Floodplain management
34. EO 11987 (May 24, 1977)—Exotic organisms (revoked)
35. EO 11969 (Feb 2, 1977)—Administration of the Emergency Natural Gas Act of 1977 (revoked)

President Carter relied on a broad range of statutes for authority to issue these executive orders: National Environmental Policy Act of 1969 (5), PIFU (2); PURPA (1); NGPA (1); Energy Security Act (2); Emergency Petroleum Allocation Act (3); Clean Air Act (2); Federal Advisory Committee Act (4); Energy Policy and Conservation Act (1); Federal Property and Administrative Services Act (1); Emergency National Gas Act (1); Comprehensive Environmental Response, Compensation, and Liability Act (1); and pursuant to a reorganization plan or the DOE Organization Act (4). Only five of the executive orders were issued without reference to a statute, and four of the five were establishing committees or studies. Only one of President Carter's energy-environmental executive orders was issued pursuant to the President's emergency powers, EO 11969.[115] This executive order was issued concurrently with the President's proclamation of a

natural gas emergency, [116] discussed in section 1. In EO 11969, President Carter activates emergency authorities of the Emergency Natural Gas Act of 1977 and delegates them to the Chairman of the Federal Power Commission. These executive orders with their full disposition and the statutes cited for authority are included in the database described earlier in this chapter. All revocations were by subsequent executive orders and most by a later president.

4. The Reagan Administration: Executive Orders as Short Lived Policy

Ronald Reagan came into office in 1981 (1981-1989). The Reagan team made a systematic process of revoking orders from the Carter administration. [117] Thirty-nine orders were revoked by the end of 1981, most of them issued by the Carter administration. Reagan's first executive order, EO 12287,[118] eliminated controls on crude oil and refined petroleum products by revoking the price and allocation regulations imposed by Carter's EO 11790 and 12038. Reagan's second executive order terminated the wage and price regulatory program then operating under Carter's EO 12092. They were signed on January 28 and 29 of 1981, respectively. [119] In addition, the Reagan administration promptly eliminated a variety of advisory committees from the Carter years and various organizational and operational changes followed. On Feb. 26, 1986, President Reagan signed EO 12553[120] which revoked 386 executive orders ranging from EO 723 (1907) to EO 12495 (1985) including nine of Carter's executive orders addressing energy or the environment (25 of Carter's executive orders in total). This exemplifies one of the key drawbacks of implementing policy by executive order; these policies can be short lived.

5. Limits on Executive Authority— Even Under the Auspices of National Security

In 1980, by presidential proclamation, President Carter tried to impose a fuel surcharge in an effort to reduce domestic gasoline consumption. Proclamation 4744, creating the Petroleum Import Adjustment Program (PIAP) was signed on April 2, 1980 (effective Mar. 15, 1980).[121] He cited for authority, the Constitution and laws of the United States and specifically the Trade Expansion Act of 1962 (section 232 authorizes the President to impose a system of license fees as a means of controlling imports under certain circumstances) and the Emergency Petroleum Allocation Act of 1974. The PIAP was challenged by gas and oil interests and the federal District Court for the District of Columbia, in *Independent Gasoline Marketers Council v. Duncan*, found that the Program was unlawful.[122]

Although President Carter did not declare a state of emergency pursuant to the NEA, the proclamation makes repeated reference to a threat to national security. Specifically, that imports of petroleum and petroleum products were entering the county "in such quantities and under such circumstances as to threaten to impair the national security."[123] The purpose of the PIAP was to lower domestic gasoline consumption by raising the retail price of all gasoline by ten cents per gallon. The court did not question the determination of the President that, given the extent of United States dependence on foreign oil, any significant interruption of imported oil could have severe consequences

for national security, and that the level of oil imports, coupled with the unprecedented increase in oil prices has had a dramatic impact on the economic well-being of the United States. However, the court ruled against the President's action.

Specifically the court found that the PIAP was unlawful in that the gasoline conservation fee at issue did not fall within the inherent powers of the President, was not sanctioned by statute, and was contrary to the manifest intent of Congress as stated in the EPCA. The fee is specifically precluded by the EPCA; therefore, it is contrary to the manifest intent of Congress. Prior to the proclamation, Congress passed the EPCA which allows the President to prescribe a plan "which imposes reasonable restrictions on the public or private use of energy which are necessary to reduce energy consumption."[124] However, the plan can be prescribed only if the President has found the existence of a severe energy supply interruption,[125] and even under those circumstances the plan "may not impose rationing or any tax, tariff, or user fee and may not contain any provision respecting the price of petroleum products."[126]

The PIAP under the authority of the TEA implemented an import fee and through other parts of the program had the fee distributed uniformly over all fuel, eventually being paid by consumers of both domestic and imported gasoline. The TEA provides, if the Secretary of Commerce has found after an appropriate investigation that imports of an article "threaten to impair the national security," the President is authorized to "take such action, and for such time, as he deems necessary to adjust the imports of such article" so as to lessen the threat to national security.[127] An import fee that directly affects the price of imported oil relative to domestic oil is permissible under the TEA. Standing alone, the import fee component of the PIAP would have a similar effect. In the context of the PIAP mechanism as a whole, however, the court observes, "the import fee has no 'initial and direct impact on imports' . . . . Nor is it intended to have such a result." Thus the court did not accept the President's position on the application of the TEA. The court looked at the purpose of the TEA and the design of the program as a whole and found that the overall goal of the PIAP was not consistent with the Act.[128] Essentially the President used the authority of the TEA to achieve an ultimate goal not contemplated by that statute.

The President argued that because of the national security aspects presented by this nation's consumption of imported oil, the President has authority, independent of Congress to impose the conservation fee.[129] However, the court held that any inherent powers the President may have under these circumstances do not trump the will of Congress, as manifested in a statute, to the contrary.[130] The EPCA prohibits the tax.

6. Conclusions

President Carter's administration spanned some of the worst years of the 1970's energy crisis. During that time, Congress passed a number of statutes that are relevant to energy conservation, energy efficiency and alternative and renewable energy. Some of these statutes are quite useful in terms of application to climate change policy. For example, the EPCA and the NECP are comprehensive statutes that include, but are not

limited to, provisions for energy efficiency and conservation programs, state energy conservation plans, and federal energy conservation initiatives; and PURPA promotes conservation of energy supplied by electric utilities and has been used to create a market for power from non-utility power producers. Others are somewhat useful but limited by a mandate to promote coal use. For example, PIFU which promotes the development of alternative fuels includes coal as an alterative fuel and encourages the conversion of power plants to coal because one of the goals of the Act is to reduce reliance on imported petroleum. During this period Congress also passed a number of "emergency" delegations of authority to the President, but, these delegations are largely focused on addressing energy shortages and thus not directly applicable to climate change policy. However, the action by Congress during this period exemplifies a model that is not atypical for addressing emergencies or emergency-like situations. Congress enacts appropriate delegations that enable quick action by the President when certain conditions exist.

In addition to congressional action, the Carter administration illustrates two other points. The Carter to Reagan transition, marked by a systematic effort by the Reagan administration to eliminate the policies and programs of the Carter administration, illustrates the fragility of policy implemented by executive order. Finally, as *Independent Gasoline* illustrates, the courts do not always approve of the President's use of unilateral authority even in the context of national security and emergency-like conditions. The courts struck down President Carter's fuel tax program implemented by executive order to lower gasoline consumption. It is not clear if this is a reflection of how the courts view an economic or energy crisis as compared to a military emergency, as notably there was evidence of Congress's intent to prohibit the President's action.

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[1] "Maximum certainty" does not guarantee that any executive order issued by the President would withstand a legal challenge. As set forth carefully in previous sections of this report, there are no bright-line rules and there are a number of other factors that can impact the legality of an executive order, e.g., how it is applied to an individual, whether the delegation is valid, etc. "Maximum certainty" indicates that within this category, the President begins with the assumption of maximum deference by the courts. In addition a delegation indicates support from the legislative branch and reduces the chance that Congress can or will interfere with implementation of the action directed by the executive order (i.e., the existence of the delegation indicates Congress's will, further it would take a veto proof majority of Congress to revoke a delegation). It is essentially one of the strongest starting points for the President to claim authority.

[2] Exec. Order No. 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007) was the last published executive order relating primarily to energy or environmental issues at the time the research was performed.

[3] The Special Committee on National Emergencies and Delegated Emergency Powers, mandated by S.Res. 10 in the 94th Congress, produced various studies during its existence (1972-1976). HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS, CRS REPORT 98-505, at 10 (updated Nov. 13, 2006) (hereinafter "Relyea 2006"). After scrutinizing the United States Code and uncodified statutory emergency powers, the panel identified 470 provisions of federal law which delegated extraordinary authority to the executive in time of national emergency. Not all of them required a declaration of national emergency to be operative, but they were, nevertheless, extraordinary grants. *Id*. at10. These provisions are published as SUMMARY OF STATUTES AND DELEGATING POWERS IN TIME OF WAR OR NATIONAL EMERGENCY, S. REP. NO. 93-549 (1973). This list has probably not changed much in terms of authorities still in effect. However, in terms of additional delegations that have been enacted subsequent to 1973, this list is most likely out-of-date. There

are at least two periods in which numerous emergency delegations were enacted in bulk, i.e., the 1970's when energy shortages and resulting economic problems were a concern and more recently since the 2001 terrorist attacks.

[4] 44 U.S.C. § 1501 et. seq.

[5] *Available at* http://www.archives.gov/federal-register/.

[6] Titles were reviewed for the following terms: Air, Arctic, Atmosphere, Basin, Bioenergy, Coal, Conservation, Coral Reef, Ecosystem, Endangered Species, Energy, Environment/Environmental, Fish/Fisheries, Forest, Gas/Gasoline, Gasohol, Lake/Lakes, Marine, Migratory Birds, Mine/Mines/Mining, Natural beauty, Ocean, Oil, Organisms, Petroleum, Pollution, Recreation, Recycling, River, Sea, Species, Sustainable Development, Waste, Water, Waterfowl, Watershed, Wetlands, and Wildlife.

[7] It is common practice, although not legally required, that the authority under which the executive order is issued is set forth at the beginning of the executive order. However, in some cases authority is cited within the body, in addition to the beginning. We did not collect authorities cited within the body.

[8] Statutory commands, such as delegations that are in the form of "shall" are typically very specific and do not leave a wide berth for executive discretion.

[9] Quite often, the authorities, as cited in the executive orders, did not use a U.S.C. citation or used an outdated U.S.C. citation. So an initial part of the research was to ascertain the correct and up-to-date codification.

[10] The most efficient and comprehensive method for this was to use the keyword search function, and use a Boolean (stringed) search query. From a review of a sampling of the statutes it was determined that the following Boolean query would cast a net wide enough to capture the delegations desired:
(president or administrator or director or secretary) /s (may or deleg! or discret! or author!).
The search query returned an overbroad list of results, but did capture the provisions we were looking for.

[11] *See, e.g.,* Exec. Order No. 11,282, 31 Fed. Reg. 7,663 (May 26, 1966); Exec. Order No. 11,507, 35 Fed. Reg. 2,573 (Feb. 4, 1970); Exec. Order No. 11,752, 38 Fed. Reg. 34,793 (Dec. 17, 1973); Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978).

[12] *See, e.g.,* Exec. Order No. 11,514, 35 Fed. Reg. 4,247 (March 5, 1970); Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

[13] HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 155-159 (2006) (hereinafter "Bruff").

[14] 16 U.S.C. § 431.

[15] On December 1, 1978, President Carter issued proclamations establishing or enlarging 17 national monuments in Alaska. A total of 56 million acres was so designated by these proclamations. *See* Proclamation No. 4611- 4627 (Dec. 1, 1978). Thirteen of these parcels were over a million acres large; the largest was 11 million acres. *Id*.

[16] 40 U.S.C. § 1308 et seq.

[17] Utah Association of Counties v. Bush 316 F.Supp.2d 1172 (D.Utah 2004).

[18] 16 U.S.C. § 431.

[19] *Id*.

[20] Theodore Roosevelt (in office 1901-1909) created the following national monuments (acreage listed in parentheses when known): Chaco Canyon National Monument (10,643.13), Cinder Cone National Monument (5,120), Devil's Tower National Monument (1,152.91), El Morro National Monument (160), Gila Cliff Dwellings National Monuments (160), Grand Canyon I National Monuments (808,120), Lassen Peak National Monument (1,280), Lewis & Clark National Monument (160), Montezuma Castle National Monument (161.39), Mount Olympus National Monument (639,000), Muir Woods National Monument (295), Natural Bridges National Monument (120), Petrified Forest National Monument (60,776.02), Pinnacles National Monument (1,320), Tonto National Monument (640), Tumacacori National Monument (10), and Wheeler National Monument (300). 146 CONG. REC. S7014-01 (2000).

[21] Taft (in office 1909-1913) created the following national monuments (acreage listed in parentheses when known): Big Hole (655.61), Colorado (13,466.21), Devils Postpile (798.46), Gran Quivara (183.77), Lewis and Clark (160), Mount Olympus, Mukuntuweap (Zion) (16,000), Natural Bridges (120), Navajo (360), Oregon Caves (465.80), Petrified Forest, Rainbow Bridges (160), Shoshone Cavern (210), and Sitka (51.25). *Id.*

[22] Wilson (in office 1913-1921) created the following national monuments (acreage listed in parentheses when known): Bandelier (23,352), Cabrillo (0.5), Capulin Mountain (640.42), Casa Grande (480), Dinosaur (80), Gran Quivira, Katmai (1,088,000), Mount Olympus, Mukuntuweap (Zion) (76, 800), Natural Bridges (2,740), Old Kasaan (43), Papago Saguaro (2,050.43), Scotts Bluff (2,503.83), Sieur de Monts (5,000), Walnut Canyon (960), Verendrye (253.04), and Yucca House (10). *Id*.
[23] Harding (in office 1921-1923) created the following national monuments (acreage listed in parentheses when known): Bryce Canyon (7,440), Carlsbad Cave (719.22), Fossil Cycad (320), Hovenweep (285.80), Lehman Caves (593.03), Mound City Group (57), Papago Saguaro (110), Pinnacles, Pipe Spring, and Timpanogos Cave (250). *Id.*
[24] Coolidge (in office 1923-1929) created the following national monuments (acreage listed in parentheses when known): Castale Pinckney (3.50), Chaco Canyon, Chiricahua (3,655.12), Craters of the Moon (22,651.80), Dinosaur, Father Millet Cross (.0074), Fort Marion (Castillo de San Marcos) (18.51), Fort Matanzas (1), Fort Pulaski (20), Glacier Bay (2,560,000), Lava Beds (45,589.92), Meriwether Lewis (50), Pinnacles, Statue of Liberty (2.50), and Wupatki (2,234.10). *Id.*
[25] Hoover (in office 1929-1933) created the following national monuments (acreage listed in parentheses when known): Arched (4,520), Bandelier , Black Canyon of the Gunnison (10,287.95), Colorado, Crater of the Moon, Death Valley (1,601,800), Grand Canyon II (273,145), Great Sand Dunes (35,528.36), Holy Cross (1,392), Katmai, Mount Olympus, Petrified Forest (11,010), Pinnacles, Saguaro (53,510.08), Scotts Bluff , Sunset Crater (3,040), and White Sands (131,486.84). *Id.*
[26] State of Wyoming v. Franke, 58 F.Supp. 890 (D. Wyo. 1945).
[27] 16 U.S.C.A. § 431a.
[28] Harry S. Truman (in office 1945-1953) created the following national monuments (acreage listed in parentheses when known): Aztec Ruins National Monument (1), Channel Island National Monument (25,600), Death Valley National Monument (40), Effigy Mounds National Monument (1,204), Fort Matanzas National Monument (179), Great Sand Dunes National Monument, Hovenweep National Monument (80), Hovenweep National Monument (81), Lava Beds National Monument (211), Muir Woods National Monument (504), and Sitka National Monument (54,30). 146 CONG. REC. S7014-01 (2000).

Dwight D. Eisenhower (in office 1953-1961) created the following national monuments (acreage listed in parentheses when known, a negative number reflects a decrease in the size of a previously created monument): Arches National Monument (-240), Bandelier National Monument (3,600), Black Canyon of the Gunnison National Monument (-470), Cabrillo National Monument (80), Capitol Reef National Monument(3,040), Chesapeake and Ohio Canal National Monument (4,800), Colorado National Monument (-91), Edison Laboratory National Monument (1), Fort Pulaski National Monument, Glacier Bay National Monument (-24,925), Great Sand Dunes National Monument (-8,805), Hovenweep National Monument, and White Sands National Monument (478). *Id.*

John F. Kennedy (in office 1961-1963) created the following national monuments (acreage listed in parentheses when known, a negative number reflects a decrease in the size of a previously created monument): Bandelier National Monument(-1,043), Buck Island Reef National Monument (850), Crater of the Moon National Monument (5,360), Gila Cliff Dwelling National Monument (375), Natural Bridges National Monument (4,916), Russell Cave National Monument (310), Saguaro National Monument (5,360), and Timpanogos Cave National Monument . *Id.*

Lyndon B. Johnson (in office 1963-1969) created the following national monuments (acreage listed in parentheses when known): Arches National Monument (48,943), Capitol Reef National Monument (215,056), Katmai National Monument (54,547), Marble Canyon National Monument (26,080), and Statue of Liberty National Monument (48). *Id.*

Gerald R. Ford (in office 1973-1977) created the following national monuments (acreage listed in parentheses when known): Buck Island National Monument (30) and Cabrillo National Monument (56). *Id.*
[29] Alaska v. Carter, 462 F. Supp. 1155 (D.C. Alaska 1978).
[30] *Id*.
[31] 16 U.S.C. § 3213.
[32] Clinton (in office 1993-2001) created the following national monuments (acreage listed in parentheses when known): Aquafria National Monument(71,100), California Coastal National Monument (acreage unspecified) , Canyon of the Ancients (164,000), Cascade-Siskiyou National Monument (52,000), Grand Canyon-Parashant National Monument (1,014,000), Giant Sequoia National Monument (327,769), Grand Staircase-Escalante National Monument (1,700,000), Hanford Reach National Monument (195,000),

Ironwood Forest National Monument (129,000), and Pinnacles National Monument (7,900). 146 CONG. REC. S7014-01 (2000).
[33] Tulare County v. Bush, 185 F.Supp.2d 18 (2001); *Utah Association of Counties*, 316 F.Supp.2d 1172.
[34] This applies to presidential action through September of 2007.
[35] *Association of Counties*, 316 F.Supp.2d at1183 (emphasis added).
[36] United States v. George S. Bush & Co., 310 U.S.371, 380 (1940).
[37] *Utah Association of Counties,* 316 F.Supp.2d at 1185, n.7.
[38] *Id.* at 1186.
[39] *Id.* at 1176-77.
[40] U.S. CONST. art. IV, § 3.
[41] Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).
[42] For this reason, the improper delegation argument is rarely an issue anymore. *See* Chapter 3 (B) of the Report.
[43] Bruff, *supra* note 13, at 157.
[44] Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285, 95 S.Ct. 438 (1974)
[45] Bruff, *supra* note 13, at 157.
[46] *Id*.
[47] *See* Franklin v. Mass. 505 U.S. 788, 797 (1992); Dalton v. Specter, 511 U.S. 462 (1994).
[48] Bruff, *supra* note 13, at 156-7. It has been suggested that the legislative history behind the Antiquities Act is also a factor. However, Squillace has suggested that the plain language of the delegation, absent the legislative history, has been enough to support a broad construction. The one court case that analyzed the legislative history found that the phrase "objects of historically scientific interest" was intended to expand the President's authority under the Act. However, the plain language of the Act seems to be enough to support a broad construction. Mark Squillace, *The Monumental Legacy of the Antiquities Act*, 37 GA. L. REV. 473, 490-1 (2003) (hereinafter "Squillace").
[49] Cameron v. U.S., 252 U.S. 450, 455-6 (1920).
[50] *Id.*
[51] In addition, the equities of *Cameron* may have also influenced the outcome of the case. Cameron had asserted a mining claim on property that was later brought within the national monument. If the mining claim was valid, the mining right would have survived the designation of the land as a national monument. However, the government had concluded that the mining claim was not valid. *Id.* at 457. The evidence suggests that Cameron used "the mining law to exploit tourists rather than minerals. . . ." Squillace, *supra* note 48 at 490. "Cameron charged [an authorized] toll for access along the trail. . . . When his toll rights expired in 1906, Cameron used numerous strategically-located . . . mining claims along the trail as a pretense for continuing to charge an access fee." *Id.*, at 490-1. If the Court wanted to uphold the government's injunction against Cameron from conducting his "business" on the land, it necessarily needed to either reject his challenge to the President's authority to designate the land as a national monument, or uphold the Secretary of the Interior's decision that Cameron's mining claim was invalid.
[52] Bruff, *supra* note 13, at 156.
[53] *See, e.g., Wyoming v. Franke,* 58 F. Supp. at 895-6 (Probing the reasoning behind the proclamation creating a national monument would constitute "a clear invasion of the legislative and executive domains."). *See also*, Squillace, *supra* note 48, at 499 ("Franke's deferential approach toward reviewing monument proclamations was implicitly affirmed by the United States Supreme Court in Cappaert v. United States.").
[54] 492 F.Supp. 614 (D.D.C. 1980).
[55] THE NEW ENCYCLOPÆDIA BRITANNICA *Petroleum Exporting Countries* 344, INTERNATIONAL *Relations* 876 (15th ed. 2002) (hereinafter "Britannica"). By 1973 members included Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Qatar, Indonesia, Libya, the United Arab Emirates, Algeria, Nigeria, and Ecuador. *Id.* at 344.
[56] *Id.* at 344.
[57] CBC News, *The Price of Oil: Marching to $100?* (July 18, 2007) *available at* http://www.cbc.ca/news/background/oil/ (hereinafter "CBC"); Constance Parten, *Reel to Reel: OPEC Oil Embargo*, (Oct. 16, 3002) *available at* http://dailynightly.msnbc.com/2006/10/real_to_reel_li.html, (hereinafter "Parten"); U.S. Department of State, OPEC *Oil Embargo 1973-1974*, *available at* http://www.state.gov/r/pa/ho/time/dr/96057.htm (hereinafter "Dept. of State").
[58] Dept. of State, *supra* note 57.

[59] Dept. of State, *supra* note 57.
[60] *See, e.g.,* Britannica, *supra* note 55, at 344-5; CBC, *supra* note 57; Dept. of State, *supra* note 57; Benjamin Zycher, *The Concise Encyclopedia of Economics, OPEC,* (2002), *available at* http://www.econlib.org/library/Enc/OPEC.html (hereinafter "Zycher").
[61] Dept. of State, *supra* note 57.
[62] *Id.*
[63] Parten, *supra* note 57 (38.5 cents to a dollar).
[64] CBC, *supra* note 57.
[65] Dept. of State, *supra* note 57 (prices doubled and then quadrupled); Energy Information Administration (EIA), *Annual Oil Market Chronology* available at http://www.eia.doe.gov/cabs/AOMC/Overview.html, (hereinafter "EIA).
[66] EIA, *supra* note 65; CBC, supra note 57.
[67] Parten, *supra* note 57.
[68] The National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (1976), 50 U.S.C.A §§ 1601-1651.
[69] 50 U.SC.A. §§ 1621, 1631.
[70] Proclamation No. 4485 (Feb. 2, 1977) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7433.
[71] Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).
[72] *E.g.,* 16 U.S.C. § 2601 (PURPA reduce reliance on imports).
[73] *E.g., Id.* (PURPA encourage domestic fuel sources).
[74] *E.g.,* 42 U.S.C. § 8301(b) (PIFU).
[75] Pub. L. 94-163, 89 Stat. 871 (1975) (primarily codified at 42 U.S.C. §§ 6201-6422)
[76] *Id.* at § 6201.
[77] 42 U.S.C. §§6231-6247b.
[78] Id. at §§ 6271-6275 (§§ 6276-83 were subsequently added).
[79] Id. at §§ 6291-6309.
[80] Id. at §§ 6321-6327 (§ 6323a was added later).
[81] Id. at §§ 6381-6385.
[82] *Id.* at § 6321 (b).
[83] *Id.* at §§ 8511, 8512.
[84] *Id.* at § 8511.
[85] *Id.* at §8512.
[86]The National Energy Conservation and Policy Act, Pub. L. 95-619, 92 Stat. 3206 (1978), 42 U.S.C. §§ 8201-8287d.
[87] *Id*. at § 8201.
[88] Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, 93 Stat. 757 (1979), 42 U.S.C. §§8501-8541.
[89] 42 U.S.C. § 8501.
[90] *Id.* at § 8511(a) (1).
[91] *Id.* at § 8521.
[92] Pub. L. 95-617, 92 Stat. 3119 (1978), 16 U.S.C. §§ 2602-2708.
[93] 16 U.S.C. § 2611.
[94] *Id.* at § 2601.
[95] *E.g., Id.* at §§ 2642, 2645.
[96] *Id.* at § 2621(d)(9).
[97] *Id.* at § 2621(d)(12).
[98] *Id.* at § 2621(d)(13).
[99] *Id.* at § 2621(d)(11).
[100] Union of Concerned Scientists, *Public Utility Regulatory Policy Act (PURPA*). *available at* http://www.ucsusa.org/clean_energy/clean_energy_policies/public-utility-regulatory-policy-act-purpa.html.
[101] Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat 3174 (1978), formerly codified at 26 U.S.C. § 1.
[102] *Id.*
[103] U.S. CONST. art. I.

[104] Powerplant and Industrial Fuels Act of 1978, Pub. L. No. 95-620; 92 Stat. 3318 (1978), 42 U.S.C. §§ 8301-8484.
[105] 42 U.S.C. § 8301.
[106] *Id.* at §§ 8301-8484. Sections 403 (a) and (b) are found at 42 U.S.C. sec. 8373(a) and (b) respectively.
[107] Exec. Order No. 12,217, 45 Fed. Reg. 41,623 (Jun 18, 1980).
[108] Exec. Order No. 12,437, 48 Fed. Reg. 36,801 (Aug. 11, 1983).
[109] 42 U.S.C. § 8301.
[110] *Id.* at §§ 8321-8824 (exemptions for existing facilities); *Id.* at §§ 8351-8354 (exemptions for new facilities).
[111] *Id.* at §§ 8374. 6202(8).
[112] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§ 301-304, 95 Stat. 3351 (1978), 15 U.S.C. §§ 3361-3364.
[113] 42 U.S.C. §3361(a)(1).
[114] *Id.* at §§ 3362, 3363).
[115] Exec. Order No. 11,969, 42 Fed. Reg. 6,791 (Feb. 2, 1977).
[116] Proclamation No. 4485 (Feb. 2, 1977) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=7433.
[117] In addition to having drastically different policy positions, Ronald Reagan also ran on a platform of curbing government action.
[118] Exec. Order No. 12,287, 46 Fed. Reg. 9,909 (Jan. 28, 1981).
[119] PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 61-63 (2002).
[120] Exec. Order No. 12,553, 51 Fed. Reg. 7,237 (Feb. 25, 1986). The list of executive orders revoked can be found in table format at: http://www.archives.gov/federal-register/codification/executive-orders-18.html.
[121] Proclamation No. 4744, 45 Fed. Reg. 22,862 (Apr. 2, 1980).
[122] 492 F.Supp. 614 (D.D.C. 1980).
[123] Proclamation No. 4,744.
[124] 42 U.S.C. § 6262(a)(1).
[125] *Id.* at § 6261(b).
[126] *Id.* at § 6262(a)(2).
[127] 19 U.S.C. §1862.
[128] *Independent Gasoline,* 492 F.Supp. at 616-18.
[129] *Id.* at 619-20.
[130] *Id.* at 620.

Chapter V. Other Considerations When Determining Whether to Use Executive Orders

A. Other Considerations

Presidents have considered executive orders attractive because they are efficient and simpler than the alternative.[1] For many administrations, the process of promulgating authoritative policies by executive order is much more appealing than the effort needed to move a bill through Congress. Further, it is less complex than the process administrative agencies must undergo to promulgate a regulation. There is no requirement for notice and public participation, and the Supreme Court has held that the President is not covered by the Administrative Procedure Act that applies to other executive agencies.[2] As one legal author points out, "It was largely because of this simplicity and in an effort to avoid the other more standard vehicles for developing policies—and the political disputes that sometimes accompany them—that former Vice President Al Gore's National Performance Review (NPR) recommended that President Clinton should proceed as much as possible by presidential directive rather than by statute or by administrative rulemaking."[3]

However, many legal scholars question the extensive use of executive orders and other executive directives to legislate from the White House.[4] The Constitution set up a three branch system of government and the legislative process is intentionally to be deliberative. Supreme Court Justice Douglas explains this succinctly in the context of the claim of authority to issue an executive order under the auspices of an emergency; the rationale applies to the use of executive orders generally:

> The Congress, as well as the President, is trustee of the national welfare. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as with speed. All executive power-from the reign of ancient kings to the rule of modern dictators-has the outward appearance of efficiency.
>
> Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160: "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the

> exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[5]

The expanded use of executive orders creates a system that bypasses this deliberative process more and more, a deliberative process intended to improve the quality of policy while reinforcing the democratic principles that are central to our chosen form of government. The question arises whether the end justifies the means.[6] As one legal author has framed the issue, "Whether the President should legislate is not really a question of constitutional law but rather one of practical politics and philosophy."[7] Thus, notwithstanding the above debate, there are pragmatic issues to consider.

Executive orders are not a stable vehicle for implementing policy; they can be revoked by subsequent presidents and overridden by Congress. An executive order can be revoked merely by the issuance of a subsequent executive order. As stated by one constitutional scholar: "Presidents who rely on executive orders instead of legislation to form policy are in more jeopardy from their successors than from the courts. What is done by the stroke of the pen can be undone the same way. . . . Thus presidential policy can wobble back and forth along with the nation's electoral fortunes. Amending statutes requires overcoming considerably greater inertia."[8] The transition from the Carter to the Reagan administration, discussed in Chapter 4, is a prime example of the policy swinging that can result. One administration can rapidly dispose of many of its predecessor's policies, organizations, and management practices. The Reagan team was one of the first to make a really systematic process of revoking orders from the previous administration.[9]

For policies that are far reaching and will require significant time to become established, this should be a significant factor to consider when choosing the vehicle for implementation. Because an executive order issued by one president can be so quickly discarded or reversed by the next, policy painstakingly crafted through the legislative process of Congress better serves the public, promoting stability, reliability, and confidence in the law. However, in some cases this consideration can be minimal, for example if the effect desired can be achieved during the term of the issuing President. This issue plays itself out often when the President acts during emergencies or crises. Congress and the courts take a highly deferential approach to the President's actions during crises. However, once the high point of the crisis has passed this deference is rapidly shed. As noted by advocates of executive authority, "such late responses really count for little, since by the time they issue forth, the President could not care less, the crisis having been successfully met."[10] However, one must also consider a response that goes beyond rescinding a particular action and permanently affects the institution of the presidency as discussed below. Thus the executive order can be an effective instrument for quick action in the short term but may not be a reliable instrument as the sole source of authority for long term solutions.

Not only is the longevity of the executive order threatened by subsequent administrations, Congress can override executive action by executive order in three ways:

(1) enacting legislation to overrule the executive order (of course the support of a veto proof majority of Congress would in all likelihood be necessary); (2) withhold appropriations; and (3) refuse to enact legislation to implement the executive order.[11] Further, there could be backlash from Congress in the form of less cooperation with the President on other matters or limiting future executive authority through legislation.[12]

As discussed in Chapter 4, the history of the Antiquities Act[13] illustrates this backlash phenomenon. Twice presidents set aside land by executive order pursuant to legitimate authority from the Antiquities Act but against the express wishes of the states in which the land was located. As a result each of those two states received amendments to the Act from a sympathetic Congress. Today presidents cannot make any designations pursuant to the Antiquities Act of land in Wyoming,[14] or withdrawls of more than 5,000 acres in Alaska without congressional approval.[15] As this case illustrates, even when the President is within his or her authority to take action, without understanding the extent of support or opposition to the measure, the aftermath could include a revocation of the action by Congress or a longer lasting revocation of some facet of executive authority. Subsequent action by Congress could include long lasting consequences for the institution of the presidency.[16]

Finally, but not of minimal consequence, the Executive must consider the impact of unilateral executive action on the day to day operations of the federal government. There are informal relationships, rules and procedures that have developed among institutions over the years, referred to by one author as the "Washington Rules:"

> These rules are not codified anywhere. . . . [T]hese are the understood norms that for many years made it possible for staff people and elected officials to work together even though they had strong institutional, partisan, or even ideological differences. These understandings have long been the warp and woof on which policy is woven and programs function. These rules make it possible for those who lose badly to continue to work with the victors and for institutions to wage pitched battles and yet retain the ability to cooperate with one another.[17]

An example of a process not established by the Constitution or a statute is the executive communication procedure, described in Chapter 2. This practice in which a bill will be introduced to effectuate the President's recommendations is usually followed even when the majority of the House and the President are not of the same political party. When the boundary of authority is overstepped by one branch, whether that boundary is set by law or long standing practice, the other branches will react. One author notes a climate change in recent years resulting in an erosion of the Washington Rules.[18]

Presidents should consider the strategic use of executive orders within this complex political environment.[19] First, one legal author suggests that presidents might not fully exploit use of the executive order during the first year in office in order to maintain some degree of cooperation with Congress in the policy process:

> The president's tenure is extremely short in comparison to the typical member of Congress, who does not face the realities of term limits. Scholars have explained that the first few months of any administration are the most crucial to presidents in pursuing their policy agenda, especially if they hope to achieve policy success in Congress. . . . Traditionally, presidents have a better chance securing policy in Congress during their first year in office rather than the last . . . .[20]

On the other hand, if a policy is popular with the public and Congress has not acted, the use of the executive order can be protected by this popularity. It would be hard for Congress to withhold support or oppose such a policy; in fact, Congress may choose to establish the policy more firmly with legislation subsequent to the executive action. For example, President Kennedy initially established the Peace Corps by executive order.[21] He relied on general language in the Mutual Security Act of 1954 that made no reference to the establishment of such an entity. Within the next year Congress passed the Peace Corps Act.[22] President Kennedy subsequently issued a new executive order under the authority of the newly enacted statute.[23] Thus, if time is of the essence or action by Congress does not seem forthcoming, the executive order can be used to initiate a policy and allow the President to subsequently work with Congress to have the policy more firmly established by legislation.

B. Presidential Philosophy: The Taft-Roosevelt-Roosevelt Continuum[24]

The scope of the President's power to legislate has been debated in literature, in the courts, and in practice. Different presidents have held different understandings of their role and authority.[25] The scope of presidential power may be influenced by the President's philosophy more than any other factor. Article II of the Constitution delineates the President's duties and authority but it is vague and therefore subject to a broad range of interpretation. Section 1 of Article II begins with: "The executive power shall be vested in a President of the United States of America." This could be read as merely conferring a title or as assigning a broad set of powers.[26] Section 3 of Article II includes the provision that the President "take care that the laws be faithfully executed." A close reading of the Constitution takes this to mean only that the President has the duty to obey Congress. A broad reading construes this clause as giving the President the power to make laws.[27]

The range of interpretations can be characterized by three presidents. William Howard Taft had the closest reading of the Constitution, believing that it allowed the President to do only those things which had been explicitly laid out in the Constitution or explicitly given to him by Congress. Theodore Roosevelt had a broader interpretation. He believed that as the steward of the people he had the power to do whatever was necessary to promote the public interest so long as it had not been forbidden by the Constitution or Congress, and he exerted his authority in a moderate fashion relative to some later presidents. Franklin Delano Roosevelt's administration has been associated with the most expansive philosophy of executive authority,[28] often summarized by the following: "In the event that Congress should fail to act, and act adequately, I shall accept

the responsibility, and I will act."[29] Although in theory, Franklin Roosevelt's interpretation of presidential authority is the most expansive, in action, he appeared to operate within the legal boundaries as expressed by Theodore Roosevelt. However, he was operating under very different circumstances than the previous Roosevelt and wielded the tools of leadership in a more assertive manner.

Part B proceeds chronologically, addressing the administrations of Theodore Roosevelt, Taft, and then Franklin Roosevelt, exploring their philosophies, describing the legal basis for their philosophies, and providing examples of how they put their philosophies into practice. A model for navigating national crisis is extracted from a review of Franklin Roosevelt's administration. The model is centered on the expansion of executive authority through statutory delegations and the aggressive use of those delegations to meet the demands of the crisis that require undelayed action by executive order.

1. Theodore Roosevelt (1901-1909)

Just before Theodore Roosevelt took office in 1901, there had been a large population expansion. Immigration to the United States caused the population to almost double between 1870 and 1900. The result was noticeably polluted, overcrowded cities. The economic disparity between the upper and lower classes increased. Big businesses dominated the political scene. This population expansion had become a conspicuous problem and by the turn of the century Americans wanted it curtailed.[30]

Roosevelt was perceived as charismatic and ready to affect change. Playing up to the public sentiment against big business, Roosevelt was able to advance widespread conservation. He promoted the idea that forests and mines were resources that belonged to the people, and that they were limited. In part, by capitalizing on the fear that greedy big business was squandering the remainder of the nation's resources,[31] he was able to push conservationist policy, expanding the legislative power of the presidency in the process.

a. The Stewardship Theory: Duty to Act in the Public Interest. Theodore Roosevelt believed that as President, he was a steward of the people and it was his responsibility to improve their situation. In his "Notes for a Possible Autobiography," he wrote, "My view was that every Executive Officer . . . was a steward of the people bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin. . . . My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or its laws."[32] In order to fulfill this responsibility, he expanded the use of executive authority beyond the boundary created by his predecessors. Stated in his own words, "Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of departments. I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by a direct

constitutional or legislative prohibition."[33] Roosevelt's philosophical belief was that it was his presidential duty to use executive authority as much as was necessary to promote the public interest, so long as he did not do anything prohibited by the Constitution or congressional legislation. He believed that great leaders did not shy away from their power, but rather used it to lead.

Article II, Section 3 of the Constitution includes the provision that the President "take care that the laws be faithfully executed." Roosevelt interpreted this clause as authorizing him to enforce the laws in general, not just to implement specific directives of Congress.[34] This interpretation turns the duty to "take care" into the power to make laws. Roosevelt's philosophical belief had its legal basis in the idea that the President is the official most representative of the people because he or she is the only official for which all the people may vote. Congressmen and senators are elected by a subsection of Americans, people living in their states or districts. As the only representative of all the people, the President may use his or her discretion to decide what is necessary to "take care that the laws be faithfully executed," as long as it is not forbidden by the Constitution or Congress.

b. Limited Only by Explicit Prohibitions. In practice, Roosevelt pushed the boundaries of his authority. In 1862, Congress passed the Homestead Act, opening undeveloped land in the American west for settlement.[35] In the Act of February 11, 1897,[36] Congress declared all public lands containing petroleum or other minerals to be "free and open to occupation, exploration, and purchase by citizens of the United States." Through executive orders and proclamations, Roosevelt closed parts of this land from settlement and mining. By 1910, there had been issued 99 executive orders establishing or enlarging Indian Reservations;[37] 109 executive orders establishing or enlarging military reservations; and 44 executive orders establishing bird reserves.[38] Concerning these withdrawals, in upholding an executive order, the Supreme Court wrote:

> In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law, or by virtue of any general or special statutory authority. For it is to be specially noted that there was no act of Congress providing for bird reserves or for these Indian reservations. There was no law for the establishment of these military reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated.[39]

Neither the Constitution nor Congress had explicitly given Roosevelt the authority to withdraw these lands from settlement, in fact a statute declared these lands generally to be open, but they had not specifically forbidden him from making these reservations. Roosevelt's philosophy was to do as much as he could for the common good so long as it was not *forbidden* by the Constitution or Congress. He believed that withdrawing land from settlement was in the public's best interest given the problems caused by the recent population expansion. In *U.S. v. Midwest Oil Company*, the Supreme Court agreed:

> But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory, purposes.[40]

Thus there was some Supreme Court support for Roosevelt's expansion of power. As noted by two legal authors, Fleishman and Aufses, "By requiring specific prohibition against, rather than specific authorization for, executive action, *Midwest Oil* moved the Court close to an acceptance of Theodore Roosevelt's stewardship theory."[41] There was also some congressional support for presidential land withdrawals. Not only did Congress not disaffirm the land reservations but in a few cases they also supported it financially. Fleishman and Aufses point out, "the action of the President in making the reservations had been indirectly approved by Congress by appropriating moneys for the construction or fortifications and other public works upon them, and that the reservations embraced lands upon which public buildings had been erected."[42] The Court relied, in part, on this congressional acquiescence to executive action in affirming the President's authority, something repeated in other reviews by the Court of executive authority.

c. Broad Interpretations of Delegations. Roosevelt's philosophy of doing all that is necessary to promote the public interest, so long as it is not forbidden, leads to broad interpretations of congressional delegations. During Roosevelt's administration, Congress passed the Antiquities Act as a way of preserving prehistoric antiquities in the Southwest.[43] The Act was originally motivated by a desire to prevent private collectors from removing Indian artifacts.[44] However, the language ultimately passed in the Act was much broader. The President is authorized to reserve as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" that are situated upon the lands owned or controlled by the Government of the United States.[45] Roosevelt first used the Act to make Devils Tower, Wyoming a national monument. Devils Tower is a natural geological feature, and thus an object of "scientific interest," but it would not be considered an Indian artifact. He went on to create many other national monuments that had no ties to Indian artifacts. Thus Roosevelt's interpretation of the Act was that the coverage was not limited by the original motivation for the Act. Further, although the Act requires the President to

preserve only the "smallest area compatible with the proper care and management of the objects to be protected," in 1908 Roosevelt proclaimed more than 800,000 acres of the Grand Canyon to be a national monument. Thus the size limitation was interpreted very broadly. Despite Roosevelt's broad interpretation of the Antiquities Act, Congress never challenged him. With his broad interpretation and the subsequent congressional acquiescence, Roosevelt paved the way for future presidents to use the Act even more broadly. This is discussed in Chapter 4. A president's expansive interpretation and use of a delegation, combined with congressional acquiescence and the passage of time can permanently enlarge presidential power.

2. William H. Taft (1909-1913)

Theodore Roosevelt elected to not run for a third term. Although, typically such a move creates a lame-duck president, this was not the case with Roosevelt as he had been a very popular president; rather it freed him to be even more expansive with his powers. As his successor, Taft worried that use of this expanded power would diminish his popularity. He was perceived as lacking Roosevelt's charisma and rapport with the people. This manifested itself at the mid-term election when the majority in Congress shifted from the Republicans (Taft and Roosevelt's party) to the Democrats. Taft embraced the opportunity to rein in the power Roosevelt had been trying to expand. In *Ethics in Service*, Taft wrote: "It may be good for a country to have an occasional rest from legislation, to let it digest what reformers have already gotten on its statute book, and the period when the President differs from Congress offers such an opportunity for test and rest."[46] For Taft, a lack of action was a welcome respite.

a. The Constitutional Theory: Limited to Explicit Grants of Authority. Taft believed that presidents only had the powers that were explicitly given to them by the Constitution and Congress. He wrote: "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grants must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof."[47]

Taft's view of presidential authority is sometimes called the constitutional theory because it is based in a close reading of the Constitution. Article II of the Constitution enumerates the President's powers. Taft believed that the President must be able to justify his actions on the basis of these powers or by an act of Congress. In *Our Chief Magistrate and His Powers*, Taft wrote that the only legislative power given to the President by the Constitution is veto power.[48] So unlike Roosevelt, Taft did not interpret his duty to "take care that the laws be faithfully executed" to mean that he could create laws. Rather, he read it as only authorizing the President to obey Congress. He believed that any legislative authority, other than the power to veto, must be given to the President by Congress.

Taft also thought that presidents should not interpret the Constitution or acts of Congress broadly. When confronted with a situation in which he was unsure of whether

he had a certain power and to what extent he could use it, Taft sent a message to Congress asking them to clarify the boundary of his powers rather than to risk a broad interpretation.[49]

b. Lack of an Explicit Prohibition Not Sufficient to Support Presidential Action. In practice, Taft restricted his use of legislative power. At the beginning of his presidency, Taft continued Roosevelt's policy of withdrawing land from settlement. But unlike Roosevelt, he was uncomfortable doing it. He wrote, "President Roosevelt had exercised the power to withdraw lands, which were open for settlement under an act of Congress, from the operation of the act, and in which course I had followed him with very considerable doubt as to my power."[50] Taft doubted his authority to make such withdrawals despite the fact that Congress had acquiesced to his and Roosevelt's use of this power. Up to this point, Congress had never repudiated use of this power by presidents or sought to overturn any of the orders withdrawing the land. Reports from a Senate committee show that the majority of senators thought he had this authority without additional legislation.[51] But because of his doubts, Taft sent a message to Congress on January 14, 1910, in which he said:

> The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land the disposition of which under such statutes would be detrimental to the public interest is not clear or satisfactory. This power has been exercised in the interest of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawls that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise. . . . I earnestly recommend that all the suggestions which he [the Secretary of the Interior] has made with respect to these lands shall be embodied in statutes, and, especially, that the withdrawls already made shall be validated so far as necessary, and that the authority of the Secretary of the Interior to withdraw lands for the purpose of submitting recommendations as to future dispositions of them where new legislation is needed shall be made complete and unquestioned.[52]

Taft felt uncomfortable using power that had not explicitly been given to him. It becomes clear from Taft's term as a U.S. Supreme Court Justice that he was not opposed to presidential legislative power per se; his objection was to the President asserting legislative power that had not been explicitly provided to him by the Constitution or Congress.[53] Taft, therefore, asked Congress to validate his actions and to explicitly give him the power he and Roosevelt had been using.

In response to Taft's message, a bill passed through the House of Representatives providing for withdrawals under certain conditions and providing that "all withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act."[54] This bill would have given Taft exactly what he had asked. Unfortunately, the bill failed to pass the Senate. The Act of June 25, 1910[55] adopted the bill in a modified form which did not validate past presidential withdrawals.[56] This statute explicitly gave Taft the power he had been using and outlined its limits:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time, in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the district of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.[57]

However, it failed to explicitly validate, or invalidate, past actions. Section 2 specifically states: "[T]his act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act." [58]

c. Past Practice and Congressional Acquiescence Form the Basis for a Power Not Explicitly Granted. Roosevelt had been willing to interpret the Constitution and acts of Congress broadly. He felt empowered by the people to use his discretion to make laws. Taft did not. Taft's philosophy did not just confine him to the limits of authority set by his predecessor but caused him to tighten those limits. But before he had tightened those limits, on September 27, 1909, in the first year of his presidency, uncertain as to his authority, he withdrew from public acquisition land in California and Wyoming containing petroleum.

In the Act of February 11, 1897,[59] Congress declared all public lands containing petroleum or other mineral oils, and chiefly valuable therefore, to be "free and open to occupation, exploration, and purchase by citizens of the United States . . . under regulations prescribed by law."[60] The Act allowed people to explore and find lands containing oil and other valuable minerals at no cost and to acquire the title to such land for a minimal fee. Many Americans made use of this statute, resulting in rapid oil extraction. On September 17, 1909, the Director of the Geological Survey reported that given the limited supply of oil in the United States, it would "be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the government will be obliged to repurchase the very oil that it has practically given away. . . ." "In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the government's own use . . . ." and "pending the enactment of

adequate legislation on this subject, the filing of claims to oil lands in the state of California should be suspended."[61]

The Director of the Geological Survey's report prompted Taft to issue a proclamation on September 27, 1909, withdrawing 3,041,000 acres of land in California and Wyoming from "all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws" in aid of proposed legislation.[62] Six months after Taft's proclamation was published, William T. Henshaw and others discovered oil in a section of the public land withdrawn by Taft's proclamation. On May 4, 1910, they filed a location certificate and subsequently extracted 50,000 barrels of oil from this land. The U.S. Government filed a bill in equity against the Midwest Oil Company seeking to recover the land and to obtain an accounting for the oil alleged to have been illegally extracted. The case made its way to the Supreme Court.[63]

The Government argued that "the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties."[64] The appellees argued that:

> [T]here is no dispensing power in the Executive, and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They further insist that the withdrawal order is absolutely void, since it appears on its face to be a mere attempt to suspend a statute—supposed to be unwise—in order to allow Congress to pass another more in accordance with what the Executive thought to be in the public interest.[65]

Since Taft's proclamation was issued before the Act of June 25, 1910, the Act did not give congressional assent to the President's withdrawal. Thus, *U.S. v. Midwest Oil Co*. presented to the Supreme Court the issue of whether the President had the authority to make the withdrawal prior to explicitly being given the authority by Congress.

Despite Taft's worry that he had overstepped the bounds of his true authority, the Supreme Court ruled in favor of the President:

> Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest. Considering the size of the tracts affected and the length of time they remained in force, without objection, these orders by which islands, isolated tracts, coal, phosphate, and oil lands were withdrawn in aid of legislation, furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw.[66]

The Court concluded that, "the long-continued practice, the acquiescence of Congress, as well as the decisions of the courts, all show that the President had the power to make the order."[67] *Midwest Oil* illustrates that Taft had a stricter reading of the Constitution than even the Supreme Court. Taft felt that he only had the authority to do something if the Constitution or an act of Congress specifically gave him the power to do it. The Supreme Court held that "the long-continued practice" and "the acquiescence of Congress" was enough to validate a specific presidential action not explicitly granted. This case establishes that an explicit grant of authority is not required for presidential action. In this case, the lack of a specific prohibition to reserve federal land, in light of a general statutory policy to open that land, left an opening for presidential action taken for the public good. Congressional acquiescence to this action solidified this executive power for future presidents.

3. Franklin Delano Roosevelt (1933-1945)

Franklin Delano Roosevelt took office 20 years after Taft. His presidency began in the middle of the Great Depression and he felt that as the elected representative of the people it was his duty to pull the country out of it. To accomplish this task, he pushed for radical legislation, expanding his authority in the process. Winning his second term of office in a landslide election gave him the confidence to push the boundaries of his power even further, causing him to clash with the Supreme Court. During his second term of office, World War II broke out. His presidency came at a time when the nation was in great need of strong leadership. He successfully navigated the country out of the Great Depression and through World War II. Throughout his presidency he was cloaked in wild popularity and has historically been seen as one of the greatest U.S. presidents. During his administration numerous delegations of authority to the executive branch were passed by Congress, and Roosevelet actively applied them. Similar to Theodore Roosevelt, Franklin Roosevelt believed that a great president required the use of great power and justified his philosophy with the fact that he was the elected representative of the people and had the support of the people behind him.

a. Stewardship in Emergency Conditions: Philosophy Influenced by Circumstances. Franklin Roosevelt's philosophy can be seen as a further extension of Theodore Roosevelt's stewardship concept. In addition to acting when Congress or the Constitution have not explicitly forbidden action, he aggressively sought and achieved an expansion of authority by obtaining from an amenable Congress additional and broad statutory delegations. Roosevelt saw President Wilson's use of presidential decrees to take the nation through World War I as a model for mobilizing, not only to meet the military side of national emergencies, but also the economic dimensions.[68] He intended to attack the depression as if it were a military invader. If Congress would not do what was necessary to repel the "invader" than he would do it himself:

> But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure . . . and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront

> me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.[69]

Pursuant to this philosophy, he did not shy away from acting first and seeking congressional approval later.[70]

Franklin Roosevelt's philosophy has been connected with the presidential prerogative theory of executive action.[71] This theory is based on a statement made by John Locke: "He that will look into the history of England will find that the prerogative was always largest in the hands of our wisest and best princes."[72] Technically the prerogative theory is the idea that the Chief Executive is not limited to delegations of authority from the Constitution or statutes, thus it does not apply to Franklin Roosevelt's strategy to obtain authority through increased delegations. However, Roosevelt did successfully expand executive authority and substantial discretionary authority through congressional delegations and used this power aggressively; thus in some sense his strategy was consistent with the prerogative philosophy. The prerogative theory of executive action has been described, in basic terms, as the power of the President to act at his discretion for the public good without explicit legal authority—sometimes even in violation of a law which the President believes impinges upon the common good. This philosophy can be gleaned, in part, from Roosevelt's statements. In an address to Congress, Roosevelt summed up his philosophy as follows: "In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."[73] However, in terms of ignoring statutes, there was little need to put this to the test; Congress seemed as though it could not wait to adopt the adminstration's bills.[74]

b. Authority for Executive Orders Based on Statutory Delegations. Franklin Roosevelt used executive orders more frequently than any other president.[75] He used executive orders to establish or enlarge animal refuges and national forests to a far greater extent than any president before him. He also used executive orders to create revolutionary policy. He promoted civil rights by declaring a national policy of nondiscrimination in hiring for government and defense industries[76] and he created economic controls by establishing an Office of Price Administration[77] and an Office of Economic Stabilization[78] and giving them broad authority to regulate prices, wages, and profits.[79] His most progressive executive orders were supported by acts of Congress. For example, on March 6, 1933, Roosevelt proclaimed the Bank Holiday in an effort to curb the Great Depression. Rather than relying solely upon "inherent powers" or powers given to him by the Constitution, Roosevelt had Congress give him the authority to declare the holiday (albeit after the fact).[80]

Franklin Roosevelt issued several executive orders authorizing the seizure of privately owned businesses. For example, on November 1, 1943, Roosevelt issued an executive order authorizing the Secretary of the Interior to take possession and operation of coal mines which had stopped production due to a strike.[81] It may seem like a radical expansion of power for the President to take control of a private business. However, he

did so under the authorization of the War Labor Disputes Act.[82] In fact, by 1939 there were 99 separate statutory grants by Congress of emergency or war-time executive powers.[83] Roosevelt consistently used these grants of power to issue executive orders.

In *Youngstown Sheet and Tube Co. et al. v. Sawyer,* the Supreme Court found that Franklin Roosevelt's successor, Harry Truman, had issued an executive order directing the Secretary of Commerce to take possession and operation of certain steel companies, which had stopped production due to a strike, without authorization from either Congress or the Constitution.[84] The Solicitor General argued that Franklin Roosevelt had set a precedent which gave the President the inherent power to seize companies whose production had stopped due to a strike when their product was essential to the war effort. In particular, he cited Roosevelt's seizure of June 9, 1941, of the California plant of the North American Aviation Company. The Supreme Court declared that, "Its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure."[85] The key distinction between the executive orders was that Roosevelt's relied on explicit congressional authorization. The Selective Service Act of 1940 authorized the President to protect government property by seizure.[86] The North American Aviation Company's plant contained government-owned machinery, material and goods. The steel companies, whose seizure Truman had authorized, did not contain any government property and therefore the Selective Service Act could not provide him with authority. The Supreme Court characterized Roosevelt's executive orders and proclamations as relying "steadily on legislation to empower him."[87]

The strongest basis for the expansion of presidential power is by having Congress delegate new authority to the executive. This appears to be Franklin Roosevelt's preferred method of obtaining the powers he sought and he was aided by a very supportive Congress. Key to the success of this strategy were a number of factors: he was very popular with the general public; he had a unified government (i.e., Congress was controlled by the same political party); and the country was undergoing two of the greatest traumas in its history during his term, an economic depression and then World War II. Both in terms of navigating the economic depression and the war, he relied heavily on statutory delegations as a source of authority for issuing executive orders and the philosophy that executive action should be used aggressively to conquer both economic and military emergencies.

c. Authority Reined In by the Courts. Franklin Roosevelt's expansion of legislative authority was aided by a very supportive Congress. In fact, Congress went so far as to pass a law that delegated more authority than constitutionally permitted and even authority it did not have. In response to the Great Depression, Congress passed the National Recovery Act (NRA).[88] The NRA gave the President the new power to regulate business in order to promote fair competition, create jobs for unemployed workers, and stimulate the economy. Franklin Roosevelt's first clash with the Supreme Court came in May 1935, when the Court unanimously ruled that the NRA "infringed upon states' authority, unreasonably stretched the Commerce Clause, and gave legislative powers to

the executive branch in violation of the Nondelegation doctrine."[89] The Court found that Congress had overstepped its ability to give power to the President:

> The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Company Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.[90]

The Supreme Court's decision against the NRA hinged on the ambiguity of the term "fair competition." The Court ascertained that Congress did not impose clear limits on the power it delegated nor did it provide standards adequate to guide the President: "In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."[91] Moreover, the Court ruled that the power they tried to delegate did not belong to Congress: "If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void."[92]

That same day, May 27, 1935, the Supreme Court unanimously overturned the Frazier-Lemke Act, an act that provided relief for farm debtors, because it was in contravention of the Tenth Amendment to the Constitution,[93] and reversed Roosevelt's dismissal of William E. Humphrey from the Federal Trade Commission because he did not have the authority to dismiss Humphrey without showing just cause. The Court's actions prompted Roosevelt to publicly denounce the Supreme Court for taking the country back to a "horse and buggy" concept of interstate commerce.[94]

d. Advancing Policies Opposed by the Supreme Court and Congress. Subsequent to the Supreme Court rulings reining in executive authority, Roosevelt drafted a bill proposing an amendment to the U.S. Constitution that would reform the Supreme Court by giving the President the authority to name one new judge for every incumbent over the age of 70 who had been on the bench for at least 10 years and had not resigned. Had the bill passed, it would have allowed Roosevelt to appoint six new justices immediately. As noted author Merlo Pusey writes: "The President represented

his bill as a reform aimed at correcting injustice and relieving the court of congestion. His inference was that aged justices on the Supreme Court bench were keeping their calendar clear by rejecting an excessive number of petitions for review—a charge that almost every lawyer knew to be false."[95] Legislators were shocked by Roosevelt's audacity but because of the President's rapport with them, they immediately supported the bill.[96] If not for the intervention of the Chief Justice in the form of a letter setting forth the implications of the bill, it may have passed.[97]

Roosevelt was also not opposed to using legitimate executive authority to circumvent Congress, when he viewed this action in the public's interest. On March 15, 1943, Franklin Roosevelt created the Jackson Hole National Monument in Wyoming by Proclamation No. 2578, against the explicit wishes of Congress. John D. Rockefeller, Jr. had acquired land in Wyoming and wished to add it to Grand Teton National Park. Congress refused to authorize this park expansion, so Franklin Roosevelt used the Antiquities Act to circumvent them. This use of executive authority was held valid by the Federal District Court for Wyoming.[98] This prompted the first congressional challenge to a president's use of the Antiquities Act. In 1944, Congress passed a bill abolishing Jackson Hole National Monument, but Roosevelt vetoed the bill. After Roosevelt's term, however, Congress placed restrictions on the use of the Act for withdrawals in Wyoming. This is discussed in Chapter 4.

e. The FDR Model: Can It Be Duplicated? Franklin Roosevelt's administration is considered a success by almost any standard. An overview of Roosevelt's use of executive authority to implement policy and steward the country though crisis includes: (1) aggressive use of executive authority, such as executive orders; (2) reliance on the strongest basis for authority to the maximum extent possible (i.e., operating under statutory delegations to the greatest extent possible); (3) expansion of executive authority as necessary to meet the demands of the public interest (i.e., obtaining new delegations to address circumstances that require undelayed action); and (4) a willingness to promote the public good in the face opposition. It should not be overlooked that when President Roosevelt overstepped the bounds of executive authority and was challenged he was restrained by the courts and when Congress did not approve of his action that institution also stepped in.

An important component of the "FDR model" is that he primarily relied upon statutory delegations as authority for his executive orders and worked for, and was quite successful in obtaining, new statutory delegations to support other action where necessary. Action taken in this manner is done so under the strongest basis of authority. However, he had broad support by both the public and Congress which probably accounts for much of his success in obtaining the necessary delegations.

Party composition in the legislative branch influences the policy behavior of the White House.[99] While conventional wisdom leads to the conclusion that the President would use unilateral action more frequently when the opposing party composes either one or both houses of Congress to avoid expected stalemates, the statistical results lead to the conclusion that presidents issue more orders when they are successful in achieving their

policy goals in Congress.[100] That is, on average they issue more policy executive orders during unified government.[101] The President has a better chance of using his executive order authority when Congress is controlled by the same party, when the party in control of Congress is more willing to give the President greater autonomy to exercise his unilateral powers. Whereas, resistance of a divided government does not come only in legislation but is also directed against attempts by chief executives to invoke their unilateral policy tools to circumvent Congress.

Although Franklin Roosevelt relied on statutory delegations to support his actions, it should be noted that while a statutory delegation gives the President a new power, in many cases it also has the effect of limiting what the President is able to do under certain circumstances. Once a delegation is passed it can include prohibitions on certain actions or essentially cover the field in terms of specifically delineating the boundaries of the President's new authority. While the delegations put the President on more certain legal footing when he or she is acting pursuant to the delegation, they also limit the President's authority in terms of filling in gray areas where Congress has not spoken.

For example, in 1947, Congress passed the Labor Management Relations Act, better known as the Taft-Hartley Act.[102] In the event of an emergency, the Act authorizes the President to intervene when an actual or threatened strike is affecting an industry that is central to the war effort. The President is allowed to appoint a board of inquiry, negotiate, and call for a 60-day cooling off period after which he can make recommendations to Congress. Conspicuously missing from the Act, is an authorization for the President to seize the affected industry. The result of the Act, was that seizure could not be resorted to without specific congressional authorization. The Chairman of the Senate Committee sponsoring the bill made it clear that their omission to include seizure as a power of the President was deliberate:

> We did not feel that we should put into law, as part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment though such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.
>
> We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose.
>
> I have had in mind drafting such a bill, giving power to seize the plants, and other necessary facilities, to seize the unions, their money, and their

> treasury, and requisition trucks and other equipment; in fact to do everything that the British did in their general strike of 1926. But while such a bill might be prepared, I should be unwilling to place such a law on the books until we actually face such an emergency, and Congress applies the remedy for the particular emergency only. Eighty days will provide plenty of time within which to consider the possibility of what should be done; and we believe very strongly that there should not be anything in this law which prohibits finally the right to stike.[103]

The Taft-Hartley Act, and the debate around it, illustrated that Congress had expressed its will about the President's power to seize industry in an emergency. When the Supreme Court ruled against Truman in the *Youngstown* case, they did so in part because Truman was acting in an area that was no longer gray. He seized an industry after Congress clearly expressed that he did not have the authority to make such a seizure.

From 1939 to 1973, Congress has almost quintupled the number of statutes addressing presidential action in various emergency circumstances, from 99 statutory delegations in 1939[104] to 470 in 1973.[105] Succinctly stated in a report by Congressional Research Services:

> The development, exercise, and regulation of emergency powers, from the days of the Continental Congress to the present, reflect at least one highly discernable trend: those authorities available to the executive in time of national crisis or exigency have, since the time of the Lincoln Administration, come to be increasingly rooted in statutory law. The discretion available to a Civil War President in his exercise of emergency power has been harnessed, to a considerable extent, in the contemporary period.[106]

Thus, presidents today have more authority based in statutory delegations, but far less room in which Congress has not spoken.

4. Conclusions

Part B of this chapter illustrates the extent to which presidential philosophy influences the use and boundaries of executive action. President Taft had the most conservative position. He believed that presidents only had the powers that were explicitly granted by the Constitution and Congress. His philosophy and understanding of executive authority were more restrictive than the actual legal boundaries and his use of executive authority was the most restricted. Theodore Roosevelt exemplifies a moderate position. He had a more expansive understanding of executive authority. He believed that presidents have an affirmative duty to pursue the common well-being unless prevented by a direct constitutional or legislative prohibition. Under his understanding a president does not need specific authorization for executive action. This led to broad interpretations of statutory delegations and in the arena of federal land preservation the power to reserve land without an explicit grant of authority and in light of a congressional

policy to open the land for mining or homesteading. His use of executive orders and proclamations to withdraw land for the public good paved the way for more expansive use of presidential action to preserve public lands in subsequent administrations.

Supreme Court decisions tend to support Theodore Roosevelt's stewardship theory. Fleishman and Aufses write that the courts "have consistently invoked the narrow 'constitutional theory' of President Taft, yet have often been both generous and ingenous in finding sources of authority for executive action."[107] They go on to note: "[T]he courts have encouraged presidential legislation by refusing to overturn either congressional delegations or executive orders. What has emerged is a pattern of judicial deference to presidential actions. . . [E]xcept for the most extreme cases, they tend to avoid confrontations."[108] A president does not need to adhere to as strict a reading of the Constitution as Taft did in order to be affirmed by the courts.

Adhering to a close reading of the Constitution, as Taft did, prompts little resistance from Congress or the courts. However, it does not allow a president to effect much change in policy. To make great change, a president can go to the broader end of the spectrum. Franklin Roosevelt's administration exemplifies the most expansive philosophy regarding use of executive authority. It is an extension of Theodore Roosevelt's stewardship theory. Franklin Roosevelt aggressively sought expansion of executive authority by obtaining additional statutory delegations and actively used statutory delegations as authority for executive action to "attack" economic crisis and military foes. The success of his administration was to some extent circumstantial, due to a supportive Congress, popularity with the people, and historical situations that instilled in the nation a sense of urgency. However, it is not improbable that one or more of these circumstances would again present themselves, especially in light of recent scientific findings regarding the implications of climate change and the growing consensus as to the urgency of the problem.

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[1] PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 17 (2002) (hereinafter "Cooper"); ADAM L. WARBER, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE 14-15 (2006) (hereinafter "Warber").

[2] Cooper, *supra* note 1, at 17.

[3] *Id*. (endnotes omitted).

[4] *E.g*., *id*., *supra* note 1 (each chapter includes a section discussing the problems posed by various types of executive directives), at 70-80 (discusses potential dangers of governance by executive order), at 231-243 (discusses the "dangers of power tools" generally); William D. Neighbors, *Presidential Legislation by Executive Order,* 37 U. COLO. L. REV. 105, 117-118 (1964) (hereinafter "Neighbors"); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 161 (2006) (hereinafter "Bruff"); HUGH C. KEENAN, EXECUTIVE ORDERS: A BRIEF HISTORY OF THEIR USE AND THE PRESIDENT'S POWER TO ISSUE THEM, CRS REPORT 13-17 (revised February 26, 1974 by Grover S. Williams) (hereinafter "Keenan").

[5] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Douglas, J., concurring).

[6] Some of the most important policy moves in our history, both good and bad, were created by executive order. As an example of the bad: executive orders were used to engineer the Tea Pot Dome debacle, executive orders launched the ill-fated loyalty security program, and national security directives supported the Iran-contra imbroglio. Cooper, *supra* note 1, at 8.

[7] Neighbors, *supra* note 4, at 117.
[8] Bruff, *supra* note 4, at 161.
[9] In addition to having drastically different policy positions than his predecessor, Ronald Reagan also ran on a platform of curbing government action.
[10] Cooper, *supra* note 1, at 12-13.
[11] Neighbors, *supra* note 4, at 114.
[12] *See also* Cooper, *supra* note 1, at12-13 (discusses post crisis backlash).
[13] 16 U.S.C. § 431.
[14] *Id.* at § 431a.
[15] *Id.* at § 3213.
[16] *See, e.g.,* Cooper, *supra* note 1, at 13.
[17] *Id.* at 3.
[18] *Id.* at 3. *See also id.* at 70, 72-75 (the use of executive orders can create or exacerbate interbranch or intergovernmental tensions).
[19] Warber, *supra* note 1, is the first book to examine the policy content of every published executive order since March 1936 rather than relying on a sample of directives. The author explores "the multiple dimensions of executive orders, rather than merely analyzing the number issued each year" and seeks to "develop a greater understanding about the broad contours of presidential powers." *Id.* at 25-6. In Chapter 3 the book explores some key elements in the political environment that might influence the President's executive order activity. In addition to the point in tenure, it looks at the correlation of use with the impact of divided government, major scandals, and election years. *Id.* at 63-76.
[20] *Id.* at 71 (references omitted). In regard to other points in the President's tenure, executive orders allow the chief executive to further build a policy record, to help their party during an upcoming election or to enhance their own policy legacy. The White House might also use executive orders during the last year of the President's tenure to pursue some of the policies that the President failed to convince Congress to adopt into law. *Id.*
[21] Exec. Order No. 10,924, 26 Fed. Reg. 1,789 (March 1, 1961).
[22] Pub. L. No. 95-331, 75 Sat. 612, (1978), as amended and codified at 22 U.S.C. §§ 2501-2523.
[23] Exec. Order No. 11,603, 36 Fed. Reg. 12,675 (June 30, 1971).
[24] Part B is largely from an unpublished article by Katherine Peters, Professional Research Associate, Center for Energy and Environmental Security (CEES).
[25] Cooper, *supra* note 1, at 4.
[26] Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 9 (1976) (hereinafter "Fleishman & Aufses").
[27] *Id.* at 12-13.
[28] One legal author associates Franklin Roosevelt with the "presidential prerogative theory of executive action." Basically, that the President has the power to act at his discretion for the public good without explicit legal authority—sometimes even in violation of a law which the President believes impinges upon the common good. Neighbors, *supra* note 4, at 108-9.
[29] Neighbors, *supra* note 4, at 109 (quoting F. Roosevelt's Labor Day Address to Congress, 88 Cong. Rec. 7052, 7054 (1942)).
[30] *See* Miller Center of Public Affairs, University of Virginia, "*Theodore Roosevelt: Domestic Affairs*," *at* http://www.millercenter.virginia.edu/index.php/Ampres/essays/roosevelt/biography/4 (Sept. 5, 2007); *See also*, R.M. Abrams, *Theodore Roosevelt - The Ripening of the Square Deal,* Profiles of U.S. Presidents, *at* http://presidentprofiles.com/Grant-Eisenhower/Roosevelt-Theodore.html (Sept. 5, 2007).
[31] *See* HAROLD HOWLAND, THEODORE ROOSEVELT AND HIS TIMES: A CHRONICLE OF THE PROGRESSIVE MOVEMENT (1921).
[32] WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1925) (hereinafter "Taft 1925") (quoting Theodore Roosevelt's "Notes for a Possible Autobiography").
[33] *Id.*
[34] Fleishman & Aufses, *supra* note 26, at 12.
[35] Act of May 20, 1862 (Homestead Act), Pub. L. No. 37-64, (1862), 12 Stat. 392.
[36] 29 Stat. 526.

[37] *See*, *e.g.*, the Executive Orders of November 14, 1901 (1901 WL 2413); June 13, 1902 (1902 WL 2570); September 4, 1902 (1902 WL 2567); February 20, 1904 (1904 WL 2183); March 10, 1905 (1905 WL 2488); February 5, 1906 (1906 WL 2423); December 19, 1906 (1906 WL 2424).
[38] U.S. v. Midwest Oil Co., 236 U.S. 459, 471, 35 S.Ct. 309 (1915).
[39] *Id.*
[40] *Id.*
[41] Fleishman &Aufses, *supra* note 26, at 17.
[42] *Id.*
[43] The Antiquities Act of 1906 (codified at 16 U.S.C. § 431).
[44] For a history of, and motivations behind, the Act's creation, see Utah Association of Counties v. Bush, 316 F.Supp.2d 1172, 11 A.L.R. Fed. 2d 917 (2004).
[45] 16 U.S.C. § 431.
[46] WILLIAM H. TAFT, ETHICS IN SERVICE 38 (1915).
[47] Taft 1925, *supra* note 32, at 139-140.
[48] *Id*.
[49] This message of January 14, 1910 and the congressional response will be discussed later in this section.
[50] Taft 1925, *supra* note 32, at 136.
[51] *Midwest Oil Co*., 236 U.S. at 509.
[52] *Id*. at 507-508 (quoting President Taft's message to Congress on January 14, 1910).
[53] After his presidency, Taft became Chief Justice of the Supreme Court. In *Hampton v.United States* , 276 U.S. 394 (1928), Chief Justice Taft delivered the majority opinion saying, "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."
[54] *Midwest Oil Co.,* 236 U.S. at 508.
[55] Act of June 25, 1910, 36 Stat. 847.
[56] *Midwest Oil Co.,* 236 U.S. at 508.
[57] 36 Stat. 847 (1910).
[58] *Id.* at Section 2:

> Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry was made. And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the states of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

[59] 29 Stat. 526.
[60] *Midwest Oil Co*., 236 U.S. at 465 (quoting the Act of Februrary 11, 1897, 29 Stat 526).
[61] *Id*. at 465 (quoting the report by the Director of the Geological Survey).
[62] Proclamation of September 27, 1909.
[63] *See Midwest Oil Co*., 236 U.S. 459.
[64] *Id.* at 468.

[65] *Id.* at 468-469,
[66] *Id.* at 479-480.
[67] *Id.* at 473.
[68] Cooper, *supra* note 1, at 40 (citing FRANK FRIEDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 93(1990)).
[69] *Id.* at 40 (citing FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 2, 15 (New York: Random House, 1938)).
[70] *E.g.*, *id.* at 40-41 (On March 9, 1933, pursuant to a call by Roosevelt, Congress met for an emergency session. It adopted the equivalent of a war powers resolution which approved and confirmed both past actions and future actions by the President. President Roosevelt had already declared a bank holiday and on March 10, pursuant to this resolution, issued regulations for bank operations upon their opening.).
[71] Neighbors, *supra* note 4, at 108.
[72] *Id.* at 109 (quoting JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT: BOOK 2 (1690)); *but see* Cooper, *supra* note 1, at 5-9 (The prerogative is both misunderstood and misapplied. Locke was writing in the context of the British experience and not working with a positive Constitution in the American tradition. Therefore, great care needs to be exercised in seeking to apply Locke directy and broadly in the latter setting.).
[73] Neighbors, *supra* note 4, at 109 (quoting F. Roosevelt's Labor Day Address to Congress, 88 CONG. REC. 7052, 7054 (1942)).
[74] *E.g.*, Cooper, *supra* note 1, at 41.
[75] On average, Franklin Roosevelt issued just under 300 executive orders per year. The most he issued in one year was in 1933 when he issued 573 executive orders. The fewest he issued in one year was in 1944 when he issued only 100 executive orders. As of 2007, the only other president to issue more than 100 executive orders in a single year was Harry Truman (he issued 148 executive orders in 1946). A compilation of executive orders by president (which includes the number of executive orders issued by each president per year) is available at Federal Register online at: http://www.archives.gov/federal-register/executive-orders/disposition.html.
[76] *See* Exec. Order No. 8,802, 6 Fed. Reg. 3,109 (June 25, 1941).
[77] *See* Exec. Order No. 8,734, 6 Fed. Reg. 1,917 (April 11, 1941).
[78] *See* Exec. Order No. 9,250, 7 Fed. Reg. 7,871 (October 3, 1942).
[79] Fleishman &Aufses, *supra* note 26, at 8.
[80] Act of Congress of October 6, 1917, 40 Stat. 411, § 5(b), as amended, 50 U.S.C. Appendix, § 5(b); Cooper, *supra* note 1, at 40-41.
[81] *See* Exec. Order No. 9393, 9 Fed. Reg. 54 (Nov. 1, 1943).
[82] Pub. L. No. 89, 57 Stat. 163.
[83] 39 Op. Atty. Gen. 348.
[84] *See* Exec. Order No. 10,340 17 Fed. Reg. 3,139 (April 8, 1952).
[85] *Youngstown*, 343 U.S. 579.
[86] Selective Training and Service Act of 1940, 54 Stat. 892, §9 (1940), as amended by the War Labor Disputes Act, 57 Stat. 163 (1943).
[87] *Youngstown*, 343 U.S. at 647.
[88] This statute is also known as the National Industrial Recovery Act of 1933, 15 U.S.C. §701 (1933).
[89] GARY DEAN BEST, PRIDE, PREJUDICE, AND POLITICS: ROOSEVELT VERSUS RECOVERY, 1933-1938 97-100 (1991); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[90] *Schecter Poultry Corp*., 295 U.S. at 529-530.
[91] *Id.* at 541-542.
[92] *Id.* at 554.
[93] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854 (1935).
[94] Merlo J. Pusey, *F.D.R. vs. the Supreme Court*, 9 AMERICAN HERITAGE MAGAZINE (April 1958), *available at* http://www.americanheritage.com/articles/magazine/ah/1958/3/1958_3_24.shtml (hereinafter "Pusey").
[95] *Id.*
[96] *Id.*
[97] The support of Congress ended after Chief Justice Hughes sent a letter to the Senate Judiciary Committee that was conducting hearings on the bill. Hughes was able to show not only that the Supreme Court was

granting plenty of petitions for review, but also that adding justices to the Supreme Court would impair its efficency. "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." *Id.* (quoting Chief Justice Hughes). Hugh's letter made a mockery of Franklin Roosevelt's argument and led the Senate Judiciary Committee to characterize the bill as "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." *Id.* (quoting Chief Justice Hughes). By the middle of 1937, the Senate recommitted the bill to the Judiciary Committee, formally burying it. And yet, because his presidency lasted for so long, Franklin Roosevelt was able to pack the court in the traditional way, naming seven of its nine members. *Id.*

[98] In *State of Wyoming v. Franke,* 58 F. Supp. 890 (D.C.Wyo. 1945), the State of Wyoming challenged the Jackson Hole Monument. Wyoming was unsuccessful and the action was dismissed because there was substantial evidence that the President had satisfied the requirements of the Antiquities Act.

[99] Warber, *supra* note 1, at 64-67.

[100] *Id*. at 65 (Most of the literature analyzing executive orders has found evidence that challenges the conventinal wisdom that presidents are more aggressive in using their execuitve order power during divided government.).

[101] *Id*. (According to an analysis conducted by this author, on average, the White House issues 11.1 more policy orders each year during unified rather than divided government.).

[102] 29 U.S.C. 78 (1947).

[103] 93 Cong. Rec. 3835-3836.

[104] 39 Op. Atty. Gen. 348.

[105] HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS CRS REPORT 98-505, 10 (updated November 13, 2006).

[106] *Id.* at 18.

[107] Fleishman & Aufses, *supra* note 26, at 10.

[108] *Id.* at 41.

VI. The President's Authority Over Agencies

The Constitution places no specific limits on the extent to which the President can control the policies of agencies. This task is left to informal and statutory arrangements. There are primarily two categories of agencies that are important to this analysis, executive departments and independent agencies, although four types of agencies will be discussed in this chapter. "As to 'purely' executive or 'non-independent' administrators,[1] it is presumed that the President is constrained only by the requirement that he not direct any act beyond the bounds of an administrator's legal authority."[2] It is said that executive agency heads serve "at the pleasure of the President" and, therefore, are under greater pressure to conform to the President's policy goals.[3] In contrast, the chief limitations placed on the President regarding authority over independent agencies is that he or she may only police them for legal compliance and may not remove the agency heads unless it is "for cause." [4] This is interpreted to mean that the President can only remove the head of an independent agency if the agency head acts illegally but not if he or she goes against the policy wishes of the President, thus granting independent agencies "policy independence." [5] Although not distinguished in the literature as a third category of agency, much of the work of executive oversight takes place within the organizations which comprise the Executive Office of the President (EOP), which includes the White House offices.[6] The President exerts the most influence over these entities.[7]

Although there are two primary categories of agencies, federal agencies do not come in two discrete models, one "executive" and one "independent," that are recognizable by clearly distinguishable characteristics.[8] Technically, the President's legal authority over the entity is more direct for executive departments. Many executive orders reflect this with provisions distinguishing between "agencies" or "executive departments" and "independent agencies." For example, many executive orders set a separate standard for independent agencies, using "shall" to direct the action of agencies or executive departments and later using "encouraged to comply" to direct the action of independent agencies.[9] Realistically, the amount of control the President has over an agency is driven by an analysis of several factors: how the agency head is selected; how the agency head can be terminated (key); how vague or specific a delegation of authority is; and whether the term for the agency head is staggered or does not correspond with that of the President. If the entity is run by a committee or commission the analysis includes how the members are selected (staggered terms) and quotas on the number of agency members who can come from a particular party. In addition, the President through other means can exert substantial influence over most federal entities, whether or not they are designated independent. For example, the President approves the budgets for all federal agencies, under current procedure all rulemaking goes through the Office of Management and Budget (OMB) in the EOP, and it is the President's power to choose the chair of a committee or commission and the chair manages the work of the committee or commission. Under this analysis, the Environmental Protection Agency (EPA), technically an "independent establishment," is probably not distinguishably more independent than the Department of Agriculture, an executive department. The head of the EPA is a single administrator who is appointed by the President (with the consent and

approval of the Senate), the Administrator does not have a statutory "for cause" limitation for removal, and all of the secondary avenues for exerting authority apply. There is general consensus among legal scholars that too much emphasis must not be placed on this distinction.[10]

As for the constraint that the President not direct any act beyond the bounds of an administrator's legal authority, much of this "boundary" would come from legislation, including the statute or reorganization plan creating the agency, if it was created in that manner. Thus, as a first check on appropriate authority for a presidential directive, the executive order should not direct agency action that contravenes legislation. To make this determination some preliminary statutory analysis is required, for example: (1) is the action under the statutory mission of the agency to which it is directed or other authorities delegated to that agency; (2) is the action under the statutory mission of another agency; or (3) is there any statutory provision specifically or indirectly prohibiting that which the directive orders.

1. Technical Distinctions and the Agencies that Fall Within Each Category

a. Executive Departments and Independent Agencies. An "executive department" is a governmental entity so designated by law. For example, pursuant to 7 U.S.C.§ 2202, the Department of Agriculture is designated an executive department: "The Department of Agriculture shall be an executive department, under the supervision and control of a Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate." The list of executive departments is found at 5 U.S.C. §101:

1. The Department of State
2. The Department of the Treasury
3. The Department of Defense
4. The Department of Justice
5. The Department of the Interior
6. The Department of Agriculture
7. The Department of Commerce
8. The Department of Labor
9. The Department of Health and Human Services
10. The Department of Housing and Urban Development
11. The Department of Transportation
12. The Department of Energy
13. The Department of Education
14. The Department of Veterans Affairs
15. The Department of Homeland Security

The executive departments are subdivisions of the executive branch and have been described as the "peculiar and intimate agencies" of the President's authority.[11] The head of each executive department is a member of the President's Cabinet.[12] A few agencies that are not executive departments have also been elevated to Cabinet status.

Under George W. Bush, Cabinet-level rank, has been accorded to the Administrator, Environmental Protection Agency; Director, Office of Management and Budget; Director, National Drug Control Policy; and U.S. Trade Representative. Cabinet-level status (meaning the head of the agency becomes a member of the President's Cabinet) does not legally change the President's authority over the agency. However, bringing an administrator into the inner circle, in practical terms, is an element of influence.

An "independent establishment" is essentially every other government agency with a few exceptions. The definition found at 5 U.S.C. §104 is as follows:

> (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
>
> (2) the Government Accountability Office.

A list of federal executive independent agencies can be found at the federal government web sites; they are too numerous to list here.[13] Notably the EPA and a number of science agencies (e.g., National Science Foundation, National Aeronautics and Space Administration, etc.) are technically "independent establishments." Historically, the independent title has been given to agencies that address technical issues such as health, science and the environment, issues that it has been viewed should be less subject to presidential control. Independence is an attribute with varying degrees rather than a fixed type. That is, within the category of "independent agency" some entities are more independent than others. This is discussed further below.

The term "executive agency" or "agency" is typically an all inclusive term that captures all governmental entities except the military departments (the Department of the Army, Navy and Air Force).[14] Executive agency, therefore, includes executive departments, Government corporations,[15] and independent establishments.[16]

b. The Executive Office of the President. The Executive Office of the President (EOP) is made up of agencies and the White House offices. These entities help develop and implement the policy and programs of the President.[17] The authority of the President is at its peak in the EOP. Generally, putting an agency in the EOP gives the President the authority to prescribe the policies and directives that govern the actions of the administrator and the agency.[18] The White House Office is a subset of the EOP; the entities located in the White House Office are noted with asterisks in the list below. Currently, the EOP includes the following entities:[19]

- White House Office*
- The Cabinet
- Council of Economic Advisers

- Council on Environmental Quality
- Domestic Policy Council*
- Homeland Security Council*
- National Economic Council*
- National Security Council (NSC)
- Office of Administration
- Office of Faith-Based and Community Initiatives*
- Office of Global Communications
- Office of Management and Budget (OMB)
- Office of National AIDS Policy*
- Office of National Drug Control Policy
- Office of Science and Technology Policy
- Office of the United States Trade Representative
- President's Foreign Intelligence Advisory Board
- Privacy and Civil Liberties Oversight Board*
- USA Freedom Corps Volunteer Network*
- United States Trade Representative*
- White House Fellows Office*
- White House Military Office*

Pursuant to statute, the President has the broadest authority over entities and employees in the White House Office (and the Executive Residence at the White House). Pursuant to 3 U.S.C. § 105:

> [T]he President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Employees so appointed shall perform such official duties as the President may prescribe.

In addition, pursuant to 3 U.S.C. § 107, the President is given almost identical authority in terms of hiring Domestic Policy Staff. This includes the authority to hire, "without regard to any other provision of law regulating the employment or compensation of persons in Government service," ten employees in the Office of Administration. Both provisions go on to limit the number of persons that can be hired at upper grade levels, but allow "such number of other employees as he [the President] may determine to be appropriate" for those hired at GS-16 and below for all but the Office of Administration. Further these statutes provide for procurement of experts and consultants. President Clinton established the National Economic Council by executive order under the auspices of these two statutory provisions.[20]

c. Substantive Categories. Although there are officially two primary categories for executive entities, executive departments and independent establishments, in reality these can be subdivided into four types of entities based on some finer distinctions relating to executive authority:

1. entities in the EOP;
2. executive departments;
3. agencies that are referenced as independent but do not have the stronger attributes of independence (i.e., "independent establishments" excluding those that fall into type 4 below); and
4. agencies that are independent based on features that minimize presidential control.

The EOP and executive departments are defined above. The fourth type is a subgroup of "independent establishments" as defined by 5 U.S.C. § 104 and is typically what is meant in scholarly articles when reference is made to "independent agencies." Although there are distinctions between the first three types, generally speaking, the President's authority over these agencies is quite broad, especially for the first. The order of this list represents the extent of presidential influence from highest to lowest, although it is much the same for the second and third type. Again, however, the general relationships can be, and are, altered by the statutes governing the agencies and their programs. It would probably not be wise to disregard completely the distinctions between the second and third type set out in the statutory provisions defining government organization (5 U.S.C. §§101-105), or the designations in the statutes or reorganization plans establishing individual agencies (e.g., 7 U.S.C. § 2202). However, there is consensus by legal experts that the real distinction between executive agencies, in terms of the President's authority, is in the structure and attributes of each agency.[21] That is, the extent of the President's authority is primarily based on certain characteristics of an agency rather than some organizational category into which the agency falls.

2. Attributes of an Independent Agency and the President's Removal Power [22]

The designation of independent agency is typically used to indicate an agency independent of the executive branch and its control.[23] The reason why some agencies are designated independent agencies is because they are structured to prevent partisan politics from heavily influencing their decision-making.[24] Since independent agencies execute the law, they cannot have constitutional status different from executive agencies with respect to presidential oversight.[25] However, Congress has the power to decide the structure of independent agencies and how the President can affect this structure. Further, in terms of policy, the head of an independent agency has some degree of job security if he or she disobeys an order to implement a policy within the lawful discretion of the agency head. Both executive and independent agencies follow approximately the same procedures and are reviewed in the same fashion by the courts. Thus, the difference between the two has little relevance to the vast majority of the principles of administrative law.[26] Independent agencies are considered to be both quasi-judicial and quasi-legislative, depending on their designated duties (this is the same for executive agencies).[27] Regardless of the designation, independent agencies are defined by the fact that they perform functions that would usually be associated with the executive branch but they are not under the full control of the President.[28]

The general reason why some agencies are informally denominated "independent agencies" is that certain of their features are designed to mitigate the degree to which partisan politics can dominate their decision making. Common attributes of independence include the adoption of collegial decision making, staggered terms for the agency's prime decision makers, terms of office that are longer than the four-year presidential term; quotas on the number of agency members who may belong to either of the major parties; and immunity from removal of certain agency heads who refuse to follow the policy directives of the President.[29] Thus, "independent" agencies tend to be multimember boards and commissions, such as the Securities and Exchange Commission, the Federal Communications Commission, and the National Labor Relations Board. [30] Under these attributes, the EPA and non-executive agencies like it not administered by a board or commission, are at the central area of the continuum between "independent" and "executive."

An important presidential power is that of removal of officers. The Constitution does not say whether, or in what circumstances, the President may remove an executive officer.[31] It is an important question because the modern Supreme Court assumes that constitutional control of an officer's discretionary decisions lies in the branch that holds the power of dismissal. It was in a removal case that the Court created a special constitutional category of "independent" agencies. A significant difference between independent agencies and executive agencies is that the heads of independent agencies do not serve at the pleasure of the President. Their governing statutes, for example, may provide that commissioners are appointed for a fixed period of years that does not correspond with the President's term of office. There also may be statutory provisions protecting the commissioners or administrators from arbitrary removal during their terms of office, e.g., the "good cause" standard. In practice, though, scholars have found no consistent difference separating the work of the "independent" commissions (agencies) from that of the "cabinet-level" agencies.[32] Furthermore, no president has ever attempted to discharge an independent administrator for disobeying a direct presidential order to implement a policy within the administrator's lawful discretion. There is, therefore, no judicial test as to whether such disobedience would constitute cause sufficient to sustain dismissal under an independent agency's organic statute.[33]

Congress has no power, other than impeachment, to remove agency officials.[34] However, when it comes to influence over agencies, Congress is by no means as impotent in practice as it is in constitutional theory. Every agency needs a minimum degree of legislative support if it is to maintain its programs and obtain funding for them.[35] "In both theory and practice, independent agencies report to Congress. *All* agencies report to Congress in the sense that they must abide by the statutes that authorize their programs and appropriate their funds."[36] Abiding by these statutes is also a limitation of the directives a president can issue to agencies of all types.

The distinction between independent and executive agencies should not be overemphasized because even fixed terms of office and removal-for-cause statutes do not pose serious obstacles to the President's ability to influence regulatory policy through the appointment process. Since regulators' terms of office are typically staggered in the

multimember agencies and many commissioners do not serve out their terms, a newly elected president almost always has the opportunity to make key appointments early in his administration. Also, if the President formally requests an administrator's resignation, even an "independent" commissioner is not very likely to resist or to face the prospect of a removal-for-cause controversy.[37] The President also has the statutory power to designate one of the commissioners of an independent agency to serve as chairman and to "demote" the chairman back to the rank of commissioner without cause. Since the chairman of a regulatory agency has the primary responsibility for managing its operations, including the hiring of new personnel, a change in agency leadership often results in policy changes.[38]

As one legal author correctly summarizes the consensus of the legal community, "It is not obvious what practical significance currently attaches to agency independence. Despite the theoretical interest inherent in the constitutional issues, no one has comprehensively assessed the impact on agency policymaking of whatever insulation from direct presidential supervision such agencies enjoy."[39] Independent agencies, even if not required to do so, may nonetheless choose to align their policies with those of the President[40] and can be influenced in a number of other ways discussed below.

3. How the President Exerts Authority Over Agencies

The President has a variety of powers and techniques he or she can use to oversee and influence administrative agencies. In addition to removal power discussed above there is the appointment power, budget review (the OMB also reviews the agencies' requests for substantive legislation for consistency with the administration's position), review of agency rulemaking through a "regulatory analysis program," Department of Justice advocacy of agency positions in litigation, and more informal influence over the rulemaking process.

One of the most important presidential powers is the power to appoint federal officers. The Appointments Clause of the Constitution[41] provides that the President generally appoints all "Officers of the U.S.A." with the advice and consent of the Senate. These appointees normally share the President's policy preferences and feel some commitment to advancing his or her priorities. In *Buckley v. Valeo*, the Supreme Court explained that the term "Officers of the U.S.A." includes all appointees exercising significant authority pursuant to the laws of the U.S., such as rulemaking, adjudication, or enforcement powers. [42] A proviso to the Appointments Clause contains a significant limitation on the President's appointment power: "Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." An "inferior officer" is an official whose work is directed and supervised at some level by a presidential appointee. It is important to note that a "department" for the purposes of the Appointments Clause applies only to executive divisions like the "cabinet-level" agencies.[43]

Every four years, just after the presidential election, the *United States Government Policy and Supporting Positions* is published. It is commonly known as the

Plum Book and is alternately published between the House and Senate. The *Plum Book* is a listing of over 9,000 civil service leadership and support positions (filled and vacant) in the legislative and executive branches of the federal government that may be subject to noncompetitive appointments. These positions include agency heads and their immediate subordinates, policy executives and advisors, and aides who report to these officials. Many positions have duties which support administration policies and programs. The people holding these positions usually have a close and confidential relationship with the agency head or other key officials.[44] The last *Plum Book* was published in 2004. The type of appointment is shown for each position, including, for example, presidential appointment with senate confirmation, presidential appointment without senate confirmation, appointment excepted by statute and limited term appointment.[45]

In the day-to-day administrative process the President's power of persuasion and other less drastic tools of executive oversight are usually more significant factors than the threat of removal. Exercise of these powers often takes the form of an executive order, a formal directive from the President to federal agencies or officials. Depending on context, a particular executive order may be based either on an inherent constitutional power of the President or an express or implicit delegation from Congress. [46] This is discussed further below.

Much of the work of executive oversight takes place within the organizations which comprise the EOP. The EOP includes not only the President's personal advisors, who comprise the White House Office, but also permanent organizations like the National Security Council and the Council of Economic Advisers. The most important of these units to the regulatory agencies is the OMB, which has the primary responsibility of formulating the annual executive budget which the President transmits to Congress. In performing the task, the OMB receives budget requests from the individual agencies and modifies them in accordance with the administration's priorities. The OMB also reviews the agencies' requests for substantive legislation, including agency officials' proposed testimony before congressional committees, for consistency with the administration's position. Both of these procedures give rise to extensive negotiations between OMB staff and agency officials. Usually a compromise is reached but major disagreements are sometimes resolved by the President. [47]

Since 1971, the White House has attempted to exert direct supervision and control over major rulemaking proceedings through a "regulatory analysis program." Presidents Ford and Carter used it, but Reagan solidified it with EO 12291 of 1981. The executive order instructed agencies to take regulatory action only if the potential benefits to society for the regulation outweigh the potential costs to society. The agencies were to prepare a "regulatory impact analysis" or assessment of anticipated costs and benefits for any proposed rule that was likely to have a significant economic impact. An entity within the OMB, the Office of Information and Regulatory Affairs (OIRA), would then conduct its own review of the agency's analysis with OIRA approval being a prerequisite for the agency's proposed rule. These kinds of orders applied only to "cabinet-level" agencies, although some independent agencies voluntarily participated in the oversight program. President Clinton modified Reagan's cost-benefit scheme with EO 12866 of 1993,

softening the regulatory thrust and acknowledging more explicitly the limitations of quantitative analysis. EO 12866 also provided that if OIRA and an agency were unable to resolve their differences over a proposed rule, the disagreement could be referred to the President or Vice President for resolution. In addition, although most of the order remained applicable only to executive agencies, the regulatory planning process was explicitly extended to independent agencies. Courts have not directly ruled on the legality of EO 12866 or its predecessors.[48] The legal case for the order rests on the supervisory power inherent in the President's status as head of the executive branch.[49]

Another often overlooked tool of executive oversight is the President's power to control litigation affecting the agencies through the DOJ. Although there are significant exceptions, most agencies lack the statutory authority to litigate on their own behalf, and must obtain representation from the DOJ, and if the DOJ refuses to advocate or defend a particular agency policy, then the agency's decision has no practical effect.[50] This concentration of authority enables the DOJ to reconcile the competing litigation interests of multiple agencies and to insist that agencies' briefs conform to the President's policy priorities.[51]

Over and above this wide array of formal presidential oversight techniques, the White House policy staff routinely examines and exerts influence on major rulemaking proceedings. Informal contacts by the President's personal staff of policy advisors remain essentially unregulated by procedural checks in rulemaking, despite their increasing importance. This type of control has been prominent during the Clinton and George W. Bush administrations, and should the trend toward direct presidential management of the regulatory process hold up, pressures for strengthened controls on presidential decision-making are likely to result.[52]

4. Issuing Executive Orders

Again agencies must abide by the statues that authorize their programs and appropriate their funds as well as the delegations of authority that give them their power. The President, in issuing executive orders must also abide by these constraints. Further, the President can delegate authority to agencies. The general authorization to delegate functions is found in 3 U.S.C. § 301. This statute authorizes the President to designate and empower the head of any department or agency in the executive branch, to perform any function that is vested in the President by law, or any function that such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President. These delegations are required to be in writing and are typically done by executive order. In the delegation the President can exercise any discretion the statute provides, for example, by providing details as to how an action, policy or program will be implemented. The President can also direct agencies to take action pursuant to the authority of his or her office not derived from a statutory delegation. All in all this gives the President broad latitude in directing the actions and policies of agencies.

In establishing additional guidelines for directives to agencies, the water becomes murkier. Again, the authority for the President to order an agency to take a certain action must be determined on a case-by-case basis, considering both applicable legislation and the type of agency being directed. In this area there are no bright-line rules. However, the most commonly understood parameters of this authority are as follows. First, a number of respected legal scholars support the existence of "procedural" supervisory authority over administrative officers. This enables the President to demand information from and engage in consultation with agencies and their officers. This applies to all executive agencies across the board and would include, for example, the OMB review of actions, discussed earlier in this chapter, and demanding reports on various issues, even reports that suggest a preferred policy position.[53] Second, the conventional view in administrative law, which is in accord with case law, is that the President lacks the power to direct an agency official to take designated actions within the sphere of that official's delegated discretion. An official's delegated discretion would come in the form of a specific delegation from Congress to the agency (rather than to the President), for example.[54] As discussed below, however, there is no legal precedent mandating this position and presidents have taken different approaches. Further, these baseline parameters for direct commands to agencies should be viewed in context with other presidential power, for example, the President's appointment and removal power.

Outside of statutory delegations directly to the President, the extent of executive authority to command agency action is not as clear. There is not one view held by constitutional and administrative law experts.[55] Nor has this question been answered by the courts. A large part of this debate is based on the legal significance of statutory delegations directly to agencies or their heads (rather than to the President). At one extreme there is the position that the President is the "unitary executive." This is described as "a system in which all of what now counts as administrative activity is controllable by the President."[56] Under this doctrine it is presumed that a delegation directly to an agency implies a delegation to the President as well. That is, the President has plenary control over all heads of agencies involved in executing, implementing or administering federal law and the President can direct agency officials as to the exercise of this delegated authority. This authority extends to all executive agencies including independent agencies.[57] At the other end of the debate, it is argued that a delegation to an agency head represents congressional intent to insulate agency discretion from the President. Thus, the President is prohibited from commanding an agency to act in this area of discretion and this limitation extends to all agencies.[58]

An intermediate ground, argued by a legal expert who formerly held a position in the White House, Elena Kagan, is represented by the Clinton administration. Kagan argues that delegations directly to independent agencies are intended to insulate agency discretion from the President. However, delegations directly to other executive agencies imply a delegation to the President as well. Thus, for executive agencies that are not independent, the President can direct administrative officials in the use of the delegated authority.[59] This argument is based, in part, on the fact that "Congress knows that executive officials stand in all other respects in a subordinate position to the President, given that the President nominates them without restriction, can remove them at will and

can subject them to potentially far ranging oversight."[60] Kagan describes the Clinton administration as a model for this "directive authority" approach, which includes commands to executive branch officials to take specific actions within their statutorily delegated discretion:

> Clinton made the regulatory activity of the executive branch agencies more and more an extension of his own policy and political agenda. Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct and or finally announce administrative actions –regulations, guidance, enforcement strategies, and report– to showcase and advance presidential policies. In executing this strategy, the White House in large measure set the administrative agenda for key agencies, heavily influencing what they would (or would not) spend time on and what they would (or would not) generate as regulatory product. [61]

Experts do not agree on whether the unitary or intermediate approach argued by Kagan are legally sound, nor is there legal precedent conclusively deciding the matter. Of course, this legal debate could be made void if Congress explicitly stated in each delegation its intent with respect to presidential involvement. However, there seems to be the broadest consensus regarding differential treatment of independent agencies. This differential treatment shows up in executive orders.

A number of executive orders will distinguish between "executive departments" or "agencies" and "independent agencies" and use directive language such as "shall" for the former two and "encouraged to comply" for the latter."[62] Based on the previous analysis of presidential influence over agencies, it seems that, in some cases, this may be merely a formalism with no effect. That is, the President may or may not have the authority to command an independent agency in a more mandatory manner, but in fact, based on the realities of government operations, the directive is made. In trying to determine when the differential treatment is required we reviewed a number of executive orders, and some guidance emerged. For example, if the statute under which the executive order is issued distinguishes between agencies in terms of their treatment under the statute, the President would have to abide by these differences. Sometimes the distinction in the executive order is somewhat meaningless; for example, EO 12843 uses different command language for "agency" and "independent agencies." However, the definition it applies for "agency" is that found in 5 U.S.C.A. § 105 for "executive agency." That definition combines executive departments with independent establishments. Nonetheless, the end result is consistent with the statute cited for authority in the executive order which applies to agencies without distinguishing between executive or independent.[63] The President should be guided by the analysis in the previous paragraphs and should consider differential treatment for independent agencies.

5. Conclusions

The President's authority to order an agency to take a certain action must be determined on a case-by-case basis, considering both applicable legislation and the type of agency being directed. In terms of the President's authority, agencies can be subdivided into four types of entities: (1) entities in the EOP; (2) executive departments; (3) agencies that are referenced as independent but do not have the stronger attributes of independence (i.e., "independent establishments" excluding those that fall into type 4); and (4) agencies that are independent based on features that minimize presidential control. The order of this list reflects the extent of presidential influence from highest to lowest, although in specific cases these relationships can be altered by statutes. The primary distinction in terms of presidential influence is between the first three types and the fourth. Notwithstanding whether and agency is designated as an "independent establishment" by statute, "independence" in terms of analyzing presidential influence is determined by a number of attributes such as: how the agency head is selected; how the head is removed (key); whether the head is a multimember body with staggered terms or quotas on members who can come from a particular party. Most "independent establishments" with a single person at the head and no statutory "for cause" removal provision, such as EPA, fall within category three and are treated similarly to executive departments.

The President has broad discretion over federal agencies. This authority is at its peak for entities in the EOP, which includes the White House offices, to prescribe the policies and directives that govern the actions of the administrator and the agency. "As to 'purely' executive or 'non-independent' administrators, it is presumed that the President is constrained only by the requirement that he not direct any act beyond the bounds of an administrator's legal authority."[64] There is a more limited standard for independent agencies. The most significant difference is the President's ability to discharge the head, for truly independent agencies it is limited to "cause." Thus it is said that the head of an independent agency cannot be discharged if he or she goes against the policy wishes of the President; the President can only remove the head of an independent agency if he or she acts illegally. Considering the other avenues of presidential influence, however, it is not clear that in reality this limitation on presidential influence over independent agencies is as significant as it appears on its face.

The true constraint on the President's authority over an agency is that found in statutes. Agencies must abide by the statues that authorize their programs and appropriate their funds as well as the delegations of authority that give them their power. The President, in issuing executive orders, must also abide by these constraints, although the President can delegate authority to agencies as well. An unsettled issue is whether agencies enjoy a sphere of delegated discretion protected from presidential influence, and if so, if this applies to all agencies. That is, what is the legal significance of statutory delegations directly to agencies (rather than the President)? The conventional view in administrative law, which is in accord with case law, is that the President lacks the power to direct an agency official to take designated actions within the sphere of that official's delegated discretion. Another approach supported by experts is the unitary approach,

which maintains that a delegation to an agency implies a delegation to the President. Thus, the President can direct administrative officials in the use of the delegated authority and this applies to all agencies including independent agencies. An intermediate position, described in the prior section, combines the two approaches. Kagan argues that delegations directly to independent agencies are intended to insulate agency discretion from the President. However, delegations directly to other executive agencies imply a delegation to the President as well. On this issue, legal experts do not agree nor is there legal precedent conclusively deciding the matter. At a minimum, however, the President should consider protected discretion for independent agencies.

In addition to appointment and removal power in regard to the agency head, the President exerts substantial influence over agencies through budget review (the OMB also reviews agencies' requests for substantive legislation for consistency with the administration's position), review of agency rulemaking, DOJ advocacy of agency positions in litigation, and other more informal influence over the rulemaking process. Some of these processes, such as the review of agency rulemaking, have been implemented with executive orders.

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[1] Administrator refers to the head of the agency.
[2] Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis,* 57 GEO. WASH. L. REV. 596, 609 (1989) (hereinafter, "Shane") (footnote omitted).
[3] ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 53 (5th ed. 1997) (hereinafter "Gellhorn & Levin").
[4] Shane, *supra* note 2, at 608.
[5] *Id.* at 608.
[6] Gellhorn & Levin, *supra* note 3, at 63.
[7] William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002).
[8] Shane, *supra* note 2, at 608.
[9] *See, e.g.,* Exec. Order No. 13,221, 66 Fed. Reg. 40,571 (July 31, 2001) (stating, "Sec. 2. Independent Agencies. Independent agencies are encouraged to comply with the provisions of this order.").
[10] *E.g.*, Shane, *supra* note 2, at 609; Gellhorn &Levin, *supra* note 3, at 59.
[11] 2 Fed. Proc., L.Ed. § 2:20 (2006) (citing Russell Motor Car Co. v. U.S., 58 Ct. Cl. 708, 261 U.S. 514, 43 S. Ct. 428, 67 L. Ed. 778 (1923)).
[12] Although a "cabinet" is not specifically included in the Constitution it is inferred from Art. II, Sect. 2, of the U.S. Constitution: "[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."
[13] *Available at* http://www.whitehouse.gov/government/independent-agencies.html, *also at* http://www.usa.gov/Agencies/Federal/Independent.shtml.
[14] 5 U.S.C. §§104, 105. Although some specific Acts may include definitions different than these, those definitions are only applicable in the application of that particular statute and generally they are not very different from the above. *E.g.*, 44 U.S.C. § 3502 (definitions in the Paperwork Reduction Act). However, this distinction may be important in terms of the application of those statutes or an executive order issued under the authority of those statutes.
[15] 5 U.S.C. § 103.
[16] *Id.* at § 105.
[17] U.S. Government, *Executive Office of the President*, (updated 4/11/2007), *at* http://www.usa.gov/Agencies/Federal/Executive/EOP.shtml.
[18] *See* AFL-CIO v. Kahn, 618 F.2d 784, 788 & n.20 (C.A.D.C. 1979).

[19] This list combines information from the U.S. Government website and the White House website. The U.S. Government website includes the following entity that the White House website does not: the Office of Global Communications. The White House website includes the following entities that the U.S. Government website does not: United States Trade Representative, Homeland Security Council, Privacy and Civil Liberties Oversight Board and White House Fellows Office. The White House website identifies those entities that are in the White House Office. U.S. Government, *Executive Office of the President*, (updated 4/11/2007), *at* http://www.usa.gov/Agencies/Federal/Executive/EOP.shtml; White House, *The Executive Office of the President*, and *The White House Office*, (no date provided), *at* http://www.whitehouse.gov/government/eop.html.

[20] Exec. Order No. 12,835, 58 Fed. Reg. 6,189 (Jan. 5, 1993).

[21] *E.g.*, Shane, *supra* note 2; Gellhorn & Levin, *supra* note 3.

[22] Several excellent resources include: Shane, *supra* note 2; HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE (2006) (hereinafter "Bruff 2006"); Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies,* 36 AM. U. L. REV. 491 (1987) (hereinafter "Bruff 1987"); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001) (hereinafter "Kagan"); Peter L. Strauss, *Overseer or "the Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[23] *Administrative Law,* 2 AM. JUR. 2d § 30 (2007).

[24] Bruff 2006, *supra* note 22, at 442 (quoting Shane, *supra* note 2, at 607).

[25] *Id.* at 449.

[26] Gellhorn & Levin, *supra* note 3, at 60.

[27] An agency is considered quasi-legislative when its duties are designed to be wide-reaching and affect more than a narrow group. An agency is quasi-judicial when it participates in rulemaking that is functionally akin to adjudication, such as the Federal Communication Commission balancing first amendment rights in broadcasting.

[28] Gellhorn & Levin, *supra* note 3, at 54-55.

[29] Shane, *supra* note 2, at 608 (There is no current challenge to the constitutionality of any of these politics-mitigating features.) .

In terms of removal power, in *Humphrey's Executor*, President Roosevelt removed a chairman of the FTC who was unsympathetic to some of the New Deal programs that the FTC was responsible for administering (Humphrey's Executor v. U.S.*,* 295 U.S. 602 (1935)). Gellhorn & Levin, *supra* note 3, at 55. The statute provided that FTC commissioners were to serve for a fixed term of years and that they could only be removed during their term for "inefficiency, neglect of duty, or malfeasance in office." *Id.* The Supreme Court held that the statutory removal-for-cause provision was a proper limit on the President's removal power. *Id.*

The Supreme Court abandoned the analysis of *Humphrey's* in 1988, when it decided *Morrison v. Olsen*, and recognized that the duties of the Independent Counsel were clearly "executive" in nature but still upheld the provision in the Ethics in Government Act, allowing the Independent Counsel to be removed only for good cause (Morrison v. Olsen, 484 U.S. 1058 (1988)). *Id* at 57. The proper inquiry was whether removal restrictions "impede the President's ability to perform his constitutional duty." *Id.* The good cause standard in the Act did not constitute such an impediment in light of the limited nature of the Independent Counsel's responsibilities and the congressionally perceived need for her to function independently. *Id.* The Court added that the good cause standard was equivalent to the statutory protections enjoyed by many independent agency heads. *Id.* The implication was that the removal protections applicable to traditional independent agencies would also survive scrutiny under the *Morrison* test. *Id.* After *Morrison*, the Constitutionality of the "independent" agencies appears to be secure, as the Court acknowledged Congress's power to innovate, pursuant to the Necessary and Proper Clause, so long as the President's ability to perform his Constitutional duty is not impaired. *Id.* at 58.

On the other hand, Presidents sometimes have to put up with high-ranking executive officials whom they have the legal right to fire because a dismissal would be politically costly. *Id.* Finally, it should be noted that both executive and independent agencies follow roughly the same procedures and are reviewed in the same fashion by the courts. *Id* at 60. Thus, the distinction between "independent" and "cabinet-level" agencies has little relevance to the vast majority of the principles of administrative law. *Id.*

[30] Gellhorn & Levin, *supra* note 3, at 54.

[31] Bruff 2006, *supra* note 22, at 411.

[32] Gellhorn & Levin, *supra* note 3, at 53-54, 57 (reference for paragraph).
[33] Shane, *supra* note 2, at 609-10 ("conventional understanding of the legal limits on the President's ability to direct independent administrators may amount to no more than folklore.").
[34] Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986).
[35] Gellhorn & Levin, *supra* note 3, at 60, 62 (reference for paragraph).
[36] Bruff 1987, *supra* note 22, at 513. Bruff also points out some of the weakness of congressional oversight. "Beyond these statutory functions, however, Congress does not act as a whole. Congressional oversight is performed by authorizing and appropriations committees in both houses, and by individual members of Congress. In short, there is no single elected officer to whom the independent agencies are accountable. In this sense, they truly are the 'headless fourth branch' of government." *Id.* (footnote omitted).
[37] The President can sometimes even hasten the departure of an embattled commissioner by simply failing to come to the official's defense, such as was the case in 2002 when an SEC chairman came under fire, the White House stayed silent, and the Chairman resigned after a short time.
[38] Gellhorn & Levin, *supra* note 3, at 59 (reference for paragraph).
[39] Shane, *supra* note 2, at 609.
[40] *Id.* at 609.
[41] U.S. CONST. art. II, § 2, cl. 2
[42] Buckley v. Valeo, 424 U.S. 1, 126 (1976).
[43] Gellhorn & Levin, *supra* note 3, at 50, 53-54 (reference for paragraph).
[44] U.S. Office of Personnel Management, *Policy and Supporting Positions—Plum Book, at* http://www.opm.gov/ses/plumbook.asp. The *Plum Book* is available on line at http://www.gpoaccess.gov/plumbook/index.html.
[45] *The Plum Book (United States Government Policy and Supporting Positions): 2004 Edition*, U.S. Government Printing Office, *at* http://www.gpoaccess.gov/plumbook/2004/index.html.
[46] Gellhorn & Levin, *supra* note 3, at 62-63.
[47] *Id.* at 63 (reference for paragraph).
[48] *Id*.
[49] *Id.* at 64-66 (reference for paragraph). The Constitution specifically authorizes the President to require the written opinion of department heads upon any subject relating to the duties of their respective offices. *Id.* at 66. Moreover, because of the President's electoral base, his participation in the process can be seen as legitimizing a rule. Sierra Club v. Costle, 657 F.2d 298, 15 ERC 2137, 211 U.S.App.D.C. 336, 11 Envtl. L. Rep. 20, 455 (1981). The countervailing consideration is that both agencies and the President must execute the laws enacted by Congress, so it is generally agreed that OIRA must not administer the regulatory analysis program in a manner that would prevent an agency from fulfilling the duties assigned to it by Congress. *Id*.
[50] *See* Federal Election Com'n v. NRA Political Victory Fund, 513 U.S. 88, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994).
[51] Gellhorn & Levin, *supra* note 3, at 66-68 (reference for paragraph).
[52] *Id.* at 68, 341-42 (reference for paragraph).
[53] Kagan, *supra* note 22, at 2323-24
[54] *Id.* at 2323-24
[55] *Id.* at 2320-24. There are, of course, experts that argue for more liberal and restrictive interpretations of presidential authority. For a discussion of the different arguments, see, e.g., Kagan, *supra* note 22; Bruff 1987, *supra* note 22; Shane, *supra* note 2.
[56] Kagan, *supra.* note 22, at 2247.
[57] *Id.* at 2325, 27.
[58] *Id.*
[59] *Id.* at 2326-28.
[60] *Id.* at 2327.
[61] *Id.* at 2248.
[62] *See, e.g.,* Exec. Order No. 13,221, 66 Fed. Reg. 40,571 (July 31, 2001) ("Sec. 2. Independent Agencies. Independent agencies are encouraged to comply with the provisions of this order.").
[63] 42 U.S.C. §§ 8252- 8253.
[64] Shane, *supra* note 2, at 609.

VII. Authority to Reorganize Executive Entities

This chapter addresses the President's authority to move, create or eliminate projects, offices, and departments within a federal agency or between agencies and to appoint officers in agencies. Under the Constitution, Congress establishes departments and agencies, and, to whatever degree it chooses, creates the offices and the internal organization of agencies.[1] It may, for example, lay out a highly specified organizational framework, or it may delegate to the President or the agency head the creation of most positions and distribution of most functions, responsibilities, and authority. Usually, Congress establishes the top three or four levels of a department's hierarchy in law. By statutorily establishing leadership positions, Congress determines the shape of the leadership hierarchy for the department as well as a system of accountability to elected officials.[2] In practice, however, the President has considerable influence over the federal bureaucracy, both in terms of reorganization and budget authority.[3] Agency leadership is addressed in section 2 of this chapter.

1. Agency Reorganization

a. Delegating Reorganization Authority. Congress can delegate reorganization authority. Congress first authorized the President to propose plans for the reorganization of the executive departments and agencies in a 1939 statute.[4] The objective of such reconfigurations was to achieve efficiency and economy in administration. A presidential reorganization plan, submitted to Congress, became effective after 60 days unless both houses of Congress adopted a concurrent resolution of disapproval. Such reorganization authority, renewed periodically a dozen times between 1945 and 1984, with slight variations, remained available to the President for nearly half a century.[5] The Environmental Protection Agency (EPA) was established pursuant to this authority by Reorganization Plan submitted to Congress by President Nixon in 1970.[6] The creation of the Department of Defense (DOD) half a century ago was also the result of a reorganization of the executive branch on a massive scale. Originally denominated the National Military Establishment at birth in 1947, DOD was given its current name and underwent the first of what would be a series of structural modifications through statutory amendments in 1949.[7]

At different junctures, qualifications were placed upon the exercise or reorganization authority. For example, reorganization plans could not abolish or create an entire department, or deal with more than one logically consistent subject matter. Also, the President was prohibited from submitting more than one plan within a 30-day period and was required to include a clear statement on the projected economic savings expected to result from reorganization.[8] Reorganization plans not disapproved by Congress were published in the *Federal Register* prior to being implemented, and also in the *Statutes at Large* and the *Code of Federal Regulations* (Title 3) for the year in which they became effective.[9] Modification of the President's reorganization plan authority was made necessary in 1983, when the Supreme Court effectively invalidated continued congressional reliance upon a concurrent resolution to disapprove a proposed plan.[10]

Under the Reorganization Act Amendments of 1984, several significant changes were made in the reorganization plan law. Any time during the period of 60 calendar days of continuous session of Congress following the submission of a reorganization plan, the President might make amendments or modifications to it. Within 90 calendar days of continuous session of Congress following the submission of a reorganization plan, both houses must adopt a joint resolution (which, unlike a concurrent resolution, becomes law with the President's signature) for a plan to be approved. This amendment, however, continued the President's reorganization plan authority only to the end of 1984, when it automatically expired.[11] Although Presidents Ronald Reagan, George H. W. Bush, and William Clinton did not request the reestablishment of reorganization plan authority, President George W. Bush indicated an interest in pursuing its restoration in his FY2003 budget message.[12] Congress has not reestablished the authority.

Although currently dormant, the Federal Executive Reauthorization Act (FERA) is still in the U.S. Code.[13] It provides broad authority for reorganization by the President, with subsequent congressional approval. Under FERA the President is authorized to prepare a reorganization plan that provides for:

> (1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;
> (2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;
> (3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;
> (4) the consolidation or coordination of a part of an agency or the functions thereof with another part of the same agency or the functions thereof;
> (5) the authorization of an officer to delegate any of his functions; or
> (6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.[14]

The Act also specifies how the President, through a reorganization plan, can name agencies, specify appointments and pay, move records, and transfer funds. [15]

The Act, however, also has limitations. One of the most significant limitations is that reorganization under the Act cannot create a new executive department or rename an existing executive department, abolish or transfer an executive department or independent regulatory agency, or consolidate two or more executive departments or two or more independent regulatory agencies.[16]

Rather than a broad delegation of reorganization authority, such as FERA, Congress can delegate agency specific reorganization authority. For example, the

Department of Homeland Security (DHS) was mandated by the Homeland Security Act of 2002 (HSA). The creation of DHS resulted in a reorganization of the executive branch on a scale not experienced since the establishment of the DOD half a century ago. A similarly complex organization, DHS was the product of legislative compromises, and it was anticipated that congressional overseers, as well as department officials, would monitor the management and operations of DHS with a view to adjusting its structure as conditions warranted. In this regard, section 872 of the HSA authorizes the Secretary of Homeland Security to reorganize functions and organizational units within DHS, subject to specified limits.[17]

Section 872 of the HSA provides that the "Secretary may allocate or reallocate functions among the officers of the Department, and may establish, consolidate, alter, or discontinue *organizational units* within the Department, but only . . . after the expiration of 60 days after providing notice of such action to the appropriate congressional committees, which shall include an explanation of the rationale for the action," and subject to certain other limitations specified in the section. These limitations include no abolition of "any agency, entity, organizational unit, program, or function established or required to be maintained by the [Homeland Security] Act" or "by statute."[18] Noting that the term "organizational units" is not defined in the Act, a CRS legal analysis of the section is instructive regarding its scope.[19]

Congress can also limit the President's ability to reorganize with specific statutory provisions, for example, by prohibiting the transfer of a function or entity by statute.[20]

b. Unilateral Action by the President. In practice, presidents have created administrative units and reorganized to some extent unilaterally through executive action. To justify these actions, presidents generally look to some combination of constitutional powers, vague statues, or expressed delegations of authority, although sometimes they reference only their authority "as President."[21] As noted in a Congressional Research Services report on executive branch reorganization: "The President might attempt a minor reorganization, such as establishing a small, temporary entity within the EOP by issuing a directive such as an executive order. Attempting more ambitious reorganizations through a presidential directive may, if not ultimately found to be illegal, incur congressional displeasure and subsequent legislative and fiscal reaction."[22]

Presidents do sometimes issue executive orders that create units within an agency, such as offices or centers, without referencing any specific statute that gives them the authority to do so. For example, G.W. Bush issued EO 13198, "Agency Responsibilities With Respect to Faith-Based and Community Initiatives," on January 29, 2001.[23] Pursuant to this executive order, "The Attorney General, the Secretary of Education, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Housing and Urban Development shall each establish within their respective departments a Center for Faith-Based and Community Initiatives (Center)." The executive order goes on to establish the purpose and responsibilities of these offices. The only authority cited for this executive order is "the authority vested in me as President by the Constitution and the laws of the United States of America." The executive order, however, also contains

the following caveat: "Sec. 7. Administration and Judicial Review. (a) The agencies' actions directed by this Executive Order shall be carried out subject to the availability of appropriations and to the extent permitted by law." Although a legal challenge to this practice is limited substantially by the doctrine of standing,[24] Congress can weigh in on the matter. For example, pursuant to section 872 of the HSA, there was significant debate over whether the President and Secretary of Homeland Security surpassed the delegation to reorganize HSA within certain limits. The language allowed alterations of "organizational units" without defining "organizational units."

Finally, when creating agencies by executive order, one must consider legislation that limits funding of agencies created by unilateral action to one year:

> (a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence.
>
> (b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section.[25]

c. Reorganization by Executive Directive versus Legislation. Congress realized long ago that it could not oversee the operations of the government in any detail, and necessary reorganizations could not be accomplished until the Congress delegated necessary authority to the executive.[26] However, from time to time there are suspicions that reorganization is being employed to further some sinister presidential object rather than to improve management and that in the wrong hands it could lead to a dictatorial exercise of authority.[27] Further, there have been differing philosophies over the purpose of reorganization. Some, such as Franklin Roosevelt, argue that the purpose is for good management, while Congress in many cases pushes for economy.[28] As noted by one author, "The issue of 'economy' often revolves around one's philosophy of government—an instrument to meet social objectives or a cross to be borne at least cost."[29]

In a study performed in 2002, the 425 agencies established between 1946 and 1995 were analyzed.[30] The authors found that: agencies created by administrative action are generally smaller than agencies created through legislation; greater resources are devoted to agencies created by legislation; and agencies created by legislation tended to have significantly longer life spans than those created by an executive order.[31] Additionally the authors found that to maximize their influence presidents: rarely placed agencies in distant sections of the federal bureaucracy, they are largely placed within the

EOP or cabinet; were less likely to create agencies governed by independent boards or commissions; and rarely placed limitations on who they could appoint to their agencies.[32] Thus, agencies created by administrative action are significantly less insulated from presidential control than are agencies created through legislation.[33]

Notwithstanding the technical legality of establishing or reorganizing agencies by unilateral action, Congress holds significant control over agencies created or reorganized by executive order. For example, if the President establishes a particularly controversial agency, Congress can simply cut off funding; without funding an agency will die.[34] There are, however, occasions where presidents create entities that enjoy popular support without specific delegated authority. Subsequent to their creation, Congress may feel obligated to financially or legislatively support their establishment. The Peace Corps, discussed in Chapter 5, is an example of this dynamic.

In the 2002 study, the authors conclude: "All else equal, presidents would prefer to establish administrative agencies with legislation, if only because these agencies are more durable over time. Presidents frequently establish agencies on their own not because Congress wants them to, but because Congress is mired in gridlock."[35] Thus, they recommend, "If an agency enjoys broad support in Congress, the President would do better to guide it through the legislative process and thereby secure its long-term prospects."[36]

2. Agency Leadership

The Constitution also provides Congress with considerable discretion over which officers of the United States will be appointed by the President with the advice and consent of the Senate (PAS positions), and which may be appointed by the President alone (PA positions), the courts, or agency heads. The appointment process for federal government leadership positions is guided by the Constitution, which provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[37]

In a 1976 opinion, the GAO Comptroller General presumably reasoned that this provision indicates that all officers of the United States are to be PAS positions unless Congress affirmatively delegates that authority.[38] With regard to which positions would be considered "Officers" under this clause, the Supreme Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed."[39] The manner prescribed is that quoted above from the Constitution.

Congress has often created departmental leadership positions as PAS positions; this approach has several institutional advantages for Congress. For example, it often allows Senators to have a role in the selection of the nominee and in determining the fitness of the selected individual for the role to which he or she has been nominated. In addition, confirmation hearings provide Senators with an opportunity to conduct oversight over agencies and programs, and to extract a pledge that the nominee will appear before committees of Congress when summoned.[40]

In some cases, Congress has elected to assign appointment authority to the President alone. Most of the positions to which appointments are made in this way are in the White House Office. These are generally positions in close proximity to the President, whose incumbents are often privy to confidential policy discussions conducted by leaders of agencies in the Executive Office of the President. By and large, officials appointed in this manner act as advisers, rather than implementing the law. Although PA positions are unusual outside of that context, the Homeland Security Act created seven such positions in the new department.[41] As a result, Congress may have less influence regarding the kinds of individuals appointed to fill these positions and the ways in which they address their responsibilities.[42] In other cases, Congress has assigned appointment authority to the agency head. This kind of appointment has been particularly common for lower-level officers, and it gives the agency head the greatest discretion. Although such an appointment is usually made with White House consent, congressional involvement may be minimal or nonexistent.[43] A discussion of appointed positions and the *Plum Book* is included in Chapter 6.

3. Conclusions

In summary, the primary methods for reorganization are as follows: (1) for smaller acts of reorganization pursuant to executive order authorized by some combination of constitutional powers, vague statues, or expressed delegations of authority or by legislation; (2) for large scale reorganization, through an executive order or reorganization plan pursuant to a statute delegating general reorganization authority to the President (such as FERA), or through the enactment of substantial legislation such as the HSA which created the Department of Homeland Security. The HSA also included provisions delegating reorganization authority to the executive for less substantial reorganization within the Department thus combining the two methods. As an additional consideration, approval by Congress can better the chances for funding and longevity of entities created through reorganization.

To determine if any reorganization proposal could be accomplished by executive order, whether to move, create or eliminate projects, programs, or offices within an agency, a review of any legislation or reorganization plan creating the agency and programs affected would be necessary. For example, if the statute or congressionally approved plan lays out a highly specified organizational framework, the President would be more limited in terms of unilateral action.[44] Similarly, this same analysis would apply to moving projects between agencies. That is, if the project was established by legislation, the relevant statutes should be reviewed to determine if there is any discretion

to move, alter or eliminate it. If it cannot be accomplished by executive order, an act of Congress will be necessary for the reorganization.

For substantial reorganization, the President, in most if not all cases, will need congressional authorization, either in the form of legislation implementing the reorganization or through a more streamlined process such as that authorized under a reorganization statute. The President can either seek legislation enacting each of the specific reorganizations or seek a general authorization to reorganize executive agencies via submission of a plan to Congress. The latter could be accomplished by amendment to FERA which would reactivate those provisions of the U.S. Code. Under FERA each plan would need a joint resolution of Congress to become effective.[45] Note, however, in the current form FERA has limitations, such as a prohibition on eliminating executive departments or independent regulatory agencies.

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[1] The congressional dominance theory predominates. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1095 (2002) (hereinafter "Howell"). *See also* HAROLD RELYEA, EXECUTIVE BRANCH REORGANIZATION, CRS ISSUE BRIEF IB93026, 2 (September 22, 2000) (hereinafter "Relyea 2000").
[2] HAROLD RELYEA & HENRY HOGUE, DEPARTMENT OF HOMELAND SECURITY REORGANIZATION: THE 2SR INITIATIVE, CRS REPORT 33042, 18 (August 19, 2005) (hereinafter "CRS 33042").
[3] Howell, *supra* note 1; PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002) (hereinafter "Cooper"); Clifford L. Berg, *Lapse of Reorganization Authority*, 35 PUB. ADMIN. REV. 195 (1975) (hereinafter "Berg").
[4] 53 Stat. 561.
[5] HAROLD C. RELYEA, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW, CRS REPORT 98-611 GOV, 13 (updated April 23, 2007) (hereinafter "Relyea 2007"); Berg, *supra* note 3, at 196-7.
[6] 116 CONG. REC. H. 6523, 91ST CONG. (2nd Sess.).
[7] CRS 33042, *supra* note 2, at summ.
[8] Relyea 2007, *supra* note 5, at 13.
[9] *Id.* at 13.
[10] *See* INS v. Chadha, 462 U.S. 919 (1983); *see also* Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353(1953).
[11] *See* 5 U.S.C. § 908.
[12] Relyea 2007, *supra* note 5, at 13-14.
[13] Federal Reorganization Act, 5 U.S.C. §§ 901-916. Reauthorization would require changing the date in § 908.
[14] *Id.* at § 903.
[15] *Id.* at § 904.
[16] 5 U.S.C. § 905.
[17] CRS 33042, *supra* note 2, at summ.
[18] *Id.* at 15 & n. 55.
[19] *Id.* at 15.
[20] *E.g.,* Pub. L. 95-620, 92 Stat. 3327 (1978), § 601(j) (Specifically prohibiting the transfer of authority for a program that assists areas impacted by increased coal or uranium production).
[21] Howell, *supra* note 1, at 1097 (essentially making the argument or implying that the creation of the unit, office or reorganization proposed is necessary under the Presidents duty to "execute the laws").

[22] Relyea 2000, *supra* note 1, at 3.
[23] Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 29, 2001) (Establishes faith based initiative centers in Executive Departments).
[24] *E.g.,* Hein v. Freedom from Religion Foundation, Inc., 127 S.Ct. 2553 (2007) (plaintiff had no standing to challenge G.W. Bush's Faith-Based Initiatives Program).
[25] 31 U.S.C. § 1347.
[26] Berg, *supra* note 3, at 196.
[27] *Id*. at 196, 197.
[28] *Id*. at 197-8.
[29] *Id.* at 198.
[30] Howell, *supra* note 1.
[31] *Id.* at 1098-99.
[32] *Id.* at 1099.
[33] *Id.* at 1095, 1099.
[34] *Id*. at 1100. The authors point out, however, that the President's influence does not disappear entirely with congressional disapproval. *Id.*
[35] *Id*. at 1102.
[36] *Id*. at 1103.
[37] U.S. CONST. art. II, §2, cl. 2.
[38] Comp. Gen. Dec. No. B183012, 56 Comp. Gen. 137.
[39] Buckley v. Valeo, 424 U.S. 1, 126 (1976); CRS 33042, *supra* note 2, at 18.
[40] CRS 33042, *supra* note 2, at 18-19. This commitment may not be necessary, under most circumstances, to obtain testimony. An argument could be made that Congress has the authority to call most officers with operational duties, regardless of appointment status, before its committees. As a practical matter, however, the commitment obtained at the time of confirmation may make this process easier for Congress. Absent such a commitment, an Assistant Secretary, for example, may defer to an Under Secretary when requested to appear before a congressional committee. *Id.*
[41] Those positions are Director of the United States Secret Service, Chief Information Officer, Chief Human Capital Officer, Chief Financial Officer, Officer for Civil Rights and Liberties, Assistant Secretary for Information Analysis, and Assistant Secretary for Infrastructure Protection. *Id.* at 19 (citing P.L. 107-296, §§ 103(e), 201(b), 702, 703, 704, 705, 6 U.S.C. §§ 113(d), 121(b)).
[42] *Id.* at 19.
[43] *Id.* at 19.
[44] *See id.* at 18.
[45] *See* 5 U.S.C. § 908.

Chapter VIII. Regulating Greenhouse Gases Under the Clean Air Act

This chapter addresses the process for regulating pollutants under the Clean Air Act (CAA)[1] with an eye towards application to greenhouse gases (GHGs). Initially the CAA regulatory process is described. There are three primary paths by which the Environmental Protection Agency (EPA) regulates airborne substances under the CAA: (1) establishing air quality standards for the pollutants, states are required to meet these standards usually through State Implementation Plans (SIPs);[2] (2) implementing regulations specific to stationary sources, such as manufacturing facilities and power plants;[3] and (3) implementing regulations specific to mobile sources such as automobiles and aircraft.[4] Included in the discussion of mobile source regulation is a description of the waiver process by which a state can apply to EPA to establish a standard stricter than the federal standard for new motor vehicle emissions.[5] Should California adopt a stricter standard through this process, other states are permitted to adopt California's standard in lieu of the current federal standard.[6] This is the subject matter of several recent federal decisions[7] which are discussed. Next, the implication of a recent Supreme Court case, *Massachusetts v. EPA,*[8] is addressed in terms of EPA's duty to regulate GHGs generally and mobile sources specifically. Finally, this chapter addresses the feasibility of implementing a cap-and-trade program to regulate GHGs under the current CAA, including a brief explanation of "upstream regulation." EPA has developed by rulemaking a cap-and-trade program for regulating mercury.[9] It is EPA's position that it is within the agency's discretion to implement such a program under the current authority of the CAA.[10] This rule is being challenged in court. EPA's position and that of the challenger are analyzed including an examination of the standard of review which plays a significant role in challenges to agency interpretation of statutes.

1. Clean Air Act Regulation Process

a. Triggering the Regulation Process. For EPA to begin regulating a substance such as carbon dioxide (CO_2), the substance must first fit the statutory definition of "air pollutant" in section 302(g): "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[11] The CAA requires the EPA to regulate a particular pollutant if the EPA Administrator finds that a pollutant (as defined in CAA 302(g)) causes or contributes to "air pollution which may reasonably anticipated to endanger public health or welfare; the presence of which in the ambient air results from numerous or diverse mobile or stationary sources . . . ."[12] Thus, if a substance falls within the definition of air pollutant, and EPA determines it endangers public health, then it is placed on the "air pollutant list" and the EPA must regulate the substance through air quality standards, mobile source standards and stationary source standards, as set forth below. The CAA requires EPA to revise this list "from time to time."[13]

In *Massachusetts v. EPA,* EPA's position was that CO_2 is not an air pollutant within the meaning of 302(g).[14] However, the Court held that CO_2 and other GHGs are air pollutants under 302(g),[15] thus triggering EPAs duty to determine if these substances endanger public health. Although the Court did not make the endangerment finding, the ruling will make it difficult for EPA to find otherwise. The decision, which includes a discussion of recent scientific findings, assumes that global warming can reasonably be anticipated to endanger public health or welfare, so if CO_2 and other GHGs contribute to global warming, they in turn endanger public health or welfare.[16] Thus for EPA to avoid its duty to regulate CO_2 and other GHGs under the CAA, it would have to find that these substances do not contribute to global warming.[17]

b. Regulating GHGs as "Criteria Pollutants": Air Quality Standards and SIPS. If EPA makes an endangerment finding, the Administrator has twelve months to issue air quality criteria for the pollutant, including acceptable levels of the pollutant in the air and various information about the pollutant and its effects on welfare.[18] Simultaneously with issuing air quality criteria for a pollutant, the Administrator issues to the states and air pollution control agencies information on air pollution control techniques and data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.[19] The issued air quality criteria and other information are published in the *Federal Register.*[20]

After the Administrator issues air quality criteria for a pollutant, section 109(a)(1)(A) of the CAA requires the Administrator to publish proposed regulations prescribing primary (human health and welfare) and secondary (the environment generally) national ambient air quality standards (NAAQS) for the pollutant.[21] Within three years of the promulgation of a NAAQS under section 109, each state must submit a SIP that provides for the means a state will use to attain the NAAQS.[22] The EPA cannot mandate that a state use a particular method to attain the NAAQS.[23] It is only in the event that the Administrator finds that a state has failed to make a required SIP submission, finds that the plan does not satisfy the minimum criteria, or disapproves a SIP in whole or in part, and the state does not correct the deficiency, that the Administrator is to promulgate a federal implementation plan the state must follow.[24]

c. Regulating GHG Emissions from Stationary Sources. A second possibility for regulating GHG emissions under the CAA is pursuant to section 111, which requires the Administrator to designate categories of stationary sources that, in his or her judgment, cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.[25] A stationary source is defined in the CAA as "any building, structure, facility, or installation which emits or may emit any air pollutant."[26] So, if a pollutant such as CO_2 is found by EPA to cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (making an 'endangerment finding' for a pollutant), section 111 requires EPA to regulate stationary sources, such as coal-fired electric plants, for that pollutant. EPA is required to update the list of category designations "from time to time."[27]

The method of regulation is for EPA to set standards of performance for new and existing pollution-emitting sources. A standard of performance is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[28] It is EPA's position that a cap-and-trade mechanism is a "standard of performance" that can be implemented under this section to regulate emissions from stationary sources. This is discussed later in this chapter.

Within a year of the time that a category of stationary sources is designated under section 111, the Administrator must publish proposed regulations, establishing federal standards of performance for new sources within the category.[29] The public is then afforded a chance to submit written comments on the proposed regulations, and within one year of publishing the proposed regulations, the Administrator must promulgate standards with any modifications as he or she deems appropriate.[30] States then submit SIP-like plans (discussed in regard to criteria pollutant regulation above) to the EPA, spelling out how the state intends to meet the standard promulgated by EPA.[31] Of importance is the fact that, like with criteria pollutants, the EPA cannot mandate that a state use a particular method of emissions reductions.

Section 112 of the CAA addresses the more dangerous hazardous air pollutants (HAPs) emitted from stationary sources and regulatory methods of addressing the problem that HAPs present.[32] CO_2 would most likely not be classified as a HAP under the 112(b)(2) definition.[33]

d. Regulating GHG Emissions from Mobile Sources

New Motor Vehicles. Section 202(a)(1) of the CAA provides that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which [in the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[34] So, once again, if the EPA Administrator makes an endangerment finding for a pollutant (as defined in section 302(g) of the CAA), section 202(a)(1) would require EPA to impose CO_2 emissions standards for motor vehicles.[35] Section 202(a)(2) allows EPA to phase-in standards as technology develops and to take cost of compliance into consideration when developing the standards.[36] The CAA requires the EPA to revise this standard "from time to time."[37] In *Massachusetts v. EPA*, the Supreme Court ruled that GHG emissions from new motor vehicles must be regulated if EPA finds, under CAA section 202(a)(1), that CO_2 and other GHGs contribute to climate change.[38]

Waiver and Stricter Standards for New Motor Vehicles. Section 209(a) of the CAA preempts a state from adopting its own motor vehicle emission control standards, but 209(b) requires EPA to waive preemption for a standard that a state has determined will be at least as protective of public health and welfare as applicable federal standards unless the determination is arbitrary and capricious, the state does not need the standards

to meet compelling and extraordinary conditions, or the standards and accompanying enforcement procedures are not consistent with 209(a).[39] Further, if such a wavier is granted to California, any state which has nonattainment areas in its SIP may adopt and enforce the California standard.[40]

In 2005, California requested a preemption waiver from the EPA in order to put tougher standards into effect.[41] Subsequent to this request, and in anticipation of the waiver being granted, approximately 17 states have submitted to EPA to adopt this standard. Vermont is one of those states. [42] Automakers, also anticipating that EPA would grant California's requested waiver, sued to challenge the proposed regulations, and the Federal Court for the District of Vermont was the first to rule on the issue.[43] The court heard the case under the assumption that the EPA would indeed grant the California waiver, and the main issue was whether the new regulations are preempted by the federal standards.[44] The court found no preemption and ruled against the automakers and in favor of the states wishing to adopt the stricter California auto emissions standards.[45] In a similar case, auto manufacturers sued California in an attempt to repeal state emission laws[46] and lost.[47] The federal court decision was issued on December 12, 2007. On December 19, 2007, two years after the request was made, EPA denied California's waiver request. This is the first time EPA has ever denied a waiver request under the CAA. Until this decision, EPA had granted all 50 previous waiver requests over the last 40 years. The waiver denial is subsequent to the *Massachusetts v. EPA* ruling. California is appealing the decision in federal court.[48]

Aircraft. Section 231 of the CAA mandates that the EPA regulate pollution emitted from aircraft engines.[49] Section 231(a)(2)(A) of the CAA requires the EPA Administrator to issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare (the familiar endangerment finding).[50] The CAA requires EPA to revise these standards "from time to time."[51] After the Administrator issues proposed aircraft emission standards, public hearings shall be held with respect to the proposed standards, and within 90 days after the issuance of the proposed regulations, the Agency shall issue regulations with modifications as the Administrator deems appropriate after considering the public hearings.[52] In December 2007, five states, New York City and four environmental groups petitioned the EPA to regulate emissions of GHGs by airlines under this provision.[53]

2. *Massachusetts v. EPA*: EPA's Duty to Act and New Motor Vehicle Emissions Standards

The recent Supreme Court case *Massachusetts v. EPA* addresses mobile source regulation for CO_2. In 1999, the State of Massachusetts and a group of other states and interested parties first sued the EPA to regulate CO_2 and other GHGs that contribute to global warming emitted from new motor vehicles.[54] The Supreme Court granted certiorari on appeal and on April 2, 2007, in a 5 to 4 majority, held that EPA can avoid taking regulatory action with respect to GHG emissions from new motor vehicles only if

it determines that GHGs do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.[55]

Section 202(a)(1) of the CAA provides that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which [in the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[56] The Court decided that CO_2 and other GHGs are pollutants and subject to regulation if they contribute to climate change, which it calls a threat to public welfare, citing the CAA's sweeping definition of air pollutant and calling the statute "unambiguous."[57] In the opening paragraph, the majority mentions the rise in global temperatures and that respected scientists believe that the accompanying rise in global temperatures is related.[58] In the second paragraph, the opinion quotes the petitioners in calling global warming "the most pressing environmental challenge of our time."[59] Although the Court left the timing and methods of addressing GHG emission standards to the EPA on remand, it clearly signaled its view that global warming is a real threat and left little room for EPA to refuse to regulate CO_2 altogether.

The Court did not direct EPA to find that CO_2 and other GHGs "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[60] Instead, it remanded the case back to district court and directed the EPA, to either make an endangerment finding or not, and base its ruling on reasons conforming to the CAA.[61] The Court stated that "In short, EPA has offered no reasoned explanation for its refusal to decide whether GHGs cause or contribute to climate change."[62] The opinion makes it clear that GHGs fall within the CAA's definition of air pollutant.[63] One commentator, former EPA General Counsel (1995-98) Jonathan Z. Cannon, believes that the holding "defines a major new area of responsibility for EPA and requires the Agency to review this and other requests for regulation of GHG emissions under limits set by the Court."[64] Further, according to Canon, the opinion's opening assertion that GHGs are causing climate change signals the Court's view that science supports an endangerment finding.[65]

If the EPA finds that CO_2 and other GHGs contribute to climate change, this would trigger the regulation promulgation, public hearings, and SIP procedures of CAA sections 108 and 111 for criteria pollutants and stationary sources of pollution, respectively (discussed above). It would also trigger the mobile source procedures of Title II of the CAA, discussed above. However, the Court held that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."[66]

On May 14, 2007, President Bush publicly directed the EPA and other agencies to develop regulations to reduce GHG emissions from automobiles and increase fuel efficiency.[67] However, as Cannon points out, the President did not specify what the regulations would require or address whether the EPA should also regulate GHG emissions under other CAA provisions, such as implementing standards for new

stationary sources or national air quality standards for specific substances.[68] Rather than directing the EPA to move forward with the endangerment finding and implementing specific standards immediately, President Bush simply instructed certain agencies to make it a priority, thus issuing a directive with no real teeth.

3. Implementing a Cap-and-Trade System Under the CAA

a. Mercury Cap-and-Trade Rule. It is under section 111 of the CAA that EPA, in 2005, adopted the Clean Air Mercury Rule (CAMR) to reduce mercury emissions from coal-fired electric generators.[69] EPA set up a model cap-and-trade program for mercury and encouraged states to participate.[70] However, the CAMR is pending litigation as environmental groups sued in federal court to enjoin EPA from using cap-and-trade for mercury.[71] Part of their complaint is that mercury is a particularly harmful substance that is emitted from power plants that were formerly regulated as sources of hazardous air pollutants under CAA section 112. Mercury was removed from the section 112 list at the time of the adoption of the CAMR. A cap-and-trade program would not be possible for HAPs under section 112 because of the dangerous nature of the hazardous pollutants and the possibility of some sources actually increasing emissions of HAPs under such a scheme. That is, a cap-and-trade system would allow some sources to buy extra emissions credits and become local hot spots of dangerous mercury pollution.[72]

Of particular interest for possible CAA CO_2 regulation is EPA's justification for the use of a cap-and-trade system to regulate mercury in the CAMR. Because the CAMR is pending litigation and the CAA does not explicitly allow EPA to mandate a cap-and-trade program, it is uncertain if EPA can implement such a rule, even though participation by the states would primarily be voluntary. EPA explains its authority for cap-and-trade as stemming from CAA section 111(d), which authorizes EPA to promulgate regulations that establish a SIP-like procedure under which each state submits to EPA a plan that establishes standards of performance for any existing source for certain air pollutants and that provides for the implementation and enforcement of such standards of performance.[73] In creating the final CAMR rule, EPA interpreted the term "standard of performance" to include a cap-and-trade program, and will administer a mercury trading program and will require monitoring to track progress.[74] Note that EPA will only "administer" and not "require" a mercury trading program. The CAA is set up to allow states flexibility in determining how to meet the standards promulgated by EPA. It is unclear if EPA could force states to participate in a GHG cap-and-trade program. EPA cannot mandate participation in a federal implementation plan program unless a state does not submit a satisfactory SIP-like plan to meet standards for a pollutant.[75] However, even if such a system is not mandatory, many states have made climate change a priority and could be encouraged to join a well-designed system to reduce GHG emissions. States may favor such a plan because an EPA administered cap-and-trade program would relieve states from the task of designing the program on their own.

b. Standard of Review for EPA's Interpretation of CAA. A key issue in the case over the CAMR, *New Jersey. v. EPA,*[76] will be the amount of deference the courts afford EPA in interpreting the CAA. EPA's position is that they can regulate mercury by

cap-and-trade and should be afforded discretion to carry out the CAA in this manner. The controlling case on the issue is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*; the Supreme Court reinforced the idea that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and the principle of deference to administrative interpretations.[77] If Congress has directly spoken to the precise question at issue that is the end of the matter because the court and agency must defer to the unambiguous intent of Congress.[78] If Congress has not directly addressed the question at issue, as is the case with the CAA and pollutant regulation, the question for the court is whether the agency's answer is based on a reasonable construction of the statute.[79] The Court in *Chevron* also stated that the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[80] Further, as was the case in *Massachusetts v. EPA* and is also at issue in *New Jersey v. EPA*, Congress often delegates authority to the agency to promulgate rules and regulations in accordance with the statute, and those rules and regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[81] Regarding the *Massachusetts v. EPA* decision, the CAA expressly delegates authority to EPA to promulgate regulations for pollutants as needed. The Supreme Court held that EPA's reasons for denying the rulemaking petition were contrary to their responsibilities under the CAA, stating that instead of complying with its clear statutory command to regulate the emissions of pollutants that endanger the public health and welfare, EPA "has offered a laundry list of reasons not to regulate."[82] For the petitioners to succeed in *New Jersey v. EPA*, the court must find that the EPA's interpretation of the CAA in creating the CAMR is against clear congressional intent or arbitrary, capricious, or contrary to the statute. The outcome of this case will significantly impact the manner in which EPA can regulate GHGs under the CAA.

c. Upstream GHG Regulation. A method for reducing GHG emissions on an economy-wide basis that is favored by many environmentalists and economists is known as "upstream regulation," where instead of, or in addition to, regulating GHGs at the point where they are emitted, the GHGs would be regulated at the point of extraction from the earth or at the point of importation from foreign countries. The term "stationary source" means "any building, structure, facility, or installation which emits or may emit any air pollutant."[83] It is unlikely that importers and extractors would fall within this definition; therefore, it is unlikely that EPA can implement upstream regulations under the current authority in the CAA for stationary sources.

4. Conclusions

The CAA provides authority for the EPA to regulate CO_2 and other GHG emissions without further congressional action. Pursuant to the recent Supreme Court ruling in *Massachusetts v. EPA,* GHGs are within the CAA's definition of pollutant and EPA must make an endangerment determination, that is, determine whether CO_2 and other GHGs are found to reasonably be anticipated to endanger public health or welfare. If that determination is in the affirmative, GHGs will be added to the list of substances that are regulated by EPA through: (1) air quality standards; (2) stationary source

standards; and (3) mobile source standards. The Court's ruling in *Massachusetts v. EPA* signaled its view that global warming is a threat to public welfare, and held that the only way that EPA could avoid regulating CO_2 under the CAA is if EPA determines that CO_2 does not contribute to global warming.[84]

Left open, however, is the timing of EPA action. The Court held, in *Massachusetts v. EPA,* that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."[85] In the relevant provisions of the CAA, EPA is required to revise pollutant lists and standards "from time to time." Further, subsequent direction by President G.W. Bush lacks timeframes or specifics as to the action EPA should take. Based on EPA's past behavior, as evidenced by petitions filed with EPA and lawsuits filed against EPA over the last 8 years to force some action to address global warming and reduce GHG emissions, it becomes clear that federal action on global warming could be more aggressive. One lesson learned from the court decisions of recent months is that EPA has had the authority to take significant action the reduce GHG emissions but has not used it. Under the direction of a president who sets climate change as a priority and directs agencies to take action quickly and to the extent of their authority, the outcome would be much different.

Finally, it is EPA's position that under the current authority of the CAA, the Agency by rulemaking can adopt a cap-and-trade program as a standard for emissions regulation of stationary sources that emit criteria pollutants. In 2005, EPA promulgated regulations under the CAA, including a cap-and-trade program, for regulating mercury in the CAMR.[86] The CAMR, however, is pending litigation and EPA's ability to implement a nationwide cap-and-trade program for criteria pollutants such as CO_2 under the current authority of the CAA is not certain.[87] Although there is a possibility of unilateral action on a cap-and-trade program for GHGs, an upstream program faces an additional hurdle. It is unlikely that extractors, importers, or other upstream sources would fit within the definition of stationary sources that can be regulated pursuant to the CAA.[88]

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[1]The Clean Air Act of 1970 (CAA), Pub. L. 91-604, as amended in 1990, Pub. L. 101-549, 104 Stat 2399, codified at 42 U.S.C. §§ 7410-7627.
[2] 42 U.S.C. §§ 7408-7410.
[3] *Id.* at §§ 7411-7412.
[4] *Id.* at §§ 7521-7590 (Subchapter II).
[5] *Id.* at § 7543.
[6] *Id.* at § 7584 (applicable to states that have plans under Part D of Subchapter I, nonattainment areas).
[7] Massachusetts v. U.S. Environmental Protection Agency (EPA), 127 S. Ct. 1438 (2007); Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F.Supp.2d 295 (D.Vt.) (2007).
[8] *Massachusetts. v. EPA*, 127 S. Ct. 1438.

[9] *See* Rules and Regulations, Environmental Protection Agency: Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28606 (2005).
[10] *See* New Jersey v. U.S. EPA, No. 05-1097 (D.C. Cir. 2005), 2005 WL 3750257 (C.A.D.C.).
[11] CAA § 302(g), 42 U.S.C. § 7602 (g).
[12] *Id.* at § 108(a)(1), 42 U.S.C. § 7408(a)(1).
[13] 42 U.S.C. § 7408(a)(1).
[14] *Massachusetts. v. EPA*, 127 S.Ct. at 1460.
[15] *Id.*
[16] *Id.* at 1459-60.
[17] Technically the Court ruled that EPA can avoid taking regulatory action only if it determines that GHGs do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Id.* at 1462. However, by the terms of this decision there appears little room for EPA to legitimately avoid taking regulatory action based on the latter part of the ruling. *Id.* at 1462-63. In *Massachusetts v. EPA*, EPA argued a number of reasons why the Agency would not form a scientific judgment and determine whether or not GHGS endanger under the CAA. *Id.* The Court found, however, that these arguments did not "amount to a reasoned justification for declining to form a scientific judgment." *Id.* at 1463. In particular, the Court found that "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* The Court went on to state, "In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious . . . or otherwise not in accordance with law.'" *Id.*
[18] CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2).
[19] *Id.* at § 108(b)(1), 42 U.S.C. § 7408(b)(1).
[20] *Id.* at § 108(d), 42 U.S.C. § 7408(d).
[21] *Id.* at § 109(a)(1)(A), 42 U.S.C. § 7409(a)(1)(A).
[22] *Id.* at § 110(a)(1), 42 U.S.C. § 7410(a)(1).
[23] *See* Commonwealth of Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997).
[24] CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).
[25] *Id.* at § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A).
[26] *Id.* at § 111(a)(3), 42 U.S.C. § 7411(a)(3).
[27] 42 U.S.C. § 7411(b)(1)(A).
[28] CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).
[29] *Id.* at § 111(b)(1)(b), 42 U.S.C. § 7411(b)(1)(b).
[30] *Id.*
[31] *Id.* at § 111(c), 42 U.S.C. § 7411(c).
[32] 42 U.S.C. § 7412.
[33] HAPs are pollutants "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise. . . ." 42 U.S.C. § 7412(b)(2).
[34] 42 U.S.C. § 7521(a)(1).
[35] *Id.*
[36] *Id.* at § 7521(a)(2).
[37] *Id.* at § 7521(a)(1).
[38] *Massachusetts v. EPA*, 127 S. Ct. at 1460; *see also, supra* text accompanying note 17.
[39] 42 U.S.C. § 7543(b); 42 U.S.C. § 7543(e).
[40] *Id.* at §7507.
[41] *Request for Waiver of Federal Preemption*, 72 Fed. Reg. 21260 (2007).
[42] *Green Mtn*., 508 F.Supp.2d 295.
[43] *Id.*
[44] *Id.* at 350.
[45] *Id.* at 399.

[46] *See* Central Valley Chrysler-Jeep v. Witherspoon, 456 F.Supp.2d 1160 (E.D.Cal. 2006). Other cases were initiated around the country by automobile manufacturing interests. *E.g.* Lincoln Dodge Inc. v. Sullivan, Slip Copy, 2007 WL 4577377 (D.R.I. 2007).
[47] *See, e.g.*, Samantha Young, *Automakers Lose California Emissions Lawsuit,* Associated Press (Dec. 12, 2007), *available at* http://www.manufacturing.net/News-Automakers-Lose-California-Emissions-Lawsuit.aspx?menuid=272.
[48] On January 2, 2008, in separate petitions, California and 15 states—plus five environmental organizations—asked a federal court to reverse the December 19, 2007 U.S. EPA decision denying California a waiver to implement its Clean Cars law. The petitions were filed in the 9th Circuit of Appeals. *Petition*, California v. EPA, (9th Cir. filed January 2, 2008), *available at* http://www.cleancarscampaign.org/web-content/cleanairact/docs/n1514_epapetition-1.pdf.
[49] CAA § 231, 42 U.S.C. § 7571.
[50] 42 U.S.C. § 7571(a)(2)(A).
[51] *Id.* at § 7571(a)(2)(A).
[52] *Id.* at § 7571(a)(3)
[53] Margot Roosevelt, *Aircraft Emission Cuts Urged*, LOS ANGELES TIMES, Dec. 5, 2007, *available at* http://www.latimes.com/business/printedition/la-fi-greenhouse5dec05,0,6943743.story.
[54] *Massachusetts v. EPA*, 127 S. Ct. 1438.
[55] *Id.* at 1462.
[56] 42 U.S.C. § 7521(a)(1).
[57] *Massachusetts v. EPA*, 127 S.Ct. at 1460.
[58] *Id.* at 1446.
[59] *Id.*
[60] 42. U.S.C. § 7408(a)(1).
[61] *Massachusetts v. EPA*, 127 S.Ct. at 1462.
[62] *Id.* at 1463.
[63] *Id.* at 1460.
[64] Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. IN BRIEF 53 (2007) (hereinafter "Cannon").
[65] *Id.* at 57.
[66] *Massachusetts v. EPA*, 127 S.Ct. at 1462.
[67] *Bush Calls for Cuts in Vehicle Emissions: Agencies Ordered to Draft New Rules*, WASH. POST, May 15, 2007, at D1.
[68] Cannon, *supra* note 64, at 59.
[69] *See* Rules and Regulations, Environmental Protection Agency: Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28606.
[70] *Id.*
[71] *See New Jersey v. EPA*, No. 05-1097.
[72] *Id.* at Petitioners brief, 2007 WL 2155488.
[73] 42 U.S.C. § 7411(d); 70 Fed. Reg. 28,616.
[74] 70 Fed. Reg. 28,617.
[75] 42 U.S.C. § 7410.
[76] No. 05-1097 (D.C. Cir. 2005).
[77] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984); *see also*, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).
[78] *Chevron,* 467 U.S. at 842-43.
[79] *Id.* at 843.
[80] *Id.*
[81] *Id.* at 843-44.
[82] *Massachusetts v. EPA,* 127 S.Ct. at 1462.
[83] 42 U.S.C. § 7411(a)(3).
[84] *Massachusetts v. EPA*, 127 S.Ct. 1438; *see also, supra* text accompanying note 17.
[85] *Id.* at 1462.
[86] 70 Fed. Reg. 28,606-01 (2005).
[87] *See New Jersey. v. EPA*, No. 05-1097.

[88] 42 U.S.C. § 7411(a)(3).

Chapter IX. The Federal Government as a Consumer: Climate Mitigation through Procurement

This chapter addresses the boundaries of executive procurement authority and the extent to which this authority can be applied to measures that support climate change policy. The Federal Property and Administrative Services Act of 1949 ("Procurement Act")[1] rearranged the existing government procurement and property management schemes and created an new unified system that made the government procurement process more efficient and economical. Since its enactment, the Procurement Act has been used well beyond its original scope to touch issues such as labor and civil rights. Through the use of executive orders, presidents have both relied upon and expanded the power of the Act. Challenges to the use of the Procurement Act as justification for the exercise of executive power have met with little sympathy by the courts. The Supreme Court has yet to rule on this issue and has denied certiorari a number of times; however, the circuit courts have dealt with the issue extensively.

In section 1 of this chapter, the key provisions of the Procurement Act are indentified in regard to discretionary authority delegated to the President. In the second section, the case law on point is synthesized into a rough set of guidelines for using executive power, via the executive order, that is founded in the Procurement Act.[2] In summary, the threshold for determining whether an executive order will sustain a legal challenge is three-fold. First, it must not contradict any express wish of Congress or the Constitution. Second, it must fall into the nebulous nexus of efficiency and economy. Third, the action ordered must be within the power of the federal government. If these criteria are met it seems that the courts are reticent to strike down a use of executive authority especially if supported by additional authority including prior acts by presidents or other statutes. The argument for authority based on a previous chain of executive orders is explored in section 3. Section 4 identifies the areas the President can control under the Procurement Act. Past presidents have exerted control in three major areas: (1) direct purchase control; (2) industry control through quality standards; and (3) control over vendors via contractual conditions and obligations. The case law supports, to a large degree, the President's use of power to affect all three of these categories. Although the key court cases primarily address expansion of Procurement Act authority into policies not related to energy or the environment, throughout this chapter, parallels are made to application of this authority to climate change policy.

1. Key Provisions of the Procurement Act

The Procurement Act sought to bring governmental functions under one system that could ensure efficiency and economy in the procurement of property and services, the use of property, the disposal of property, and recordkeeping.[3] To accomplish this goal the Act established the General Services Administration (GSA), which is charged with

the oversight of efficient and economic government procurement practices.[4] The GSA is headed by an Administrator appointed by the President, with the advice of the Senate.[5] The administrator "perform[s] his functions subject to the direction and control of the President,"[6] and is given the authority to prescribe the regulations necessary to carry out the Act. [7]

The General Services Administrator has control over several specific areas of the government including the Federal Acquisition Service.[8] In addition, the Act created the General Supply Fund, renamed the Acquisition Services Fund in 2002.[9] It is out of this fund that government transactions under the GSA are to be carried out. The Administrator, as keeper of this fund, is to set the prices at which purchases by the government shall be made.[10] In addition the Administrator has control over the quality regulations governing the articles purchased by the government. The Act gives the Administrator the authority to conduct tests, "in the Administrator's discretion and with the consent of the producer or vendor . . . ."[11] The tests may be conducted "in a manner the Administrator specifies, to (1) determine whether an article or commodity conforms to prescribed specifications and standards; or (2) aid in the development of specifications and standards."[12]

This gives the Administrator, and via the Administrator, the President, a great degree of control over the procurement process and the nature of the goods procured. Further, section 205(a), provides that the President "may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act."[13] According to a 1949 federal court ruling, Congress added section 205(a) to guarantee that "Presidential policies and directives shall govern not merely guide" the agencies under the Procurement Act.[14] This control has been used on numerous occasions by presidents since the Act was passed into law. Through the use of executive orders, several presidents have successfully sought to exert control over issues that are not, on their face, obviously related to efficiency and economy in government procurement, ranging from parking meters to labor relations to civil rights. In the instances where a president's actions have been challenged, the courts have been very lenient with the meaning and purpose of the Act and the powers which it grants the President.

2. Standard Set by Courts for Taking Action by Executive Order

Two key cases summarize the courts' position on the authority to issue executive orders under the auspices of the Procurement Act. The first case, *Contractors Association of Eastern Pennsylvania (CAEP) v. Secretary of Labor,* addresses the use of the Procurement Act as justification for executive control over government hiring practices.[15] *CAEP* applies Justice Jackson's analysis from *Youngstown Sheet and Tube Co. v. Sawyer*,[16] discussed in Chapter 3, to discern a general categorical justification for executive control. This broad authorization is further honed in the second case, *American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) v. Kahn*, where the court prescribes a nexus between the order at issue and the values of efficiency

and economy.[17] Together these cases form a framework into which executive orders should fit in order to adhere to constitutional and legal requirements.

In *CAEP,* the court relies on Justice Jackson's three categories of presidential power, expressed in *Youngstown Sheet*, to bolster its argument and places President Johnson's actions into the highest ebb of presidential power category, that is, when the President is acting with the express will of Congress. According to *CAEP*, presidential action taken under the rubrics of efficiency and economy fall under the implied authority of the Procurement Act because they are in line with the stated purpose of that act. Eight years later in *Kahn,* the D.C. Circuit Court of Appeals applied a nexus test to the use of executive authority under the Procurement Act. In that case the court held that there must be a "sufficiently close nexus" between the procurement compliance program in the executive order and the values of efficiency and economy.[18] Taken together these cases suggest that the executive authority under the Procurement Act is broad and the courts are not ready to delve deeply into the depths of its use.

a. CAEP. In September of 1965, President Johnson issued EO 11246. This executive order and executive branch action taken under the order created what came to be known as the Philadelphia Plan. In 1969 the Department of Labor issued orders pursuant to the President's executive order. In summary, the orders created a program that required bidders on projects in and around Philadelphia that would cost more than $500,000 to submit an affirmative action plan that specifically outlined utilization goals for minority workers.[19] The CAEP challenged the plan on two grounds. First, the President and executive branch had no authority to issue such an order. Second, even if there was authority to issue the orders at the federal level, they had no such authority to affect state procurement. In regard to the latter issue, the CAEP challenged presidential action that created a state-centric plan for procurement contracting, arguing that the President did not have the authority to promulgate regulations affecting state procurement.

Assessing whether the President had authority to issue such an order, the Court turns to Justice Jackson's concurrence in *Youngstown Sheet* and evaluates the President's actions in terms of the ebb of presidential power. The Court outlines the historical use of executive orders to control labor through government procurement. The Court points out that up until 1953 the President utilized his authority under both the Procurement Act and the War Effort Act of 1941. In 1953, President Eisenhower used his authority to set regulations for contracting with companies with discriminatory hiring practices in the civilian world. This presidential move met with little resistance and the practice of presidential issuance of orders under the Procurement Act was almost seamlessly transferred from the military to the civilian world. The Court next points out that this transition makes sense: "No less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs . . . ."[20] The Court accepts the move made by President Eisenhower and uses the history it earlier outlined to imply that Congress gave authority to the President to act in such a manner. Basically, the argument follows that Congress wants efficiency and economy and has historically allowed the

President to dictate regulations that will ensure these goals are met. The efficiency and economy argument was that over the long run, excluding from the labor pool available minority workmen would increase costs and delay programs.[21] This logic is adopted and enhanced by the *Kahn* court.

The court spends a great deal of time on the question of whether or not the executive order violates the Civil Rights Act of 1964 and Labor Act. The court answers this question in the negative. While the reasoning behind this decision is important, more so is the fact that this is an issue. In proceeding with action under the Procurement Act, the court's persistent inquiry into other statutes suggests that it will look for such conflicts thoroughly. Thus, any action taken must be in compliance, and indeed furtherance of, another statute if it affects the subject of that statute.

The *CAEP* court goes on to address Jackson's second category, the twilight zone of presidential power. If, according to the court, the President's actions do not fall into the first category, they are valid under the second given congressional acquiescence and affirmative approval to similar orders in the past. "If no congressional enactments prohibit what has been done, the Executive action is valid. Particularly is this so when Congress, aware of presidential action with respect to federally assisted construction projects since June of 1963, has continued to make appropriations for such projects."[22]

Thus, pursuant to the *CAEP* decision, an executive order issued under the Procurement Act will be on the firmest footing if two things are present. First, Congress has not only remained silent as to past presidential action but has appropriated funds toward that action. This would speak to Congress's approval, by acquiescence or an affirmative act, to presidential authority on a particular subject. Such acquiescence, if not explicit, would place the President's acts in the second category, the twilight zone. Second, the President's actions would be stronger if they could be traced back along a statutory line just as President Eisenhower had done. In that case past presidents had used not only the Procurement Act but also the War Powers Act to bolster their justification for their actions. By providing a stable basis in another statute, the presidents strengthened their justification for their actions. When it came time to issue orders outside of the second statute—in the case of Eisenhower who left behind the war power justification—there was little resistance because Congress was accustomed to the use of the power in a seamlessly justified manner.

CAEP also addresses the issue of the President issuing orders that control state agencies that are receiving federal funding. Basically, the court said that the President has authority to act upon states when the federal government has "both financial and completion interests."[23] Thus, the authority enjoyed by the President pursuant to the Procurement Act may extend to state programs that receive federal funding.

The decision of the court was appealed to the U.S. Supreme Court which denied certiorari. This decision has not been overturned; nor has it been negated in any court. It has been distinguished on grounds of specificity, and issues not relevant to the discussion here.

b. *Kahn.* The second key case is *AFL-CIO v. Kahn*.[24] In this case the court upheld executive regulation of contracting by federal agencies to parties that failed to comply with voluntary wage and price standards. EO 12092, issued by President Carter, established a procurement policy under which government contracts above $5 million could be denied to companies that failed or refused to comply with voluntary wage and price standards.[25] In reaching this decision the court considered specifically the scope of the power that the President has under the Procurement Act and the standard for the nexus between the actions directed in the executive order and "economy and efficiency."

According to the court, "Section 205(a) grants the President particularly direct and broad ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency."[26] The court examines the language of the Act, the legislative history of the Act, and executive action taken pursuant to the Act and determines that the President's actions in this case conformed to the precedent set by a number of cases on point. In its examination of the language of the statute the court points to section 205(a) which states that the President "may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act."[27] According to the court, an analysis of the congressional record leads to the interpretation that this section was intended "to guarantee 'Presidential policies and directives shall govern not merely guide the agencies under the FPASA.'"[28] The court takes this to mean that the "President plays a direct and active part in supervising the Government's management functions."[29]

In evaluating the nexus between the Act and "economy and efficiency," the *Kahn* court adopts the standard from an earlier case,[30] *Farkas v. Texas Instrument, Inc*.[31] In Farkas, the court affirmed the authority for an executive order relating to affirmative action and states: "We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of 'an economical and efficient system for the procurement and supply' of property and services, 40 U.S.C.A. § 471, that the order should be treated as issued without statutory authority."[32]

The *Kahn* court explains, "'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions."[33] The court goes on to consider how the procurement power has been exercised under the Act:

> Congress itself has frequently imposed on the procurement process social and economic programs somewhat removed from a strict view of efficiency and economy. More significant for this case, however, several Executive actions taken explicitly or implicitly under Section 205 of the FPASA have also imposed additional considerations on the procurement process.[34]

The FPASA (Procurement Act) itself included a directive that a fair portion of government purchases and contracts be placed with small businesses. Other prominent examples enacted since 1949 include directives that government service contractors meet minimum standards for wages and working conditions and that the government not contract with any company that has been found in criminal violation of air pollution standards of the CAA. In February 1964, President Johnson directed by executive order that federal contractors not discriminate (against persons) because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement. In order to ease this nation's balance of payments problem in 1967, the General Services Administrator issued a regulation requiring that procurement of materials and supplies for use outside the United States be restricted to goods produced in this country, except when the Government has excess foreign currencies available for purchases overseas. Through EO 11755 in 1973 President Nixon continued in effect the exclusion from employment on federal contract work of certain state prisoners.[35]

c. Combining *CAEP* and *Kahn*. *CAEP* and *Kahn* offer a firm basis for comparison in determining the path to take with reference to the promulgation of executive orders affecting climate change policies. Under the *CAEP* rubric, an executive order is justified so long as it is not contrary to the express will of Congress. This means that the order may either be directly in line with Congress's expressed intent or may take advantage of gaps in that intent. The purpose of the Procurement Act is to ensure efficiency and economy in government procurement and contracting. As long as executive action falls within the realm of these goals, the action should be authorized. The courts have been very lenient in defining the realm of efficiency and economy. Examples of the courts' leniency include their approval of executive control over whether federal employees should be charged to use parking facilities controlled by federal agencies;[36] their sanction of the President's order that notices to employees of their right not to join a union be posted in the workplace;[37] and their allowance of the President to design a labor program for federally funded construction projects that required the hiring of minorities.[38] In each of these examples, the courts found a sufficient nexus between the ordered action and the goals of efficiency and economy. This sets the bar rather low for how closely linked the executive action must be to the stated goals. The posting of informational signs passed the court's litmus test and satisfied the goal of ensuring efficient and economical government function. The posting of an informational sign is an extremely attenuated example and leaves open the door for action that is much more closely linked to economy and efficiency.

In addition, *CAEP* gives the President the ability to promulgate orders that apply to state government, so long as those governments, and projects, are federally supported. This is important given the current landscape of pollution control legislation. The Clean Air Act and Clean Water Act depend largely on state action, as do many state environmental programs and initiatives.

3. Authority Based on a Chain of Executive Orders

Farmer v. Philadelphia Electric Company offers an excellent example of the compound nature of the executive order.[39] In 1941 President Franklin D. Roosevelt issued EO 8802. According to the order, "All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin . . . ."[40] This established the requirement of nondiscrimination in defense department contracts and laid the groundwork for subsequent presidents to build strong executive control over discrimination.[41] In 1943, EO 9346 amended EO 8802 and broadened it to apply to all government contracting agencies.[42] The nondiscrimination executive order was further amended by President Truman, EO 10308; President Eisenhower, EOs 10479 and 10557; and President Kennedy, EO 10925.[43] By this last order the issues of nondiscrimination in government contracting policy had come to full bloom. President Kennedy's order created the President's Committee on Equal Employment Opportunity and imbued that body with the power to do what it deems necessary to carry out the order, including adopting rules and regulations and issuing orders.[44]

This sequence of executive orders eventually ended as the Civil Rights Act was passed. Codified in that act were many of the policies outlined in its executive branch predecessors. This example of the use of executive orders shows not only their sweeping power in controlling the procurement and contracting ability of the federal government but also illustrates the supportive power of executive orders. President Kennedy's executive order was issued based on the general authority of the President with reference to previous executive orders supporting similar policies. This creates a kind of compounded presidential power phenomenon where the President takes his power not from Congress or constitutional delegation but by the actions of past presidents. This is a line of reasoning that has been accepted by the courts.[45] In particular, courts pay attention to the reaction of Congress to executive orders and if Congress either does not react, or reacts favorably, via appropriates for example, to past executive orders, the court is reticent to hold the most recent promulgation of executive authority unjustified.[46] In other words, when there exists a chain of executive order precedent on an issue, which Congress has not directly opposed, the court is more likely to support the most recent link in that chain.

This foundational presidential power phenomenon can be applied as an argument for executive authority to address climate change because the executive orders issued by previous presidents on this issue may serve, as did those issued by President Kennedy's predecessors, as a strong foundation for current executive power. For example, a number of executive orders issued in the past thirty years can be used as a foundation for current authority to implement climate change policies by executive order. In 1978 President Carter ordered executive agency heads to take responsibility for "ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution. . . ."[47] Three years later in 1981, President Carter issued EO 12261 which required federal agencies to use gasohol in their vehicles where and when possible.[48]

In 1999 President Clinton issued EO 13123 which required agencies to reduce their greenhouse gas emissions and improve their energy efficiency.[49] The order set specific targets for greenhouse gas emissions reduction, requiring agencies to reduce emissions to thirty percent lower than the 1990 levels by 2010.[50] This order does not specifically cite the Procurement Act but it does state as its goals efficiency and saving taxpayer dollars. Also in 1999, President Clinton issued an executive order that outlined specific elements of a plan to develop and promote biobased products and bioenergy.[51] This order was meant to encourage the early growth of a bioindustry in order to make bio-products viable in a world market. In 2004, President G.W. Bush issued EO 13221, which ordered agencies, when purchasing devices with standby power, to purchase devices with standby power of no more than one watt.[52] This order arguably reaches further into procurement policy than any outlined thus far and sets a new standard of control by the President. Other executive orders that would support this argument include, but are not limited to: EO 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition (September 14, 1998); EO 13148, Greening the Government Through Leadership in Environmental Management (April 21, 2000); EO 13149, Greening the Government Through Federal Fleet and Transportation Efficiency (April 21, 2000); EO 13423, Strengthening Federal Environmental, Energy, and Transportation Management (January 24, 2007); and EO 13432, Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007).

Although most of these orders were issued under the auspices of various environmental and energy related statutes, an argument could be made by combining these orders with the Procurement Act to extend executive authority into areas not explicitly covered by environmental and energy related statutes. An executive order exerting control over procurement practices that support climate change measures could assert as partial authority this long line of environmental and energy based executive orders.

4. Areas of Presidential Influence

Presidents in the past have exerted control over a number of areas under the auspices of the Procurement Act. There are three major categories over which presidents have exerted control: (1) direct control over the purchases made by the government; (2) control over the industries through the implementation of standards; and (3) control over the vendors by means of contract provisions and conditions. The assertion of power in each of the three categories has been tested in the courts. The area least explored by the courts is that of direct control over purchases. According to the *Carmen* court, the President has authority to directly control government purchasing. In that case the court upheld an executive order requiring agencies to install parking fee systems for government-owned parking lots.[53] More recently, President G.W. Bush issued EO 13221 which gives specifics about the purchase of standby power devices.[54] This order has not yet been challenged at the federal level so it remains to be seen what the courts will do if it is. It seems likely, however, that if the executive action is well-founded in the

Procurement Act and does not fail to meet any of the criteria outlined by *Kahn* and *CAEP*, it would withstand a legal challenge.

The area of presidential authority under the Procurement Act that has been explored the most is the setting of standards under which the agencies and/or vendor-industries must act. The authority to set standards for industries and agencies comes from the Procurement Act itself. Section 313 of the Act states, "The Administrator, in the Administrator's discretion and with the consent of the producer or vendor, may have tests conducted, in a manner the Administrator specifies (1) determine whether an article or commodity conforms to prescribed specifications and standards; or (2) aid in the development of specifications and standards."[55] This authority is furthered by *Kahn* where the court upheld the setting of wage and price standards.[56] In *Kahn,* the executive order mandated that government contractors set wage and price standards or that their contract be cancelled. In a resounding majority of cases, the courts have upheld the President's authority.

The final area over which the President has influence under the Procurement Act is through contracting. This category includes special conditions to contracting and provisions in contracts. In *Farmer*, the court upheld an executive order that required an antidiscrimination provision in government contracts with contractors.[57] Further, in *UAW* the court upheld an order requiring a contract provision whereby employers agreed to post signs informing employees of their right not to join a union.[58] In *CAEP* the executive order required an affirmative action plan to be submitted by government contractors.[59] Thus courts have been willing to affirm the President's authority to require policy-oriented contractual provisions or conditions.

5. Conclusions

The President has expansive authority pursuant to the Procurement Act. First, the language of the Act itself is quite broad in terms of discretion delegated to the President in establishing procurement policy. The courts have established three criteria which must be met in order for an executive order issued pursuant to the Act to withstand a legal challenge; however, in application of these criteria the courts are fairly lenient. First, the actions prescribed by the order and any subsequent actions resulting from the order must not contradict the express will of Congress, in other words, any other law.[60] In addition, the President's actions must not contradict any constitutional mandate. Second, the action prescribed must be linked to the efficient and economic functioning of the government.[61] This link is not difficult to establish. The courts seem content with a relatively attenuated showing of relevance. The Procurement Act has been used to justify actions that on their face do not seem obviously related to efficiency and economy, for example, promoting civil rights policy. Third, the action taken subsequent to the order must be within the power of the federal government to carry out. This means that state and local government can only be affected by the executive order where there is some tie between the specific area of state government in question and the federal government. It is enough that a state project is receiving federal support.[62] Finally, an argument can be made for authority to issue an executive order based a chain of prior executive orders.

Case law supports the presidential control over three major categories under the auspices of the Procurement Act: (1) direct control over the purchases made by the government; (2) control over the industries through the implementation of standards; and (3) control over the vendors by means of contract provisions and conditions. This bodes well in the case of advancing climate change policy. Given the history of executive-initiated environmental action and the favorable rulings by the circuit courts, the Procurement Act offers fertile ground to issue executive orders that support climate change measures.

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[1] Federal Property and Administrative Services Act, 40 U.S.C. §101 et.seq.
[2] *See, e.g.,* AFL/CIO v. Kahn, 618 F. 2d 784 (1979); Contractors Association of Eastern Penn. v. Secretary of Labor, 442 F.2d 159, 168-71 (1971).
[3] 40 U.S.C. § 101(2) (Declaration of Policy).
[4] *Id.* at §§ 301, 501(a). The Federal Property and Administrative Services Act of 1949 ("Original Act") outlines the creation of the GSA. Federal Property and Administrative Services Act of 1949, 63 Stat. 389, previously codified at 40 U.S.C. § 751(a)-(f).
[5] *Id.* at § 302 (a).
[6] *Id.* at § 302(a).
[7] *Id.* at §§ 121, 501(b).
[8] *Id.* at § 303(a). Originally, the Administrator of the GSA had control over several specific areas of the government including the former Bureau of Federal Supply and the Federal Works Agency, see Original Act, 40 U.S.C. § 752(a), but due to agency changes and merges in the last fifty years, Title 40 has been amended.
[9] 40 U.S.C. § 321.
[10] *Id.* at § 321.
[11] *Id.* at § 313(b). The current version is largely unchanged from the original text. The text from the Original Act reads: "Whenever any producer or vendor shall tender any article or commodity for sale or lease to the General Services Administration or to any procurement authority acting under the direction and control of the Administrator pursuant to this Act, the Administrator is authorized in his discretion, with the consent of such producer or vendor, to cause to be conducted, in such manner as the Administrator shall specify, such tests as he shall prescribe either to determine whether such article or commodity conforms to prescribed specifications and standards, or to aid in development of contemplated specifications and standards." Original Act, 40 U.S.C. §756(g).
[12] *Id.* at § 313(b).
[13] Federal Property and Administrative Services Act of 1949, originally codified at 40 U.S.C. § 486(a) (1976), relocated to 40 U.S.C. 121(a) (*see* 116 Stat. 1062, Pub. L. 107-212 (2002)).
[14] *Kahn*, 681 F.2d at 788, *citing* 95 Cong.Rec. 7441 (1949), I-A Legis.App. at 134 (remarks of Rep. Holifield); S.Rep.No.475, 81st Cong., 1st Sess. 3 (1949), I-A Legis.App. at 90; 95 Cong.Rec. 7452 (1949), I-A Legis.App. at 145 (remarks of Representative Bolling: "In drafting this legislation the President was given the power to prescribe policies and directives which he may deem necessary to carry out the provisions thereunder. These policies and directives must govern the action of the Administrator and the executive agencies. This accomplishes for all intents and purposes the same objective that could be obtained by placing the General Services Administration in the Office of the President").
[15] *CAEP*, 442 F.2d at 168 (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 US 579, 72 S.Ct. 863 (1952)).
[16] 343 U.S. 579 (1952).
[17] *Kahn*, 618 F. 2d at 792.
[18] *Id.*
[19] *CAEP*, 442 F.2d at 163.
[20] *Id.* at 170.
[21] *Id.* at 170.
[22] *Id.* at 171.

[23] *Id.* at 171.
[24] *Kahn*, 618 F. 2d 784.
[25] Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (Nov. 1, 1978).
[26] *Kahn*, 618 F. 2d at 789.
[27] The current language is slightly revised; in substance it is the same. In its current form it reads: "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle." 40 U.S.C. § 121(a).
[28] *Kahn*, 618 F.2d 788 (citing Senate Report and Congressional Record).
[29] *Id.* at 788.
[30] *Id*. at 791.
[31] Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir.), cert. denied, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967).
[32] *Id.* at 632 n.1.
[33] *Kahn*, 618 F.2d at 789.
[34] *Id*.
[35] *Id*. at 789-91.
[36] American Fed'n of Government Employees v. Carmen, 669 F. 2d 815 (1981).
[37] UAW-Labor Empl. & Training Corp. v. Chao, 325 F.3D 360 (2003).
[38] *CAEP*, 442 F. 2d 159.
[39] Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (C.A.3 1964).
[40] Exec. Order No. 8,802, 6 Fed. Reg. 3109 § 2 (June 25, 1941).
[41] The following sequence is laid out in *Farmer*, 329 F. 2d at 5.
[42] "All contracting agencies of the Government of the United States shall include in all contracts hereafter negotiated or renegotiated by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin and requiring him to include a similar provision in all subcontracts." Exec. Order No. 9,346, 8 Fed. Reg. 7183, § 1 (May 27, 1943).
[43] Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951); Exec. Order No. 10,479, 18 Fed. Reg. 4,899 (Aug. 13, 1953); Exec. Order No. 10,557, 19 Fed. Reg. 5,655 (Sept. 3, 1954); Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (March 6, 1961).
[44] Exec. Order No. 10,925, 26, Fed. Reg. 1,977 (March 6, 1961); *see also Farmer,* 329 F.2d at 6.
[45] *See, e.g., CAEP*, 442 F2d 159 at 169-171 (The court examines the history of related executive orders ranging from President Eisenhower to President Johnson).
[46] *Id.* at 171.
[47] Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978) (issued pursuant to section 22 of the Toxic Substances Control Act, 15 U.S.C. 2621; section 313 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1323; section 1447 of the Public Health Service Act, as amended by the Safe Drinking Water Act, 42 U.S.C. 300j-6; section 118 of the Clean Air Act, as amended, 42 U.S.C. 7418(b); section 4 of the Noise Control Act of 1972, 42 U.S.C. 4903; and section 6001 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6961).
[48] Exec. Order No. 12,261, 46 Fed. Reg. 2,023 (Jan. 5, 1981) (issued pursuant to section 271 of the Energy Security Act, 94 Stat. 710; Public Law 96-294; 42 U.S.C. 8871).
[49] Exec. Order No. 13,123, 64 Fed. Reg. 30,851 (June 8, 1999) (issued pursuant to the National Energy Conservation Policy Act, Public Law 95-619, 92 Stat. 3206, 42 U.S.C. 8252 et seq., as amended by the Energy Policy Act of 1992 , Public Law 102-486, 106 Stat. 2776).
[50] *Id.*
[51] Exec. Order No. 13,134, 64 Fed. Reg. 44639 (Aug. 12, 1999) (establishing council to prepare strategic plan).
[52] Exec. Order No. 13,221, 66 Fed. Reg. 40,571 (July 31, 2001) (issued pursuant to the National Energy Conservation Policy Act, Public Law 95-619, 92 Stat. 3206, 42 U.S.C. 8252 et seq., as amended by the Energy Policy Act of 1992, Public Law 102-486, 106 Stat. 2776).
[53] *Carmen*, 669 F. 2d 815.
[54] Exec. Order No. 13,221, 66 Fed. Reg. 40,571 (July 31, 2001).
[55] 40 U.S.C. § 313(b).
[56] *Kahn*, 618 F. 2d 78.

[57] *Farmer*, 329 F. 2d 3.
[58] *UAW*, 325 F. 3d 360.
[59] *CAEP*, 442 F.2d 159.
[60] *See generally Kahn*, 618 F. 2d 784; *CAEP*, 442 F.2d 159, 168-71.
[61] *Kahn,* 618 F. 2d at 789-92.
[62] *CAEP*, 442 F. 2d at 171.

Chapter X. Emergency Authority

When we speak of the President's "emergency powers," this typically references the powers invoked due to a natural disaster, war or near-war situation. There is traditional deference, in fact the greatest amount, granted to presidents in international matters and in emergency situations. Further, the Supreme Court has usually avoided head-on confrontations with the President in crisis conditions.[1] However, this has been the case in the above categorized emergencies.[2] Although the Constitution makes no mention of emergency governmental procedures and powers,[3] federal law provides a variety of powers for the President to use in response to crisis, exigency, or emergency circumstances threatening the nation, and they are not limited to military or war situations. Some derive from the Constitution or statutory law and are continuously available to the President with little or no qualification; others, statutory delegations from Congress, exist on a standby basis and remain dormant until the President formally declares a national emergency.[4] Although based on one or more of these authorities, the actual exercise of emergency powers has been dependent on the President's view of the presidential office. This is considered in Chapter 5.

In section 1 of this chapter we attempt to categorize emergencies in terms of the different authorities used to justify such action: implied, inherent (presidential prerogative), and those delegated by Congress. In section 2, we pull together the various definitions of an emergency in an attempt to determine what would qualify under such an umbrella; address the deference given the President's determination of an emergency; and analyze two key cases in which the President's authority was reined in. In section 3, delegated emergency authority is addressed in more detail with the observation that emergency authority is increasingly rooted in statutory law. In section 4, a summary of the National Emergencies Act (NEA) of 1976 is provided. Section 5 includes an analysis of how emergency authority can be applied in the context of climate change and leads to the conclusion that the President should work with Congress to develop a package of statutory delegations specific to addressing climate change policy that give the President the flexibility to address circumstances in a timeframe not possible through congressional action.

1. The Foundations of Emergency Powers

a. Introduction. This section describes the three foundations that have been used to support presidential exercise of emergency powers in the past, explaining some of their strengths and weaknesses and certain characteristics of the American legal system that will affect political and judicial responses. The Constitution makes no mention of emergency governmental procedures and powers. In fact, the word "emergency" does not appear in the Constitution as enacted in 1787 nor any of the twenty-seven Amendments adopted since that time.[5] This fact leads to the conclusion that when the President, faced with an emergency, seeks to exercise any sort of exceptional authority not normally available to him or her, that exceptional authority must come from one of three places. First, the President can assert exceptional authority arguably implied in the

Constitution. Second, if the President is bold enough and has sufficient political capital, he or she can assert power on the controversial and uncertain premise of inherent executive power to protect the country, above and beyond the Constitution. Finally, the President can exercise powers statutorily delegated to him or her by Congress.

The Founders of our nation, when they wrote and adopted our Constitution in 1787, could not have foreseen the environmental calamities of the 21st century. They were farmers and craftsmen who sought to protect themselves and their families from the colonialist oppressions of the British Empire. The greatest evil to that generation was the threat of physical violence and deprivation inflicted by armed forces from without.[6] For all that was different in 1787, however, history shows, and the Supreme Court agrees, that the Founders were conscious of the need for a living, flexible Constitution that might accommodate the unknown and unknowable eventualities of the future. And presciently, the Founders created such a document.[7]

The Constitution describes the duties and powers of the President in Article II, which states among other things that:

> The executive power shall be vested in a President of the United States. . . . The President shall be Commander in Chief of the Army and Navy of the United States . . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . . [H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.[8]

Although a minority of scholars argue against the wisdom or need of implying powers not thus explicitly given to the President, the better and dominant view is that implying powers is necessary and logical, so long as the implications do not cross over the proper (though often inscrutable) boundaries between the three branches.[9]

At the broadest level of analysis, we may distinguish two types of presidential power, regular and exceptional. Regular presidential power is that power which is uncontroversial and well established. With this regular power, the President may do such things as appointing ambassadors and vetoing legislation, powers explicitly conferred by the Constitution. Powers delegated to the President by Congress are regular powers as well, which is to say that they are powers the President may exercise in harmony with the framework of the Constitution. Exceptional power, on the other hand, is that power which the President does not possess except in exigent circumstances, where regular powers do not suffice to address the needs of the United States.

The term "exceptional power" is used interchangeably with "emergency power" here, as the only occasion when the political and legal systems might tolerate the exercise

of exceptional powers beyond the contemplation of the Constitution is the occasion that regular powers cannot protect the interests of the nation satisfactorily. Because the vast majority of statutes and precedent court opinions do not define "national emergency," the President typically enjoys wide discretion to declare emergencies when he or she believes that a particular situation demands extraordinary action unavailable to the President absent an emergency declaration. Thus, although a distinction could theoretically be made between a "true emergency," where the alternatives are immediate presidential action and national ruin, and the situation in which exceptional powers would only more efficiently neutralize a budding crisis, in practice presidents assert exceptional powers in both types of situations, and the term "emergency" is difficult to define meaningfully. This is discussed more in section 2 below.

Before beginning our attempt at "categorizing" emergency authority a point should be clear. There is no fine line that can be drawn between executive powers implied in the Constitution and executive powers that presidents such as Lincoln and Jefferson claimed to exist above, beyond, and separate from the Constitution. The line cannot be drawn definitively because implications are a matter of subjective interpretation. To one scholar the Constitution may imply sweeping authority for the President to protect the Nation with or without congressional approval, while another scholar may find no such authority justified in the Constitution's text.

Powers not expressly given, which can only be implied from words or suggested by the natural law of necessity, can be difficult to sustain for the fair reason that a legal system such as ours is a positivist system, which is to say that a law that has not been specifically articulated in words is weak and inherently suspect. The principle is so much ingrained in our legal system that it is tacitly assumed by the Supreme Court in the notable case *Youngstown Sheet & Tube Co. v. Sawyer*.[10] The Constitution does not refer to emergency power, so emergency power implied in it or above it is suspect because it is unarticulated in our most important documents and not a subject of general agreement among the people subject to its mandate. This suspect character of implied powers has not, however, prevented the wide assertion of implied power by presidents since the Founding.[11]

Various judges, politicians, and scholars have expressed different views on the subject. Many suggest that we might recognize the powers appropriate to handling particular emergencies after those emergencies arise, being unable to assess those powers before we see them in action.[12] This suggestion gives little guidance, only the hope that collectively the citizens and public officials of the United States will respect and abide by presidential action seen to be necessary when it is in fact necessary. One legal scholar offers the following summation of the authority, "A President who needs to take immediate protective steps, especially when there is little or no time to ask Congress for authority, can fairly rely on *Neagle*, but the case does not support major commitments of the nation's forces under the cloak of the Court's broadest phrases."[13] (*Neagle* is an 1890 Supreme Court decision discussed in the next section.) Generalizing this standard, the implied or inherent emergency authority of the President is bounded by the need to take immediate protective steps, especially when there is little or no time to ask Congress for

authority, and also limited by that which is necessary to address this need without Congress, in terms of duration and magnitude of the action.

b. Implied Powers. The President can look for emergency power in the logical extensions and implications of the words of the Constitution. Implied powers are not necessarily exceptional powers, as there are certainly run-of-the-mill implied powers that are used often and raise little controversy. As noted above, most scholars recognize that certain powers are implied by Article II of the Constitution. For example, the "Commander-in-Chief" clause implies that the President can make military decisions.[14] The difficulty with implied powers is that where no explicit provision is made, no clear limits are found, and so reason and historical practice must dictate those limits.

Professor Bruff, constitutional law scholar and former dean of the University of Colorado Law School, characterizes the question of presidential emergency authority in no uncertain terms: "What is the sum of the President's constitutional powers? Perhaps because Article II of the Constitution is so sketchy and unhelpful in answering this question, it has been debated throughout the life of our republic, *and always will be.*"[15] Supreme Court Justice Scalia "has rightly said that a thorough scholarly treatment of this subject could take thirty years to complete and fill 7000 pages."[16] Justice Jackson, in his famed concurring opinion in *Youngstown*, expressed a similar understanding of the state of the law.[17]

Because the Constitution is silent on the subject of emergency power, common sense and philosophy must sometimes guide us. It seems that congressional approval after the fact may substitute for express delegations of power to the President.[18] The absence of emergency power provisions in the Constitution is explained by history. The concept of executive prerogative to protect the nation was not a foreign concept to the Founders, rather they were so familiar with it that they knew it to be the first cousin of tyranny.[19] On the other hand, the need for a president to act sometimes without authorization has not been lost on the Presidents or legal commentators. Among others, Thomas Jefferson[20] and Abraham Lincoln[21] spoke of duties above even the Constitution. Legal scholar Henry Monaghan harshly criticizes such views:

> This is dangerous and unconstitutional doctrine . . . . The President does not stand in some direct and unmediated relationship with 'the people,' drawing legal authority from them . . . . Whether or not any president can live with it, the literary theory of 'the executive Power' recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency. The Steel Seizure Court [*Youngstown*] endorsed this proposition, and decisions too numerous to cite fully assume it.[22]

In *Balance of Forces*, Professor Bruff describes two landmark cases in constitutional law which, though antiquated, still carry weight today.[23] *Neagle*[24] involved the habeas corpus petition of a deputy United States marshal prosecuted by the State of California for homicide. Deputy Neagle had been assigned by President

Harrison to act as bodyguard to Supreme Court Justice Field as the justice travelled the West Coast. While riding on a train through California, Justice Field was assaulted by a malcontent by the name of David Terry, and Deputy Neagle shot Terry dead. When California arrested Neagle and charged him with murder, Neagle petitioned the federal courts to order his release on the grounds that the killing happened in the course of fulfilling his duties as a United States marshal under order of the President. California's position was that because Congress had enacted no law authorizing or compelling Neagle to protect any judge, the President's order lacked the force and effect of law, and thus that Neagle's shooting of Terry was unprotected by federal law and in violation of California law.[25] Addressing the duty of the President under the so-called "Faithful Execution Clause," the Supreme Court wrote:

> Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . . We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.[26]

Professor Bruff interprets *Neagle* as providing broad support for presidential action protecting government officials and interests.[27] *Neagle* seems to suggest that the Constitution implicitly empowers the federal government to preserve itself against any threat that might render the government unable to fulfill the purposes for which it was created.

The second of the historic cases Bruff cites in support of broad power to protect government interests is *Debs*. The Court held in that case that an injunction obtained by the President prohibiting labor leader Eugene Debs from communicating with striking railroad workers was enforceable against Debs, although the President lacked statutory authority to prevent the strike.[28] The Court wrote, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care."[29] In essence, the Court found that the executive branch, in seeking an injunction against Eugene Debs, was acting to preserve Congress's ability to regulate interstate commerce, one of Congress's important constitutional powers. If Debs were permitted to coordinate the railroad strike, the nation's railroads would cease to function for some period of time, and Congress would thereby be deprived of the opportunity to exercise its powers.[30]

A more modern case where the Supreme Court implied powers to uphold presidential action is *Dames & Moore v. Regan*.[31] *Dames & Moore* involved a lawsuit by American citizens challenging President Reagan's executive order suspending legal claims against the government of Iran as part of the effort to normalize relations after the Iran hostage crisis. Commenting on the Court's decision in *Dames & Moore*, one legal

scholar remarks:

> The Court specifically concluded that neither [of the statutes cited by the President as authorization for his actions] authorized the president to suspend claims pending in American courts. But the Court rejected the suggestion that these statutes were therefore irrelevant to determining whether the president's assertion of statutory power was authorized. The Court reasoned that "the enactment of legislation closely related to the question of the President's authority in a particular case" may indicate "congressional acceptance of a broad scope of presidential action." In other words, the Court took the "general tenor" of legislation in the area of law as a basis to imply congressional acceptance of the president's actions. The Court also found a history of congressional acquiescence in similar presidential actions, and concluded that this was an indication of Congress's acceptance of the president's assertion of power.[32]

This approach does more than simply evaluate deferentially a president's claim that his order falls within an arguable statutory authorization. It aggregates statutory delegations, none of which individually provide support for the president's actions.[33] This logic draws fire from commentators for the reason that, under such logic, the President can exercise powers Congress may not have knowingly given to him if Congress has given him other powers similar to the ones exercised. This result circumvents the deliberative process by which Congress weighs the pros and cons of proposed legislation and makes a value judgment as to the appropriate rules to lay down in areas of public life.

Note, however, that the Court's analysis in *Dames & Moore* was informed by evidence of the long-standing practice of presidents settling claims of United States citizens against foreign governments without the "advice and consent of the Senate."[34] Furthermore, presidents are always afforded great deference in the realm of foreign affairs, as the diplomatic function of government rests in the executive branch according to established principles of American law and legal philosophy.

c. The Highly Controversial Idea of Inherent Executive Powers. The second potential source of emergency power presents far greater difficulties than the first. This source lies above and outside of the Constitution, in the nebulous and unbounded concept of inherent executive power. This is sometimes referred to as presidential prerogative and is a topic that has been the source of serious debate since the framing of the Constitution.[35] The legal community is rightfully wary of this concept, as it depends entirely on the proposition that at certain times the President is justified in completely disregarding and nullifying the checks and balances erected by the Founders precisely to prevent such unilateral exercise of supreme, unaccountable authority.[36] Although some fractional minority of legal scholars accept the inherent power concept, or at least do not reject it outright, this is a last resort option, the source of power to which the President must turn only when his or her actions cannot rest on any statute or any implication of any constitutional provision.[37] In such circumstances, the emergency might well have to be of cataclysmic proportions for the President to find support from many in the judicial

branch of government. The best argument in support of implied inherent emergency powers is that they are required to preserve the existence of the nation.[38]

Further "inherent powers" cannot be used to override the will of Congress. In *Independent Gasoline Marketers*, discussed in Chapter 4, the court found that a provision of the Energy Policy and Conservation Act (EPCA) prohibited the fuel tax the President was attempting to implement by Proclamation:

> Defendants finally contend that, because of the national security aspects presented by this nation's consumption of imported oil, the President has authority, independent of Congress, to impose a gasoline conservation fee. The extent of the "inherent" nature of Presidential power was delineated by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). . . . It is clear that Congress, not the President, must decide whether the imposition of a gasoline conservation fee is good policy.[39]

d. Statutory Delegations of Power by Congress. As for the third and final source of power, the President can look to the laws enacted by Congress in accordance with its powers and established procedures under the Constitution. A great many statutes relate exclusively to executive branch emergency powers, and a greater number still contain individual provisions conferring emergency-contingent powers. In 1973, a Senate committee compiled a list of 470 statutory provisions giving the President special powers in national emergencies.[40] A review of the delegations reveals that provisions relate primarily to wartime government activities and responses to economic emergencies.[41] Because presidential action pursuant to a clear, express authorization from Congress most obviously conforms to the constitutional scheme of government, the President is on the firmest ground available when citing statutes as the source of his or her asserted powers. Statutory delegations are addressed in more detail below.

2. Defining "Emergency" in the Context of Executive Authority

a. The Definition. The Constitution makes no mention of emergency governmental procedures and powers.[42] Nor has Congress attempted to define the concept in a generally applicable manner, for example, the National Emergencies Act does not define "national emergency."[43] Instead, the concept has been left to the minds of scholars and the courts. The Supreme Court, during the great depression, determined that an emergency is not reasonably subject to anticipation.[44] One political scientist offered that an emergency must be a sudden occurrence in which the degree of danger to life or well-being has grown beyond acceptable limits.[45]

An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those "which have not attained enough of stability or recurrency to admit of their being dealt with according to rule."[46] Corwin also indicated that it "connotes the existence of conditions, suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal." During congressional

committee hearings on emergency powers in 1973, a political scientist described an emergency in the following terms: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits."[47] Combining several sources, the author of a CRS report reaches the conclusion that an emergency has at least four characteristics:

> The first is its temporal character: an emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: an emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: who discerns this phenomenon? The Constitution may be guiding on this question, but not always conclusive. Fourth, there is the element of response: by definition, an emergency requires immediate action, but is, as well, unanticipated and, therefore, as Corwin notes, cannot always be "dealt with according to rule."[48]

Another similar definition can also be found in case law that attempts to define "emergency" under the National Emergency Relief Act (NERA).[49] This codified definition, applicable to the NERA, specifies a list of natural disasters and includes the phrase "other catastrophe." In an attempt to define "other catastrophe" the federal court looks to the following definition: it denotes "an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill or foresight."[50] It could reasonably be presumed that an "emergency" outside of a catastrophe would include situations that meet this four part test but are not limited by the forces of nature. One must consider whether the situation in terms of climate change meets the various aspects of an emergency, especially whether the impacts would be considered unforeseen or unanticipated.

b. Deference Given to the President's Declaration. There is no formula or standard calculus for determining when a declaration of national emergency is warranted. The decision is in the hands of the President in the first place, and subject to review by Congress at regular intervals thereafter. The courts seldom if ever have questioned the basis of a president's declaration of a national emergency. The Court of Appeals for Customs and Patents noted in *United States v. Yoshida International, Inc.,* that "courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency."[51] More recently, the Federal District Court for the District of Northern California stated, "Wary of impairing the flexibility necessary to [presidential power], courts have not normally reviewed the essentially political questions surrounding the declaration or continuance of a national emergency . . . ."[52] The Ninth Circuit Court of Appeals wrote in its opinion in *United States v. Spawr Optical Research*, that "[a]lthough we will not address these essentially political questions, we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress."[53] More recently, in a nod to the President's emergency/wartime discretion, the Appeals Court of Federal Claims decided that it could not review President Clinton's determination that a particular building on foreign territory was an Al Qaeda weapons facility appropriate for a military strike.[54] Such determinations, the court found, are soundly committed to the President's discretion and

cannot be reviewed for error. On the other hand, "Although a Presidential declaration of emergency is entitled to great deference by the courts, it is subject to revision under appropriate circumstances."[55] The court making this declaration then went on to examine whether the emergency authority of NERA invoked by President Carter applied to the circumstances of the case.

c. The Supreme Court Reins in Emergency Authority. Although there is significant deference given to the authority of the President in regard to issuing executive orders and proclamations, especially in times of emergency or crisis, this authority is not unlimited. The courts are willing to find that emergency powers have limits even during a period when the country is undergoing economic stress or strains on national security. Therefore, any use of emergency authority should be approached carefully.

A notable case dealing with the use of emergency powers is *Youngstown Sheet*.[56] In *Youngstown Sheet*, the President had issued an executive order authorizing the department of commerce to seize steel mills throughout the country in response to an impending strike by steel workers.[57] There was no statutory basis for this action, only a constitutional grounding.[58] The President relied on his concern that a work stoppage would cause a national catastrophe because it would affect the war effort in Korea.[59] A divided court held that the seizure was not within the constitutional powers of the President.[60] Only Congress, and not the President, has the power to seize industries to avert a national catastrophe and to authorize the taking of private property for public use.[61] As stated in *Youngstown Sheet*, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[62] In concurring opinions, Justices expressed differing sentiments with respect to the extent of the President's power to seize private property.[63] One concurring opinion provided that the President could not unilaterally decide on a course of action that was contrary to the will of Congress.[64] In this case, Congress had explicitly decided on a different course of action with respect to the strike and had laid out procedures in the Selective Service Act of 1948.[65]

In 1980, by Presidential Proclamation, President Carter tried to impose a fuel surcharge to reduce domestic consumption of petroleum fuels. Proclamation 4744, created the Petroleum Import Adjustment Program (PIAP) and cited for authority the Constitution and laws of the United States and specifically the Trade Expansion Act of 1962 (TEA) (section 232 authorizes the President to impose a system of license fees as a means of controlling imports under certain circumstances).[66] Although President Carter did not declare a state of emergency, pursuant to the National Emergency Act of 1976, the Proclamation makes repeated reference to a threat to national security. The PIAP was challenged in court by oil and gas concerns.[67] This case, *Independent Gasoline Marketers Council v. Duncan*, is analyzed in Chapter 4. Notwithstanding the national security implications, the court found that the PIAP was unlawful in that the gasoline conservation fee at issue did not fall within the inherent powers of the President, was not sanctioned by statute, and was contrary to manifest intent of Congress as stated in the EPCA.[68]

Most relevant to a discussion of emergency powers is that part of the order addressing presidential inherent powers.[69] The President claimed that because of the national security aspects presented by this nation's consumption of imported oil, the President has authority independent of Congress to impose a gasoline conservation fee. However, the court found that any inherent powers the President may have under these circumstances do not trump a statute to the contrary. Specifically, the EPCA prohibits the implementation of such a tax.[70]

Further in analyzing the TEA, the statute under which the President was claiming authority, the court did not accept the President's position in regard to application of the Act. Under a threat to impair national security, the statute authorizes the President to "take such action, and for such time, as he deems necessary to adjust the imports of such article" so as to lessen the threat to national security.[71] An import fee that directly affects the price of imported oil relative to domestic oil is permissible under the TEA. Standing alone, the import fee component of the PIAP falls within the purview of the Act. However, in the context of the PIAP mechanism as a whole, the court found that the import fee had "no initial and direct impact on imports. Nor was it intended to have such a result." It was combined with other mechanisms in the PIAP so that both domestic and imported fuels were impacted equally. Thus the court looked to the design of the program as a whole and the purpose of the applicable statute and found that a statute cannot be used for purposes never contemplated by Congress (the TEA) and in ways contrary to congressional intent (as manifested in the EPCA).[72]

3. Statutory Delegations of Authority for Emergencies

Professor Bruff and other scholars acknowledge that the Constitution is unclear on the limits of presidential powers, and thus the limits must be discovered and established piecemeal over time, rather than drawn boldly and definitively in black and white. The President is always and indisputably on firmer ground when he or she acts in accordance with laws duly considered and passed by Congress. With this in mind, it is worth examining statutory delegations of emergency authority more closely.

Apart from the Constitution, but resulting from its prescribed procedures, there are statutory grants of power for emergency conditions.[73] The President is authorized by Congress to take some special or extraordinary action, ostensibly to meet the problems of governing effectively in times of exigency. Sometimes these laws are only of temporary duration.[74] An example of this is the Economic Stabilization Act of 1970, which gave the President emergency authority to address a crisis in the nation's economy. Specifically, it allowed the President to impose certain wage and price controls for about three years before it expired automatically in 1974.[75] There are also various stand-by laws which convey special emergency power once the President formally declares a national emergency activating them. In 1973, a special committee established by Senate Resolution, the Special Committee on the Termination of the National Emergency, identified 470 provisions of federal law which delegated extraordinary authority to the executive in time of national emergency.[76]

Under powers delegated by such statutes, the President may seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law, seize and control all transportation and communication, regulate the operation of private enterprise, restrict travel and in a variety of ways control the lives of U.S. citizens. Congress may modify, rescind, or render dormant such delegated emergency authority.[77] A number of acts containing emergency provisions relating to energy shortages were passed in the 1970's, some of these were reviewed in Chapter 4. Some environmental statutes are reviewed below.

Although these grants of authority provide the President with one of the strongest foundations for emergency power, they also narrow any implied powers. The authorities available to the executive in time of national crisis or under other exigent circumstances have, since the time of the Lincoln administration, come to be increasingly rooted in statutory law. The discretion available to a Civil War president in his exercise of emergency power has been harnessed, to a considerable extent, in the contemporary period.[78] This can be illustrated by the growth of congressional delegations. During the Franklin Roosevelt administration there were approximately 99 emergency delegations to the President, by 1973 that number had risen to 470. Furthermore, due to greater reliance upon statutory expression, the range of this authority has come to be more circumscribed, and the options for its use have come to be regulated procedurally through the NEA.[79]

4. Use of Emergency Authority and Enactment of the National Emergencies Act of 1976 (NEA)

The nation operated under a continuous state of emergency from 1933 to 1976,[80] and the majority of those years were not periods of declared war.[81] In fact, in 1973 the U.S. was in a condition of national emergency four times over. That is, four proclamations of national emergency were in effect concurrently.[82] Each time a national emergency proclamation is made, the whole array of emergency standby powers become available to the President. By 1973, 470 special emergency powers had accumulated, and the Senate Special Committee on the Termination of the National Emergency found that "this vast range of powers, taken together, confer enough authority to rule the country without reference to normal constitutional procedures."[83] This was, in part, the justification for the passage of the NEA. The NEA sought to normalize the process by which national emergencies are declared and terminated, and emergency provisions of law invoked. The Act does not define emergency or grant any emergency authority.[84]

The NEA, 50 U.S.C. §§ 1601-1651, eliminated or modified some statutory grants of emergency authority; required the President to declare formally the existence of a national emergency and to specify what statutory authority, activated by the declaration, would be used; and provided Congress a means to countermand the President's declaration and the activated authority being sought.

As enacted, the NEA consists of five titles. The first of these generally returned all standby statutory delegations of emergency power, activated by an outstanding declaration of national emergency, to a dormant state two years after the statute's

approval. Title II provided a procedure for future declarations of national emergency by the President and prescribed arrangements for their congressional regulation. The statute established an exclusive means for declaring a national emergency. Furthermore, emergency declarations were to terminate automatically after one year unless formally continued for another year by the President, but could be terminated earlier by either the President or Congress. Pursuant to Title III, when declaring a national emergency, the President must indicate the powers and authorities being activated to respond to the exigency at hand. Certain presidential accountability and reporting requirements regarding national emergency declarations were specified in Title IV, and the repeal and continuation of various statutory provisions delegating emergency powers are the subject of Title V.

From the enactment of the NEA in 1976 through 2007, 41 emergencies were declared pursuant to the Act. Until Sept. 14, 2001, all of the national emergencies declared in that period involved foreign policy actions. Eleven of the 32 emergencies were declared subsequent to the 2001 terrorist attacks.[85]

5. Application to Climate Change

At the outset it must be noted, that implementing policy by executive order is not a secure manner of establishing policy and is more suited for action in the short term as discussed in Chapter 5. Notwithstanding this, the continued inaction at the national level on implementing a plan to address climate change combined with the recent and more severe scientific conclusions regarding the impact of GHGs currently being emitted into the atmosphere could lead a future president to consider the possibility of an emergency condition developing, one that could require action by the executive based on "emergency" authority.

If the President is going to attempt to strengthen executive authority by acting under the declaration of an emergency, the first hurdle faced is that there is no precedent for declaring a national emergency with respect to environmental degradation. Most national emergencies declared under the NEA have been in response to a military threat or a humanitarian crisis.[86] The source of authority under which the President acts, then has significant implication in terms of success.

a. Inherent Authority. Relying on inherent executive power to support presidential action is the weakest position for presidential action, because legal scholarship cannot decide whether inherent power even exists. This is not to say that inherent power is without value, because if it does exist then it may support anything. However, the consensus in the legal community is solidly on the side of restraint in the recognition of any inherent emergency power in the President. The President must get power from one of two places, the Constitution or an act of Congress. Some scholars and judges believe the President should be able to act entirely outside the Constitution or laws in the face of a national emergency, but emergency powers only exist in the face of actual emergencies, so speculation as to the outer bounds of emergency power is of limited usefulness.

b. Implied Authority: The Aggregate Theory. Powers that can be reasonably implied from the language in the Constitution and existing statutes may support presidential action so long as that action does not contravene other provisions of law. It could be argued, using the aggregate theory described previously in this chapter, that the President has authority for a broad scope of action not explicitly found in the Constitution or statutes. Under this theory, one would aggregate statutory delegations, none of which individually provide support for the President's actions, but that closely relate to the question of the President's authority in a particular case. The most relevant sources in terms of climate change policy would be the environmental laws of the United States, including but not limited to the National Environmental Policy Act (NEPA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substances Control Act (TSCA), and the Clean Air Act (CAA).

In addition, a recent opinion, discussed in Chapter 8, *Massachusetts v. Environmental Protection Agency* suggests that the current Supreme Court might be sympathetic to the argument that global climate change is a crisis.[87] The Court held, by a slim 5-4 vote of the Justices, that the State of Massachusetts could sue the EPA for refusing to consider proposed rules that would more stringently regulate greenhouse gas emissions (including carbon dioxide) of new motor vehicles. The Court gave substantial credence to the scientific findings of experts that anthropogenic greenhouse gases, in particular carbon dioxide, cause global warming and the concomitant rise in sea and air temperatures around the world, which in turn contribute to more severe storms and the rise in sea level. The Court found that Massachusetts had good evidence that the sea level on the coast of that state had risen by a certain amount in the last century, and that it would continue to rise, permanently submerging coastal lands. Furthermore, the Court held that the EPA had statutory authority under the CAA to issue such restrictions as are needed to combat global warming and associated harms to United States citizens and governmental bodies.[88]

NEPA, 42 U.S.C. §§ 4321-4370f, may be supportive of the aggregate authority argument. On its face, NEPA merely requires federal agency officials to investigate and consider environmental impacts of government policies and actions. Certain portions of the Act, however, are written in bold language that might serve, in the aggregate, to justify executive action without clear statutory authorization. One such passage from the act provides:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[89]

NEPA does not itself explicitly delegate powers to the President, but it sets forth a number of congressional policy goals which could bolster an argument that Congress intended other statutes to empower the executive branch to do those things that are necessary to furthering the policy objectives laid out in NEPA.

CERCLA, 42 U.S.C. §§ 9601-9628, is another such federal statute that, taken in consideration along with NEPA, CAA, and other environmental and emergency power statutes, may weigh in favor of a judicial finding that Congress has intended to grant the President discretion in directing appropriate remedial actions in response to exigent circumstances.

CERCLA, better known as "the Superfund law," is most commonly used to clean up Superfund sites that have been polluted with toxic waste. Indeed, Congress may only have intended this limited applicability of the law. On the other hand, CERCLA explicitly authorizes the President to take measures required in order to prevent the release into the environment of hazardous substances which threaten the public health and welfare or the environment. The statute contains very particular definitions of terms like "release" and "hazardous substance," so a court might preclude a reading broad enough to include GHG emissions, even in the face of climate change.

Even if CERCLA is construed as not granting explicit authority to the President to act in such ways, as noted above, it weighs in favor of an aggregate power finding. One relevant portion of the statute provides:

> [T]o the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.[90]

Another subsection provides:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.[91]

Although, one could probably include a number of other environmental statutes into the aggregate, there are deficiencies with this argument. In *Dames & Moore*, the

case from which the theory is extracted, the case involved foreign affairs, an area in which the President is given great deference. Further the Court found congressional acquiescence in that case. The outcome of a challenge to this argument is thus far from certain.

c. Congressional Delegations of Emergency Authority. An explicit statutory delegation of power gives the President firm footing to act, provided he or she acts in ways consistent with the particular delegation in question. Once a determination is made that the President is acting "pursuant to" a statute, the courts afford great deference. However, the preliminary determination whether or not the President is in fact acting "pursuant to" a statute is more complicated,[92] as discussed in Chapter 3 and 4. If the President is going to take emergency action pursuant to a legislative delegation, there are two key issues. First, one must identify whether the action contemplated falls legitimately within the purview of the statutory delegation (i.e., is there an emergency delegation that applies in terms of the circumstances in which it is to be activated and/or the purpose of the delegation).[93] Second, one must find statutes that authorize the use of specific powers that would be helpful in dealing with the declared emergency.

There are numerous statutory delegations of emergency power. The vast majority address military threats or threats to the economy.[94] In terms of those relating to energy, the focus is largely on the impact of energy shortages, as discussed in Chapter 4. In terms of both the purposes of the delegations and the powers authorized, it is likely that the application of most emergency delegations will not be direct.[95] Thus if the President attempts to apply these emergency delegations to climate change policy the outcome of a challenge would be uncertain at best.

d. Conclusions. It was illustrated in Chapter 4 and 5 that presidents have been provided with congressional delegations of authority to navigate the country through emergencies, such as war, economic depression and recession, and energy shortages. The purpose of these delegations is to give the President the flexibility necessary to address emergency and emergency-like circumstances in a timeframe not possible with congressional action. Franklin Roosevelt's presidency is deemed a successful administration by most standards. He successfully obtained a broad range of statutory delegations and relied heavily on these delegations in asserting the authority of his office. Further, in the 1970's Congress came to the stark realization that energy was a security as well as an economic issue and passed numerous statutory provisions permitting quick and unilateral executive action in times of energy shortage. A rational course of action for a future president to address climate change policy would be to work with Congress for the appropriate and necessary delegations of authority that will give him or her the power to act with certainty and without delay within the framework of our Constitution. Of course not all emergencies can be anticipated, thus reliance on implied or perhaps inherent powers may become necessary, but it would not be wise to rely on these two sources as a primary strategy.

[1] PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 12 (2002) (hereinafter "Cooper").
[2] HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS CRS REPORT 98-505, at summ. (updated November 13, 2006) (hereinafter "Relyea 2006").
[3] Henry P. Monaghan, *The Protective Power of the Presidency,* 93 COLUM. L. REV. 1, 33(1993) (hereinafter "Monaghan").
[4] Relyea 2006, *supra* note 2, at summ.
[5] Monaghan, *supra* note 3, at 33.
[6] *Id.*
[7] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640, 72 S.Ct. 863, 96 L.Ed. 1153 (1952):

> The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.

[8] U.S. CONST. art. II, §§ 1-3.
[9] *See generally,* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 1-120 (1994).
[10] *Youngstown*, 343 U.S. at 585.
[11] Kevin M. Stack, *The Statutory President,* 90 IOWA L. REV. 539, 548 (2005) (hereinafter "Stack"):

> Presidents have asserted power unilaterally through presidential orders since the time of the Founding. In 1793, Washington issued the Neutrality Proclamation, which proclaimed the neutrality of the United States in the conflict between Britain and France, without statutory authority to do so . . . Executive and other presidential orders have been the source of a wide range of significant moments in national life. Executive orders or proclamations declared the emancipation of slaves in confederate states, the suspension of the write of habeas corpus during the Civil War, the internment of Japanese-Americans during World War II, the desegregation of the military, the establishment of the government's security classification system, and the imposition of centralized executive review of agency regulations. Presidential orders are clearly a significant source of law and policy.

[12] *Youngstown*, 343 U.S. at 637: "Any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *See also,* Monaghan, *supra* note 3, at 73:

> The protective power is . . . no talisman. Its limits are, in the end, practical ones, limits that . . . are grounded in our 'common understanding' of what conduct is appropriately 'executive' in our scheme of separation of powers. There may be controversy over what the understanding is. If so, here, as elsewhere, history and the felt intuitions of the times are likely to count far more than anything else.

[13] HAROLD BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 95 (2006) (hereinafter "Bruff") (referring to *In Re Neagle*, 135 U.S. 1 (1890)).
[14] The Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004), declined to decide the question whether the Constitution authorizes the President to detain enemy combatants. The Court chose to uphold the detentions on statutory grounds under Congress's post-September 11 AUMF (Authorization for the Use of Military Force):

> We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.

[15] Bruff, *supra* note 13, at 93(emphasis added).
[16] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws,* 104 YALE L.J. 541, 579 (1994) (referencing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852

(1989)) (hereinafter "Calabresi & Prakash").

[17] *Youngstown*, 343 U.S. at 634-35:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and ambiguous [legal] authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way . . . .
>
> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

[18] Bruff, *supra* note 13, at 98:

> The idea that 'the good of the society' may require the executive to take action when the legislature has not foreseen the need for it and has not authorized it goes back at least to John Locke. Whether force or a more peaceful means such as judicial process is employed, a President's action as guardian of the nation will invariably invade someone's rights or at least interests. As Locke suggested, legislative ratification of an action can be an acceptable way to conform it to law, although after the fact. Even if statutory ratification occurs grudgingly, in response to a fait accompli that Congress might not have welcomed in advance, the executive and legislature will have come into agreement on the root question of necessity.

See also John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 232 (2004):

> A liberal democratic regime can be threatened by a different kind off emergency: for example, an economic emergency that, in conjunction with legislative gridlock, triggers urgent and exceptional measures. In this special case the executive power has to act in the absence of an explicit legislative delegation. [Approval after the fact] can be considered, in these circumstances, as the way to reestablish, if possible, the regular pattern of government.

See also Monaghan, *supra* note 3, at 38:

> Convinced of an emergency, a court should stay its hand until the President has had a reasonable opportunity for congressional ratification. When no emergency exists, or when the President acts contrary to positive law, no similar judicial constraint should be exercised.

See also Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), in which the Supreme Court echoed the Steel Seizure Court's concern that the President acted contrary to deliberate Congressional policy:

> This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

[19] Monaghan, *supra* note 3, at 13:

> [John] Locke referred to 'prerogative' power. This term is not now common in American legal discourse because, for the founding generation, it was invariably a term of opprobrium. While prerogative is often simply a synonym for the exercise of lawfully conferred discretion, Locke posited two other troublesome formulations. Prerogative, he

> said, is 'nothing but the Power of doing public good without a Rule,' that is, without statutory authority. Indeed, he went further: 'This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative' . . . . But even advocates of a strong American Chief Executive distanced themselves from the Crown as an acceptable conception of executive authority. This is reflected in the disappearance of Lockean terminology from American legal discourse.

[20] *Id.* at 24-25 (quoting Thomas Jefferson):

> The question . . . whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when it is in danger, are of higher obligation . . . . The good officer is bound to draw [the line of discrimination between important and unimportant occasions] at his own peril, and throw himself on the justice of his country and the rectitude of his motives.

Monaghan elaborates (*Id.* at 25-26):

> [Scholars] argue that a 'political' defense of emergency presidential conduct, such as Jefferson's, comports with the Framers' general understanding: emergency conduct, either not authorized by statute or contrary to statute, is extra-constitutional in nature. While an emergency could not justify presidential conduct, the President and his subordinates could expect indemnification. Perhaps the best solution is to 'separate and protect the normal constitutional order from the dark world of crisis government.'

[21] *Id.* at 27-28:

> Lincoln's war-time conduct involved massive interference with private rights, including arrests, suspension of habeas corpus, and even conscription. To the extent that his actions contravened positive law, Lincoln's conduct was illegal. Lincoln's response was to ask: 'Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?' While his question builds on unassailable intuition that the Constitution and laws exist for the nation and not vice versa, the legal answer to Lincoln's question has been clear from the very beginning: yes. That Lincoln himself understood this is reflected in the fact that he assumed the need for congressional ratification for his conduct.

[22] *Id.* at 31.

[23] Bruff posits that *Neagle* and *Debs* are still cited by presidents as legal support for broad powers to act unilaterally to protect government interests, officials, and property. Bruff, *supra* note 13, at 94-98.

[24] Cunningham v. Neagle, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890).

[25] Bruff, *supra* note 13, at 94.

[26] *Id*. (quoting *In Re Neagle*, 135 U.S. at 64).

[27] *Id*. at 95:

> [T]he facts of *Neagle* reveal that the statutes empowering executive officers have gaps that sometimes leave the President without a statutory basis for responding to emergencies . . . . In *Neagle*, the Court visibly struggled to find a theory to support presidential action. To do so, it read the Faithful Execution Clause as more than a cross-reference to preexisting statutes: the clause justified enforcing rights 'growing out of the Constitution itself,' and out of 'the nature of the government.' . . . Executive advisers have cited *Neagle* as support for almost any conceivable response to emergencies. At a minimum, the case does show the need for a presidential power to protect federal officials from danger. Its logic also suggests a power to protect other American citizens, who possess rights under the Constitution. It would certainly be surprising if the Chief Executive of any nation were powerless to shield the nation's officers and citizens from harm . . . . A President who needs to take immediate protective steps, especially when there is little or no time to ask Congress for authority, can fairly rely on *Neagle*, but the case does not support major commitments of the nation's forces under the cloak of the Court's broadest phrases.

[28] *Id.* at 96:

> A unanimous Court ruled against Debs. Justice Brewer, perceiving the strike as a dangerous conspiracy against interstate commerce, argued that the federal government should not be restricted to criminal prosecutions against those who had obstructed commerce. Instead, force could be used: 'The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care.'

[29] *Id.* (quoting *In Re Debs*).

[30] Monaghan, *supra* note 3, at 65:

> Essentially, Debs raised two questions. First, why was the obstruction of rail traffic illegal? No express congressional prohibition existed. The Court believed that the obstruction was illegal as a result of a combination of the Commerce Clause itself and of the implications of existing statutes. Indeed, the Court intimated that the Commerce Clause alone made the obstruction illegal: 'If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association [such as a labor union] . . . has a power which the State itself does not possess?'

[31] Dames & Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

[32] Stack, *supra* note 11, at 567-68.

[33] *Id.*

[34] *Dames & Moore*, 453 U.S. at 679-80. *See also id*. at 688:

> [W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

[35] Cooper, *supra* note 1.

[36] *Youngstown*, 343 U.S. at 588-89:

> 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 . . . . The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this [order for the government to seize the steel mills] cannot stand.

See also Calabresi & Prakash, *supra* note 16, at 563:

> Commentators from Alexander Hamilton . . . to William Howard Taft . . . have all observed that the difference in language used to introduce the various lists [of judicial, legislative, and executive powers in the Constitution] strongly suggests that the Article II list [empowering the President] is less obviously an exclusive list than its Article I counterpart [empowering the Congress]. Those who agree may well believe that there exists a textual warrant for inherent, unenumerated executive powers.

[37] Stack, *supra* note 11, at 551:

> The Constitution does not mention the president's authority to issue orders, though the president's power to do so is by now beyond dispute. As to the scope of the president's powers under Article II or of any inherent or prerogative powers, over 200 years of constitutional history have furnished only broad outlines. These uncertainties have generated extensive literature on the scope of the president's constitutional powers. The courts have also not developed . . . a settled understanding of how to determine whether the assertion of statutory authority in an executive order is valid.

See also Monaghan, *supra* note 3, at 8:

> That twentieth-century Presidents and their advisers should hold expansive and perhaps ill-formed views of "inherent" presidential power is not surprising. Most Americans expect modern Presidents to provide solutions for every significant political, military, social, and economic problem. In the face of such demands, various organizational and

legal categories possess little meaning for the President.

[38] Monaghan, *supra* note 3, at 33:

> To be sure, on occasion some limited emergency power within the Constitution has been recognized by the Supreme Court: "for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence." But more typical of the literary theory are statements that an "emergency does not create power . . . or diminish the restrictions imposed upon power granted."

See also id. at 36:

> [T]o deny the legal existence of a power that every government must possess is also problematic. To be sure, our legal tradition already denies presidential authority to act contrary to positive law. Need we go still further, however, and deny all emergency power to the President, even when those who deny the lawfulness of such a power recognize its practical necessity? President after President has asserted such a power, or perhaps more accurately, at least the need to act. Although Steel Seizure seems to reject the existence of any executive emergency power, a careful examination of all seven opinions filed does not support such a definitive assertion.

[39] U.S. v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 619-20 (1980). The missing quote from Youngstown is as follows:

> 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 the 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." . . . 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 . . . ." *Youngstown,* 343 U.S. at 587-588.

[40] EMERGENCY POWERS STATUTES, S. REP. NO. 93-549 (1st Sess. 1973) (hereinafter "Emergency Powers Statutes") (Congressional research staff compiled a list of emergency powers given to the President in virtue of the states of emergency).

[41] *Id.* For example:

> 7 U.S.C. §§ 1158, 1332, 1371, 1743, and 1903 allow the President or the Secretary of Agriculture to alter standard regulations of trade in certain commodities during periods of national emergency when the national emergency is related to commodity supplies.
>
> 10 U.S.C. §§ 506, 511, 519, 565, 599, 671a, 671b, and 672 relate to the President's power to activate military reserve units and extend tours of duty during periods of war or national emergency.
>
> 10 U.S.C. §§ 2663 and 2664 permit the heads of the military branches, in wartime, to take control of private property and use its natural resources immediately after filing a petition to condemn the property.
>
> 12 U.S.C. §§ 95, 95a, and 249 give the executive branch power to more extensively regulate the Federal Reserve System and consumer credit during war or national emergency.
>
> The list goes on for 63 pages.

[42] Monaghan, *supra* note 3, at 33 ("The American Constitution contains no general provision authorizing suspension of the normal governmental processes when an emergency is declared by an appropriate governmental authority.").

[43] *See* 90 Stat. 1255, 50 U.S.C. §§ 1601-1651. The term "emergency" is not defined in CERCLA or the National Contingency Plan, and the EPA has interpreted it to include a range of time-sensitive threats.

[44] Relyea 2006, *supra* note 2, at 4 (citing Home Building and Loan Association v. Blaisdell, 290 U.S. 398. 440 (1934)).

[45] *Id.* (citing S. REP. NO. 93-549 at 277).

[46] *Id.* at 4 (citing EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 3 (1948)).

[47] *Id.* at 4 (citing S. REP. NO. 93-549 at 277).

[48] *Id.* at 4. It is noted in the report: "While some might argue that the concept of emergency powers can be extended to embrace authority exercised in response to circumstances of natural disaster, this dimension is not within the scope of this report. Various federal response arrangements and programs for dealing with

natural disasters have been established and administered with no potential or actual disruption of constitutional arrangements. With regard to Corwin's characterization of emergency conditions, these long-standing arrangements and programs suggest that natural disasters do 'admit of their being dealt with according to rule.'" *Id*. at 5, fn 15.

[49] Disaster Relief Act of 1974, §§ 102(1), 405, 42 U.S.C. §§ 5122(1), 5175. A number of other statutes include "emergency" delegations of authority. These statutory provisions set forth the conditions under which a president may use special delegations of authority. These can help shed some light on what is considered an emergency or exigent circumstance that may require action not currently within the powers of the president, but the definitions are confined to application under the Act in which they are found.

[50] Colon v. Carter**,** 507 F.Supp. 1026, 1031-2 (D.C. Puerto Rico, 1980) (reversed on other grounds) (citing Rohr v. Logan 206 Pa.Super. 232, 213 A.2d 166 (1965)). *See also* Carlson v. A. & P. Corrugated Box Corp., 364 Pa. 216, 72 A.2d 290 (1950), *cited by Rohr*. *And see* Goldberg v. R. G. Miller & Sons, 408 Pa. 1, 182 A.2d 759 (1962).

[51] United States v. Yoshida International, Inc.*,* 63 C.C.P.A. 15, 30-31, 526 F.2d 560, 578-579 (1975):

> A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action. The nature of the power determines what may be done and the nature of the emergency restricts the how of its doing, i.e., the means of execution. Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment.

[52] Bernstein v. United States Dep't of State, 974 F.Supp. 1288 (N.D. Cal. 1997).

[53] United States v. Spawr Optical Research, 685 F.2d 1076 (9th Cir. 1982).

[54]Such determinations, the court found, are soundly committed to the President's discretion and cannot be reviewed for error. Note that this decision includes the President's authority in foreign affairs and as commander in chief of the military; both powers have been characterized as "approaching absolute." El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346, 1364-66 (C.A. Fed. 2004):

> In essence then, the appellants are contending that the President failed to assure himself with a sufficient degree of certainty that the Plant was in fact a chemical weapons factory, despite his declaration to the contrary that the information he possessed in 1998 indicated al-Qaeda was using it to manufacture chemical weapons ingredients. The appellants would have the Court of Federal Claims in the first instance, and this court on appeal, provide them with an opportunity to test that contention, and in the process, require this court to elucidate the constitutional standards that are to guide a President when he evaluates the veracity of military intelligence.
>
> We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. In our view, the Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures designed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. Today, we need not decide whether and to what extent the Executive and Legislative branches share that responsibility. We conclude only that the Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations the appellants request in this case.

[55] *Colon,* 507 F.Supp at 1032 (citing *Youngstown,* 343 U.S. 579 (1952)); *cf.* United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[56] *See Youngstown*, 343 U.S. 579.

[57] *Id*. at 582.

[58] *Id*.

[59] *Id*. at 589-90.

[60] *Id*. at 589.
[61] *Id*. at 588-89.
[62] Id. at 589.
[63] *See generally id.*
[64] *Id*. at 662.
[65] *Id.* at 663.
[66] Proclamation No. 4744, 45 Fed. Reg. 22,862 (Apr. 2, 1980).
[67] *Independent Gasoline Marketers*, 492 F.Supp. 614.
[68] *Id.* at 620-21.
[69] *Id.* at 619-20.
[70] *Id.* at 620.
[71] 19 U.S.C. § 1862(b).
[72] *Independent Gasoline Marketers*, 492 F. Supp. at 618-19.
[73] *See* Relyea 2006, *supra* note 2, at 2 (discussion of debate over whether to grant emergency power to executive).
[74] HAROLD C. RELYEA, NATIONAL EMERGENCY POWERS, CRS REPORT FOR CONGRESS 98505 3 (Updated Sept. 18, 2001) (hereinafter, "Relyea 2001").
[75] *Id.* at 3.
[76] *Id.* at 9.
[77] *Id.* at 1.
[78] The first of these was enacted in 1792, 1 Stat. 264-265. This provision provided for the calling forth of the militia to suppress insurrections and repel invasions, as Congress anticipated something more than forceful opposition to the collection of a federal excise tax on whiskey. *Id.* at 5. There was an exponential escalation of the creation of standby powers during the period from the Truman administration to the Nixon years. Cooper, *supra* note 1, at 39.
[79] Relyea 2001, *supra* note 74, at 18.
[80] The emergencies terminated in 1976 simply because that was the date set by the National Emergencies Act of 1976 to terminate all pending emergency declarations. Cooper, *supra* note 1, at 39. Thereafter, all emergencies declared by the President would automatically terminate after two years.
[81] Cooper, *supra* note 1, at 15.
[82] Relyea 2006, *supra* note 2, at 9.
[83] Relyea 2001, *supra* note 74, at 39.
[84] 50 U.S.C. §§ 1601-1655. *See also* Peter T. Bazos, *Suspension of Davis-Bacon After Hurricane Katrina: The Fate of Prevailing Wages During a 'National Emergency*.' 36 PUBLIC CONTRACT LAW JOURNAL 405, 412-13 (Spring 2007):

> Through the NEA [National Emergencies Act], Congress sought to reserve the means of overriding a presidential declaration of 'national emergency.' It almost entirely failed in this regard. The NEA affords a single congressional check on the president's virtually unencumbered power to declare a 'national emergency' and to suspend legislation pursuant to such decree. For Congress to terminate a 'national emergency' and override a recalcitrant president, it would take a two-thirds vote of both houses of Congress to override the president's decision and turn a joint resolution by Congress into a law terminating the president's declared national emergency.

[85] Relyea 2006, *supra* note 2, at 13-16, TABLE: DECLARED NATIONAL EMERGENCIES FROM, (1976-2006); Proclamation No. 4485 (Feb. 2, 1977) (Carter), Proclamation No. 6867 (Mar. 1, 1996) (Clinton), Proclamation No. 6907 (Jul. 1, 1996) (Clinton), Proclamation 7757 (Feb. 6, 2004) (G.W. Bush); Proclamation No. 7924 (Sept. 8, 2005) (Bush) (proclamations available at http://www.presidency.ucsb.edu/ws/).
[86] Relyea 2006, *supra* note 2, at 13-16.
[87] 127 S.Ct. 1438 (2007). It is not clear, however, how the Court would react to a declaration of emergency founded on climate change.
[88] The Court explicitly states at the end of the majority opinion, "We need not and do not reach the question whether on remand EPA must make an endangerment finding [that GHG emissions threaten the submersion of Massachusetts territory] . . . . We hold only that EPA must ground its reasons for action or inaction in the [Clean Air Act]." *Id.* at 1463. However, the Court quotes extensively the serious

predictions of experts on climate change in the opinion. Notwithstanding the above caveat and the fact that much of the opinion is "dicta," which is not binding precedent, the case does suggest that the Court possesses an understanding of the true impact of global warming.

[89] 42 U.S.C. § 4331(a).

[90] *Id.* at § 9604(a)(4).

[91] *Id.* at § 9604(a)(1).

[92] Stack, *supra* note 11, at 558-59:

> Justice Jackson's comment [in his Steel Seizure concurrence] that the president's action 'pursuant to' a statute should be accorded 'the strongest of presumptions and the widest latitude of judicial interpretation' is a standard for determining whether the president's statutorily authorized actions are consistent with the Constitution. Justice Jackson's opinion says nothing about whether these 'strongest of presumptions' also apply to the question of whether a president has statutory authorization.

[93] *See Independent Gasoline Marketers*, 492 F.Supp. 614 (One of the grounds for finding President Carter did not have authority to issue an executive order instituting a fuel tax charge was that the purpose of the program was not consistent with the purpose of one of the statutes he cited for authority.).

[94] Emergency Powers Statutes, *supra* note 40.

[95] For example, the International Emergency Economic Powers Act (IEEPA) grants extra power to the President: "to deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701. Under IEEPA, if the President declares a National Emergency, he has the power to "investigate, regulate, or prohibit: (i) any transaction in foreign exchange, (ii) transfers of credit payments . . . [and] (iii) the importing or exporting of currencies or securities . . . ." 50 U.S.C. 1702. While this grant of power seemingly was for the purposes of controlling the economy during a national emergency relating to a war or humanitarian crisis, the statute could be read to allow greater Presidential involvement in controlling trade with other nations complicit in the climate change problem. As many Presidents have illustrated, the use of emergency powers is sometimes a question of creative statutory interpretation. *See* Relyea 2006*, supra* note 2, at 5-10.

Chapter XI. Conclusions[1]

Although some guidance can be gleaned from judicial opinions, it cannot be said that there is one consistent approach when executive authority is challenged. While there is a general theme of showing deference to executive decisions, there are purposefully no bright-line rules. This reflects the most elementary principle of constitutional law—separation of powers. Court decisions are made on the narrowest grounds, confined to the specifics of each case. Notwithstanding this deference there are limits to the use of executive directives such as executive orders. Further, guidance in this area is not completely lacking. This report reflects a summary of the most applicable guidance regarding the boundaries of executive authority with a focus on the use of executive orders to implement climate action policy. Within this analysis we highlight areas of "maximum certainty," essentially identifying the strongest starting points from which the President can claim authority. The conclusions and recommendations here are made based on this principle of maximum certainty.

The Legal Framework.[2] Executive orders must be based on statutory or constitutional authority. A continuum analogy is adopted to analyze certainty, or deference accorded by the courts, in terms of the strongest starting point from which the President can claim authority. The framework for review is essentially three overlapping continua. The first continuum, Justice Jackson's framework from *Youngstown*,[3] represents the relationship between the executive action taken and the will of Congress. For example, the President acts with most certainty if he or she is acting pursuant to a specific statutory delegation of authority from Congress and with least certainty if he or she is acting in contravention of a provision of legislation. The second layer would be the subject matter of the executive order and whether it lies in an area in which the President has traditionally been given great deference, such as foreign or military affairs. The third layer would be the circumstances surrounding issuance of the executive order, or the outside context, for example, whether there are exigent circumstances that need to be addressed. In determining whether the President has the authority to take some action, typically all three layers are considered.

Authority Under Statutory Delegations. One of the primary conclusions of this analysis is that the when the President acts pursuant to a statutory delegation of authority he or she is in the strongest position.[4] One hundred and twelve statutory delegations of authority regarding energy or the environment have been identified during our research as reflected in the appendices. This is not an exhaustive compilation, but fairly extensive and based on a review of all published executive orders since 1937 relating to environmental or energy issues.[5] In terms of relying on these delegations as authority for executive orders relating to climate change policy, there are two key issues: (1) does the directive come within the purposes and goals of the delegation; and (2) are the acts or powers authorized by the delegation useful in terms of implementing climate change policy. This is not always a straightforward analysis.[6]

In regard to the second question, we looked in-depth at the Clean Air Act,[7] the Federal Property and Administrative Services Act[8] and the statutes passed in the 1970's to address the national energy crisis resulting from the OPEC Oil Embargo and other fuel supply reduction measures taken by the Cartel.[9] In terms of the 1970's, Congress passed a substantial amount of legislation during that time relating to energy, however, the overarching purpose of the relevant legislation was to reduce U.S. dependence on imported sources of energy. In an effort to achieve this goal, the focus of this legislation was placed on encouraging conservation and efficiency measures, and developing sources of domestic energy including alternative and renewable energy sources. Thus, there are a number of statutes that are useful in the climate change context, such as the Energy Policy and Conservation Act of 1975 and the National Energy Conservation Policy Act of 1978, comprehensive statutes that include, but are not limited to, provisions for energy efficiency and conservation programs, state energy conservation plans, and federal energy conservation initiatives; and the Public Utilities Regulatory Policy Act, which promotes conservation of energy supplied by electric utilities and has been used to create a market for power from non-utility power producers. However, in promoting the development of domestic energy sources, a number of the statutes placed a premium on coal, as coal is a plentiful domestic source of energy. Thus, some of these statutes are limited by the mandate to promote coal use, such as the Power Plant and Industrial Fuel Use Act. Numerous emergency provisions were also passed, however, they largely focus on emergencies that may arise from energy shortages and are not directly relevant to climate change policy.[10]

Acting pursuant to the will of Congress initially places the President on the strongest footing. Congressional intent can be gleaned from: statutes that authorize an act or power; statutes that prohibit an act or power; the interaction between various provisions of legislation when more than one provision is applicable; inaction by Congress (acquiescence which can be implied over time); an act by Congress ratifying an executive order after the fact, directly or indirectly; legislative history; and in one case congressional intent was gleaned from the act of Congress voting against a measure (thus implying the intent to prohibit the President from taking a particular action).[11] An aggregation argument can also be made to indicate congressional support (aggregating statutory delegations, none of which individually provide support for the President's actions), but with less certainty as to the outcome in terms of surviving a legal challenge.[12] Further, aggregation will probably not overcome a specific provision prohibiting the act.

The Subject Matter of Executive Orders.[13] Some specific examples of areas in which the executive has traditionally been given great deference include: military and foreign affairs; operation of the executive branch of the federal government including federal procurement and federal employment practices; management of federal lands; emergency situations (most often international conflict or economic crises); and fields largely ceded to the government by executive order. "Fields largely ceded to the government by executive order" include security classification, ongoing governance of civil servants, foreign service and consular activities, operation and discipline in the military, controls on government contracting, and until recently, the management and control of public lands. Although there are statutes in many of these areas, there has been

a tradition over many administrations of using executive orders as the primary, or at least as an important, policy and management tool

The Context Factor.[14] The most significant factor affecting the deference given by the courts in terms of context, or outside conditions, is the claim of an emergency or crisis. An emergency traverses all three categories. First, there are numerous statutory provisions delegating authority to the President that become active in the event of an emergency. Thus the relationship of the action to legislation would be important if it is undertaken pursuant to such a statutory provision. Second, there is a debate regarding "implied emergency authority" outside of any statutory delegation. Whether or not the courts agree that the President technically has such a "power" or whether emergencies are folded into the analysis by looking at outside circumstances, there is deference given to the President under such conditions.

Other Reasons for Invalidating an Order. Notwithstanding that an executive order appears to have valid authority on its face, there can be other ways in which it fails. For example, the President can overstep the bounds of a statutory delegation, or authority under one statute can be insufficient based on the provisions of another statute;[15] an order can be implemented in an invalid manner by an executive agency;[16] an order can violate the Fifth Amendment of the Constitution when applied to a particular person or entity (most relevant are the Takings Clause and Due Process Clause);[17] or an order can usurp any of Congress's specific Article I constitutional powers.[18] However, generally, in addition to deferential treatment of presidential interpretation of statutes, courts have found a variety of ways to avoid invalidating actions of presidents. They can choose simply to not hear a case based on standing doctrine or one of the other justiciability limits. The *Hein*[19] case shows how even strict adherence to *stare decisis* can be used to uphold a presidential action.[20]

Other Considerations.[21] In addition to the legal boundaries, there are pragmatic and philosophical considerations in determining whether to implement policy by executive order. The expanded use of executive orders creates a system that bypasses the normal, deliberative process of enacting statutes. This process is intended to improve the quality of policy while reinforcing the democratic principles that are central to our chosen form of government. Executive orders are not a stable vehicle for implementing policy. They can be revoked by a subsequent president with an executive order, and overridden by Congress in three ways: (1) enacting legislation to overrule the executive order; (2) withholding appropriations; and (3) refusing to enact legislation to implement the executive order. Further, there could be backlash from Congress in the form of less cooperation with the President on other matters or limiting future executive authority through legislation. There may be an impact on the day to day operations of the federal government, the informal relationships, rules and procedures that have developed among institutions over the years (the "Washington Rules"). Further, presidents should consider the strategic use of executive orders, such as not fully exploiting the use of the executive order during the first year in office in order to maintain some degree of cooperation with Congress. On the other hand, if a policy is popular with the public and Congress has not acted, the use of the executive order can be protected by this popularity. It would be hard

for Congress to withhold support or oppose such a policy. In fact, Congress may choose to establish the policy more firmly with legislation subsequent to the executive action.

Authority over Federal Agencies.[22] In terms of executive orders directing agency action, the President has broad discretion over federal agencies. "As to 'purely' executive-or 'non-independent' administrators, it is presumed that the President is constrained only by the requirement that he or she not direct any act beyond the bounds of an administrator's legal authority."[23] There is a more limited standard for independent agencies. The most significant difference is the President's ability to discharge the head, for independent agencies it is limited to "cause." Thus it is said that the head of an independent agency cannot be discharged if he or she goes against the policy wishes of the President. The President can only remove the head of an independent agency if the agency head acts illegally.[24] Given the other avenues for presidential influence, it is not clear that in reality this limitation on presidential influence over independent agencies is as significant as it appears on its face. The true constraint on the President's authority over an agency is that found in statutes. Agencies must abide by the statues that authorize their programs and appropriate their funds as well as the delegations of authority that give them their power. The President, in issuing executive orders, must also abide by these constraints, although the President can delegate authority to agencies as well.[25]

The President's authority to order an agency to take a certain action must be determined on a case-by-case basis, considering both applicable legislation and the type of agency being directed. In terms of the President's authority, agencies can be subdivided into four types of entities: (1) entities in the EOP; [26] (2) executive departments (e.g. Department of Energy, Department of Agriculture, Department of Transportation, Department of Interior, etc.);[27] (3) agencies that are referenced as independent but do not have the stronger attributes of independence such as the Environmental Protection Agency (i.e., "independent establishments" excluding those that fall into type 4); and (4) agencies that are independent based on features that minimize presidential control. The order of this list reflects the extent of presidential influence from highest to lowest, although in specific cases these relationships can be altered by statutes. Most "independent establishments" with a single person at the head and no statutory "for cause" removal provision, such as EPA, fall within category three and are treated similarly to executive departments.[28]

In addition to appointment and removal power in regard to the agency head, the President exerts substantial influence over agencies through budget review (the OMB also reviews the agencies' requests for substantive legislation for consistency with the Administration's position), review of agency rulemaking, Department of Justice advocacy of agency positions in litigation, and other more informal influence over the rulemaking process. Some of these processes, such as the review of agency rulemaking, have been implemented with executive orders.[29]

Reorganization.[30] Several of the PCAP proposals recommend large scale reorganization of federal agencies. For substantial reorganization, the President, in most

if not all cases, will need congressional authorization, either in the form of legislation implementing the reorganization or through a more streamlined process such as that authorized under a reorganization statute. The President can either seek legislation enacting each of the specific reorganizations or seek a general authorization to reorganize executive agencies via submission of a plan to Congress. The latter could be accomplished by amendment to the Federal Executive Reorganization Act (FERA) which would reactivate those provisions of the U.S. Code. Under FERA each plan would need a joint resolution of Congress to become effective. Note, however, that in its current form, FERA has limitations, such as a prohibition on eliminating executive departments or independent regulatory agencies. As for smaller changes, such as adding offices within agencies, moving programs or setting goals for projects and programs, there is an historical practice of presidents accomplishing this unilaterally through executive order, as long as there is funding to support the change and it does not contravene any legislation. This is typically done under the auspices of some combination of constitutional powers, vague statues, or expressed delegations of authority or by legislation. Reorganization by executive order, however, can be less stable than that authorized by legislation. There are advantages to agencies created or reorganized by Congress. They are better funded and survive longer. Thus, "if an agency enjoys broad support in Congress, the President would do better to guide it through the legislative process and thereby secure its long-term prospects."[31]

Regulating Greenhouse Gases Under the CAA.[32] The Clean Air Act (CAA) provides authority for the EPA to regulate CO_2 and other GHG emissions without further congressional action. Pursuant to the recent Supreme Court ruling in *Massachusetts v. EPA,*[33] GHGs are within the CAA's definition of pollutant and EPA must make an endangerment determination, that is, determine whether CO_2 and other GHGs are found to reasonably be anticipated to endanger public health or welfare.[34] If that determination is in the affirmative, GHGs will be added to the list of substances that are regulated by EPA through: (1) air quality standards which would be implemented by the states through state implementation plans (SIPS); (2) stationary source standards that would apply to entities such as utilities and manufacturing facilities; and (3) mobile source standards which impact cars and aircraft, for example. The Court in Massachusetts *v. EPA* held that the only way that EPA could avoid regulating CO_2 under the CAA is if EPA determines that CO_2 does not contribute to global warming.[35]

The President can influence the timing of action which is fairly discretionary under the CAA. In the relevant provisions of the CAA, EPA is required to revise pollutant lists and standards "from time to time."[36] The Court held, in *Massachusetts v. EPA,* that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."[37] Based on EPA's performance in recent years, as evidenced by petitions filed with EPA and lawsuits filed against EPA over the last 8 years to force some action to address global warming and reduce GHG emissions, it is clear that federal action on global warming could be much more aggressive.[38] One lesson learned from the court decisions of recent months is that EPA has had the authority to take significant action the reduce GHG emissions but has not used it. Under the direction of a president who sets climate change as a priority and

directs agencies to take action quickly and to the extent of their authority, the outcome would be much different.

Finally, it is EPA's opinion that under the current authority of the CAA, the Agency, by rulemaking, can adopt a cap-and-trade program as a standard for emission regulation of stationary sources that emit criteria pollutants. EPA recently promulgated regulations under the CAA, including a cap-and-trade program, for regulating mercury in the Clean Air Mercury Rule (CAMR) of 2005. The CAMR, however, is pending litigation and EPA's ability to implement a nationwide cap-and-trade program for criteria pollutants such as CO_2 under the current authority of the CAA is not certain. Although there is a possibility of unilateral action on a cap-and-trade program for GHGs, an upstream program faces an additional hurdle. It is unlikely that extractors, importers, or other "upstream" sources would fit within the definition of "stationary sources" that can be regulated pursuant to the CAA.[39]

Federal Procurement.[40] One of the most promising avenues for executive action is through federal procurement, largely considered the domain of the chief executive. There are three major categories over which presidents have exerted control: (1) direct control over the purchases made by the government; (2) control over the vendors by means of contract provisions and conditions; and (3) control over the industries through the implementation of standards. The exertion of power in each of the three categories has been tested in the courts.[41]

The President has expansive authority pursuant to the Procurement Act. The language of the Act itself is quite broad in terms of discretion delegated to the President in establishing procurement policy.[42] A rough set of guidelines can be gleaned from case law reviewing the use of executive power founded in the Procurement Act. The threshold for determining whether an executive order will sustain a legal challenge is three-fold: (1) it must not contradict any express wish of Congress or the Constitution; (2) it must fall into the nebulous nexus of efficiency and economy; (3) the action ordered must be within the power of the federal government. If these criteria are met it seems that the courts are reticent to strike down a use of executive authority especially if supported by additional authority including prior acts by presidents or other statutes. The courts have been very lenient in defining the realm of efficiency and economy. Examples of the courts' leniency include their approval of executive control over whether federal employees should be charged to use parking facilities controlled by federal agencies; their sanction of the President's order that notices to employees of their right not to join a union be posted in the workplace; and their allowance of the President to design a labor program for federally funded construction projects that required the hiring of minorities. Further, the President has authority to act upon states when the federal government has "both financial and completion interests." Thus, authority pursuant to the Procurement Act may extend to state programs that receive federal funding.[43]

Emergency Powers.[44] In terms of emergency powers, conclusions are drawn from various sections of this report.[45] Emergency powers are rooted in one of three theories: implied, inherent (presidential prerogative), and those delegated by Congress.[46]

Relying on inherent executive power to support presidential action is the weakest position for presidential action because legal scholarship cannot decide whether inherent power even exists.[47] In terms of implied authority, the President can look for emergency power in the logical extensions and implications of the words of the Constitution or implied from statutes.[48] There is some support for an aggregate argument by aggregating provisions from various environmental statutes that imply an authority to act under crisis or emergency situations.[49] Under this argument one would aggregate statutory delegations, none of which individually provide support for the President's actions, but that closely relate to the question of the President's authority in a particular case, and argue that these provision together authorize a broad scope of action by the President not explicitly found in the Constitution or statutes.[50] However, the ultimate conclusion is that there are significant deficiencies in this argument and the outcome upon challenge would be uncertain.

An explicit statutory delegation of power gives the President firm footing to act, provided he or she acts in a manner consistent with the particular delegation in question. Over 600 statutory delegations were reviewed.[51] Over 500 of these were emergency provisions and the vast majority of the emergency delegations address international conflict or economic exigencies.[52] In terms of those relating to energy, the focus is largely on the impact of energy shortages.[53] Likely, both in terms of the purposes of the delegations and the powers authorized, the application to climate change policy would not be direct. Thus the certainty of the outcome upon a challenge is not clear. Further, in terms of implied or inherent emergency authorities, these are rarely tested outside of military conflict or economic crisis.

Presidential Philosophy and a Model for Navigating Crisis. It was illustrated in several chapters of this report that a model for navigating the country through profound emergencies, such as World War II and the Great Depression and addressing crisis such as that brought on by the OPEC Oil Embargo, is to develop a package of statutory delegations that give the President the flexibility to address circumstances in a timeframe not possible through congressional action.[54]

Franklin Roosevelt's administration exemplifies the most expansive philosophy regarding use of executive authority. It is an extension of Theodore Roosevelt's stewardship theory.[55] Under the stewardship theory, presidents have an affirmative duty to pursue the common well-being unless prevented by a direct constitutional or legislative prohibition.[56] Franklin Roosevelt aggressively sought expansion of executive authority by obtaining additional statutory delegations and actively used statutory delegations as authority for executive action to "attack" economic crisis and military foes. The success of his administration was to some extent circumstantial, due to a supportive Congress, popularity with the people, and historical situations that instilled in the nation a sense of urgency.[57] However, it is not improbable that one or more of these circumstances would again present themselves, especially in light of recent scientific findings regarding the implications of climate change and the growing consensus as to the urgency of the problem.

One of the key actions to be taken by a future president to address climate change policy would be to work with Congress for the appropriate and necessary delegations of authority that will give him or her the power to act with flexibility, without delay, and with certainty within the framework of the Constitution. Of course not all emergencies can be anticipated, thus reliance on implied or perhaps inherent powers may become necessary, but it would not be wise to rely on these two sources as a primary strategy.

Final Remarks. The ultimate conclusion of this report is that there exists significant authority, without further action by Congress, for the President to take action by executive order to implement various aspects of climate change policy. This is in terms of action taken within the appropriate boundaries of the Constitution, respecting the balance of power between the three branches of our government. Further, when operating within these boundaries the President is in the best position to withstand attempts to terminate his or her policies and maximizes his credibility. Of course, there are other considerations that must be evaluated by the Chief Executive regarding whether the executive order is the best vehicle for implementing specific policies, and for successful implementation of a comprehensive climate change policy additional statutory delegations of authority should be enacted. However, a proactive administration with an understanding of the serious implications of climate change can make a significant impact immediately upon taking office.

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[1] Specific sources for this material are found in Chapters 1-10 of this report. With only a few noted exceptions, all references are to the relevant chapter of this report.
[2] Chapter 3(A).
[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597, 72 S.Ct. 863, 890, 96 L.Ed. 1153 (1952).
[4] Chapter 3.
[5] Chapter 4(A).
[6] Chapter 3; Chapter 4.
[7] Chapter 8.
[8] Chapter 9.
[9] Chapter 4(C).
[10] Chapter 4(C).
[11] Chapter 3 (A)(2)(a), (B).
[12] Chapter10 (1)(b), (5)(b).
[13] Chapter 3(A)(2)(b).
[14] Chapter 3(A)(2)(c).
[15] Chapter 3(B)(5).
[16] Chapter 3(B)(6).
[17] Chapter 3(B)(7).
[18] Chapter 3(B)(8).
[19] Hein v. Freedom from Religion Foundation, Inc., 127 S.Ct. 2553 (2007).
[20] Chapter 3(B)(3), (7).
[21] Chapter 5(A).
[22] Chapter 6.
[23] Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis,* 57 GEO. WASH. L. REV. 596, 609 (1989) (footnote omitted).

[24] Chapter 6(2) & introductory paragraphs.
[25] Chapter 6(4) & introductory paragraphs.
[26] Chapter 6(1)(b).
[27] Chapter 6(1)(a).
[28] Chapter 6(1)(c).
[29] Chapter 6(3).
[30] Chapter 7(1).
[31] Chapter 7(1)(c), generally. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1095 (2002) (source for quote).
[32] Chapter 8.
[33] Massachusetts v. U.S. Environmental Protection Agency, 127 S.Ct. 1438 (2007).
[34] Technically the Court ruled that EPA can avoid taking regulatory action only if it determines that GHGs do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Id.* at 1462. However, by the terms of this decision there appears little room for EPA to legitimately avoid taking regulatory action based on the latter part of the ruling. *Id.* at 1462-63.
[35] *Massachusetts v. EPA*, 127 S.Ct. 1438.
[36] Chapter 8(1).
[37] *Massachusetts v. EPA*, 127 S.Ct. at 1462.
[38] Chapter 8 (1), (2).
[39] Chapter 8(3).
[40] Chapter 9.
[41] Chapter 9(4).
[42] Chapter 9(1).
[43] Chapter 9(2).
[44] Chapter 10.
[45] Chapter 10; Chapter 4(C); Chapter 5(B).
[46] Chapter 10(1).
[47] Chapter 10(1)(c).
[48] Chapter 10(1)(b).
[49] Chapter 10(5)(b).
[50] Chapter 10(1)(b), 5(b).
[51] Chapter 10(1)(d); Chapter 4(A).
[52] Chapter 10(1)(d).
[53] Chapter 4(C)(1), (2).
[54] Chapter 4(C); Chapter 5(B)(3).
[55] Chapter 5(B)(1)(a), (3)(a).
[56] Chapter 5(B)(1)(a).
[57] Chapter 5(B)(3)(a), (b), (e).

APPENDIX A

TABLE: U.S. CODE TITLES INCLUDED IN DATABASE[1]

Title	Chapter	Subchapter (if any)	Section(s)
3 – The President	4 – Delegation of Functions		301
5 – Government Organization and Employees	33 – Examination, Selection and Placement	1 – Examination, Certification and Appointment	3301
		3 – Details, Vacancies and Appointments	3345
7 - Agriculture	6 – Insecticides and Environmental Pesticide Control	2 – Environ. Pesticide Control	136
		7B – Plant Pests	150aa (et seq)
	17 – Misc. Matters		426
	33 – Farm Tenancy	3 – Land Conservation and Land Utilization	1011
	61 – Noxious Weeds		2801 (et seq)
10 – Armed Forces	641 – Naval Petroleum Reserves		7427-28
15 – Commerce and Trade	15B – Natural Gas		717
	16A - Emergency Petroleum Allocation		751 (et seq)
	16B – Federal Energy Administration	1 – Federal Energy Administration	761 (et seq), 787
	16C – Energy Supply and Environmental Coordination		791 (et seq)
	53 - Toxic Substances Control	1 - Control of Toxic Substances	2621
	60 – Natural Gas Policy	3 - Additional Authorities and Requirements	3364
	67 - Arctic Research and Policy		4102
16 - Conservation	1 - National Parks, Military Parks, Monuments, and Seashores	1 – National Park Service	1
		61 - National and International Monuments and Memorials	431

Title	Chapter	Subchapter (if any)	Section(s)
		68 - National Conservation Recreational Areas	460k
		69 - Outdoor Recreation Programs	460L
	1A - Historic Sites, Buildings, Objects, and Antiquities	1 – General Provisions	461 (et seq)
		2 - National Historic Preservation	470 (et seq)
	2 – National Forests	1 – Establishment and Administration	471, 473, 505, 521
	3 - Forests; Forest Service; Reforestation; Management	1 – General Provisions	568-70
	5A – Protection and Conservation of Wildlife	1- Game, Fur-Bearing Animals, and Fish	661 – 666c
		2 - Protection of Bald and Golden Eagles	668 – 668d
		3 - Endangered Species of Fish and Wildlife	668aa, 668dd-ee,
	7 - Protection of Migratory Game and Insectivorous Birds	2 – Migratory Bird Treaty	703 - 11
		3 – Migratory Bird Conservation	715
	9 – Fish and Wildlife Service		742a-j
	12 - Federal Regulation and Development of Power	1 - Regulation of the Development of Water Power and Resources	792 - 825
	18 - Watershed Protection and Flood Prevention		1003 - 06
	23 - National Wilderness Preservation System		1131 (et seq)
	31 – Marine Mammal Protection	1 – Generally	1362
	32 – Marine Sanctuaries		1431 (et seq)
	33 – Coastal Zone Management		1451
	35 – Endangered Species		1531 – 44
	38 – Fishery Conservation and	1 - Generally	1801 (et seq)

Title	Chapter	Subchapter (if any)	Section(s)
	Management		
	53 - Control of Illegally Taken Fish and Wildlife		3371 – 78
	59 – Wetlands Resources	1 – General Provisions	3901
		3 – State and Federal Wetlands Acquisition	3922
	64 – North American Wetlands Conservation		4401
	67 - Aquatic Nuisance Prevention and Control	1 – General Provisions	4701
19 – Customs Duties	7 - Trade Expansion Program	2 – Trade Agreements (Part 4 – Nat'l Security)	1862
	12 – Trade Act of 1974	1 – Negotiating and Other Authority	2155
	21 – North American Free Trade		3301
22 – Foreign Relations and Intercourse	7 - International Bureaus, Congresses, Etc.	18 - Privileges and Immunities of International Organizations	288
	33 - Mutual Educational and Cultural Exchange Program		2451, 2454
31 – Money and Finance	7 – Government Accountability Office	1 - Definitions and General Organization	701
33 – Navigation and Navigable Waters	26 - Water Pollution Prevention and Control	1 – Research and Related Programs	1251 (et seq)
		3 – Standards and Enforcement	1321
	27 – Ocean Dumping		1401 (et seq)
	40 – Oil Pollution	1 - Oil Pollution Liability and Compensation	2701 (et seq)
38 – Veteran's Benefits	36 - Administration of Educational Benefits	2 – Miscellaneous Provisions	3680
40 – Public Buildings, Property and Works	1 – General	3 – Administrative and General	121
42 – The Public Health and Welfare	6A – Public Health Service	12 – Safety of Public Water Systems	300j-6, 8301, 9615
	19B – Water Resources Planning	2 – River Basins Commissions	1962b
	23 – Development and Control of Atomic Energy	1 – Atomic Energy General Provisions	2011 (et seq)
	50 – National Flood Insurance		4001 (et seq)

Title	Chapter	Subchapter (if any)	Section(s)
		3 - Coordination of Flood Insurance with Land-Management Programs in Flood-Prone Areas	4104 – 07
		4 – General Provisions	4128
	55 – National Environmental Policy		4321 – 47
	56 – Environmental Quality Improvement		4371 (et seq)
	65 – Noise Control		4903
	73 - Development of Energy Sources		5801 (et seq)
	77 – Energy Conservation		6201 (et seq)
	82 – Solid Waste Disposal	1 – General Provisions	6901 - 07
		6 – Federal Responsibilities	6961
	84 – Department of Energy		7101
	85 – Air Pollution Control and Prevention	1 – Programs and Activities	7401
	91 – National Energy Conservation Policy	3 – Federal Energy Initiative	8252 (et seq)
	92 - Powerplant and Industrial Fuel Use	1 – General Provisions	8301
	103 - Comprehensive Environmental Response, Compensation, and Liability	1 - Hazardous Substances Releases, Liability, Compensation	9615
43 – Public Lands	8A – Grazing Lands	1 - Generally	315L
	29 – Submerged Lands	3 - Outer Continental Shelf Lands	1331 (et seq)
49 – Transportation	Subtitle VI - Motor Vehicle and Driver Programs; Chapter 321 - General		32101
	323 – Consumer Information		32301
	325 – Bumper Standards		32502
	Subtitle 8 – Pipelines; Chapter 601 – Safety		60133

[1] The table is a summary of all of the statutory delegations in the database as they are found in the U.S. Code. It indicates both the parts of the U.S. Code searched (chapters and/or subchapters) and the sections of the U.S. Code in which delegations relevant to energy or the environment are located. See Chapter 4(A) of the Report for the methodology used to locate the delegations.

Appendix B

Table: Energy and Environmental Executive Orders[1]

EO	Date	Name	Notes
07512	2/27/1937	Establishing Sacramento Migratory Waterfowl Refuge, California	
07513	2/27/1937	Establishing Swan Lake Migratory Waterfowl Refuge, Missouri	
07532	1/8/1937	Establishing Shinnecock Migratory Bird Refuge, New York	Amended by EO 8184, Revoked by Public Land Order 801
07541	1/22/1937	Establishing Willapa Harbor Migratory Bird Refuge, Washington	Amended by EO 7721
07549	2/6/1937	Designating Vessels to Patrol Waters Frequented by Seal heards and Sea Otter	
07572	3/9/1937	Modification of Executive Order No. 7513 of December 16, 1936, Transferring Lands from the Roosevelt and Pike National forests to the Arapaho National Forest in Colorado	Amends EO 7513
07583	3/23/1937	Establishing Mud Lake Migratory Waterfowl refuge, Minnesota	Amended by EO 8601
07593	3/30/1937	Establishing Okefenokee Wildlife Refuge, Georgia	Amended by EO 7994
07594	3/30/1937	Establishing Jones Island Migratory Bird Refuge; Washington	Revoked by Public Land Order 5515 and Public Land Order 6489
07595	3/30/1937	Establishing Matia Island Migratory Bird Refuge; Washington	Amends EO of July 15, 1875, Revoked by Public Land Order 5515
07607	4/29/1937	Transfer of Lands from Dixie National Forest to Nevada National Forest, Nevada	Amends Proc 1465
07650	7/1/1937	Establishing Moosehorn Migratory Bird Refuge, Maine	Amended by EO 7967
07655	7/12/1937	Establishing Deer Flat Migratory Waterfowl Refuge; Idaho	Amends EO 1032, Revoked by Public Land Order 1239
07663	7/17/1937	Enlarging Uinta National Forest, Utah	
07664	7/17/1937	Modifying the Seney Migratory Waterfowl Refuge, Michigan	Amends EO 6964
07691	8/17/1937	Establishing the Snake River Migratory Waterfowl Refuge; Idaho	Revoked by Public Land Order 3110
07719	10/8/1938	Enlarging Ouachita National Forest, Arkansas	Supersedes EO 7628
07720	10/8/1937	Establishing Camas Migratory Waterfowl Refuge, Idaho	
07721	10/8/1937	Enlarging Willapa Harbor Migratory Bird Refuge, Washington	

EO	Date	Name	Notes
07724	10/8/1937	Establishing Bitter Lake Migratory Waterfowl Refuge; New Mexico	Amends EO 5909, Revoked by Public Land Order 326
07742	11/19/1937	Enlarging Tongass National Forest, Alaska	
07749	11/22/1937	Enlarging St. Marks Migratory Bird Refuge; Florida	Amends EO 5740
07752	11/24/1937	Transferring Certain Lands from the Department of Agriculture to the Department of Commerce and Reserving them as the Arcadia Fish Hatchery	Amended by Public Land Order 2069
07764	12/6/1937	Establishing the Sabine Migratory Waterfowl Refuge; Louisiana	
07770	12/14/1937	Establishing the Hazen Bay Migratory Waterfowl Refuge; Alaska	
07780	12/30/1937	Establishing the Lacassine Migratory Waterfowl Refuge; Louisiana	
07781	12/30/1937	Amending Executive Order No. 5517 of December 17, 1930, Excluding a Tract of Land From the Chugach National Forest, Alaska	Amends EO 5517
07784	12/31/1937	Establishing the Arkansas Migratory Waterfowl Refuge; Texas	
07795	1/21/1938	Establishing the Huron Migratory Bird Refuge; Michigan	Amends EO 4430, Revokes EO 357-D
07799	1/27/1938	Enlarging Lower Souris Migratory Waterfowl Refuge; North Dakota	Amends EO 7170
07801	1/28/1938	Establishing Black Coulee Migratory Waterfowl Refuge; Montana	
07810	2/8/1938	Revoking the Establishment of Baird Fish Hatchery on McCloud River, California	Revokes EO of Dec 9, 1875
07833	3/7/1938	Establishing the Hewitt Lake Migratory Waterfowl Refuge; Montana	
07836	3/11/1938	Public Water Restoration No. 80	Amends EO of May 25, 1921
07864	4/8/1938	Establishing Pea Island Migratory Waterfowl Refuge; North Carolina	
07870	4/19/1938	Revocation of Executive Order No. 3345 of October 23, 1920, Withdrawing Public Lands for National Monument Classification; Arizona	Revokes EO 3345
07882	5/9/1938	Establishing the Tybee Migratory Bird Refuge; Georgia	
07884	5/9/1938	Reestablishing the Toiyabe National Forest; Nevada	
07895	5/23/1938	Enlarging the Hart Mountain Antelope Refuge; Oregon	Amends EO 7523
07898	5/26/1938	Withdrawal of Public Land Authorities To Be Added to the Yosemite National Park; California	
07902	5/31/1938	Establishing the Tamarac Migratory Waterfowl Refuge; Minnesota	
07907	6/6/1938	Establishing the Back Bay Migratory Waterfowl Refuge;	

EO	Date	Name	Notes
		Virginia	
07923	7/2/1938	Establishing Ruby Lake Migratory Waterfowl Refuge; Nevada	
07925	7/5/1938	Enlarging the Salt Plains Wildlife Refuge; Oklahoma	Amends EO 6964
07926	7/7/1938	Establishing Wheeler Migratory Waterfowl Refuge; Alabama	Amended by EO 9790
07937	8/2/1938	Establishing West Sister Island Migratory Bird Refuge; Ohio	Amends EO of Feb 16, 1838
07940	8/2/1938	Transferring Certain Lands Within the Coronado National Forest to the Control and Jurisdiction of the Treasury Department	Amends Proc 682
07941	8/2/1938	Establishing the Fort Tyler Migratory Bird Refuge; New York	
07953	8/12/1938	Establishing Lake Isom Migratory Waterfowl Refuge; Tennessee	
07957	8/19/1938	Establishing Cape Meares Migratory Bird Refuge; Oregon	Amends EO of May 28, 1889
07966	8/30/1938	Establishing the Kentucky Woodlands Wildlife Refuge; Kentucky	Revoked by Public Land Order 4585
07967	8/30/1938	Enlarging the Moosehorn Migratory Waterfowl Refuge; Maine	Amends EO 7650
07971	9/12/1938	Establishing the Montezuma Migratory Waterfowl Refuge; New York	
07976	9/19/1938	Establishing the Union Slough Migratory Waterfowl Refuge; Iowa	Amended by EO 8015
07977	9/19/1938	Enlarging the St. Marks Migratory Bird Refuge; Florida	Amends EO 5740
07983	10/4/1938	Establishing the Breton Bird Refuge; Louisiana	Amends EO of Sept 24, 1947 and EO of Aug 31, 1869, Revokes EO of Oct 4, 1904 and EO of Nov 11, 1905
07986	10/8/1938	Transfers of National-Forest Lands; Idaho	
07993	10/27/1938	Establishing the Great White Heron Refuge; Florida	Supersedes EO 4109 and EO 6964, Revoked by Public Land Order 2710
07994	10/27/1938	Modification of Okefenokee Wildlife Refuge; Georgia	Amends EO 7593
08001	11/2/1938	Transferring Certain Lands from the Department of Agriculture to the Department of Commerce and Reserving Them as the Welaka Fish Hatchery; Florida	Amends EO 7908, Amended by Public Land Order 2069
08008	11/17/1938	Changing the Name of the Big Lake Reservation to Big Lake Migratory Bird Refuge, and Adding Certain Lands Thereto; Arkansas	Amends EO 2230
08013	11/25/1938	Enlarging the Waubay Migratory Waterfowl Refuge;	Amends EO 7245

EO	Date	Name	Notes
		South Dakota	
08015	11/30/1938	Correcting the Description of Lands Reserved as Union Slough Migratory Waterfowl Refuge, Iowa	Amends EO 7976
08021	12/5/1939	Withdrawal of Public Land for Forest Lookout Station; Wyoming	Amends EO 6910
08030	12/29/1939	Transfer of Lands From the Cochetopa National Forest to the Rio Grande National Forest; Colorado	
08031	1/9/1939	Revocation of Executive Order No. 4130 of January 22, 1925, Withdrawing Public Land for Fish Hatchery; Oregon	Revokes EO 4130
08037	1/25/1939	Establishing the Piedmont Wildlife Refuge; Georgia	
08038	1/25/1939	Establishing the Cabeza Prieta Game Range; Arizona	Amended by Public Land Order 5493 and Public Land Order 5502
08039	1/25/1939	Establishing the Kofa Game Range; Arizona	Amended by Public Land Order 5492 and Public Land Order 5637
08065	3/14/1939	Establishing the Necedah migratory Waterfowl Refuge; Wisconsin	Amends EO 6964, Amended by EO 8319 and EO 8479, Revoked by Public Land Order 1785
08067	3/17/1939	Establishing the Carolina Sandhills Wildlife Refuge; South Carolina	
08081	4/5/1939	Establishing the Anclote Migratory Bird Refuge; Florida	Amends EO of Feb 1, 1886, Amended by Proc 2416
08085	4/11/1939	Withdrawal of Public Lands for Forest Ranger Station; Colorado	Revoked by Public Land Order 5690
08086	4/11/1939	Establishing the Morgan Farm Wildlife Refuge; Vermont	Revoked by Public Land Order 801
08087	4/12/1939	Excluding Certain Tracts of Land From the Chugach and Tongass National Forests and Restoring Them to Entry; Alaska	
08100	4/28/1939	Enlarging the Homochitto national Forest; Mississippi	Amends EO 6964
08104	5/2/1939	Establishing the Little Pend Oreille Wildlife Refuge; Washington	Amends EO 6964
08110	5/10/1939	Establishing the Appert Lake Migratory Waterfowl Refuge; North Dakota	
08111	5/10/1939	Establishing Billings Lake Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 4017
08112	5/10/1939	Establishing Bone Hill Creek Migratory Waterfowl Refuge; North Dakota	
08113	5/10/1939	Establishing Buffalo Lake Migratory Waterfowl Refuge;	

EO	Date	Name	Notes
		North Dakota	
08114	5/10/1939	Establishing the Camp Lake Migratory Waterfowl Refuge; North Dakota	
08115	5/10/1939	Establishing Canfield Lake Migratory Waterfowl Refuge; North Dakota	
08116	5/10/1939	Establishing Charles Lake Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 2292
08117	5/10/1939	Establishing Dakota Lake Migratory Waterfowl Refuge; North Dakota	
08118	5/10/1939	Establishing the Flickertail Migratory Waterfowl Refuge; North Dakota	
08119	5/10/1939	Establishing Florence lake Migratory Waterfowl Refuge; North Dakota	
08120	5/10/1939	Establishing the Half-Way Migratory Waterfowl Refuge; North Dakota	
08121	5/10/1939	Establishing the Hutchinson Lake Migratory Waterfowl Refuge; North Dakota	
08122	5/10/1939	Establishing the Johnson Lake Migratory Waterfowl Refuge; North Dakota	
08123	5/10/1939	Establishing the Lake Moraine Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 1704
08124	5/10/1939	Establishing the Lake Oliver Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 6117
08125	5/10/1939	Establishing the Little Goose Migratory Waterfowl Refuge; North Dakota	
08126	5/10/1939	Establishing the Little Lake Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 1704
08127	5/10/1939	Establishing Lords Lake Waterfowl Refuge; North Dakota	
08128	5/10/1939	Establishing Lost Lake Migratory Waterfowl Refuge; North Dakota	
08129	5/10/1939	Establishing Minnewastena Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 1704
08130	5/11/1939	Transfer of Lands From the Cache National Forest to the Caribou National Forest; Idaho	
08145	5/31/1939	Changing the Name of the Nine-Pipe Reservation to Nine-Pipe Migratory Waterfowl Refuge and Adding Certain Lands Thereto	Amends EO 3503
08147	6/12/1939	Establishing the Ardoch Lake Migratory Waterfowl Refuge; North Dakota	
08148	6/12/1939	Establishing the Brumba Migratory Waterfowl Refuge; North Dakota	
08149	6/12/1939	Establishing the Cottonwood lake Migratory Waterfowl Refuge; North Dakota	

EO	Date	Name	Notes
08150	6/12/1939	Establishing the Hiddenwood Lake Migratory Waterfowl Refuge; North Dakota	
08151	6/12/1939	Establishing the Hobart Lake Migratory Waterfowl Refuge; North Dakota	
08152	6/12/1939	Establishing Lake Elsie Migratory Waterfowl Refuge; North Dakota	
08153	6/12/1939	Establishing Lake George Migratory Waterfowl Refuge	
08154	6/12/1939	Establishing Lake Ilo Migratory Waterfowl Refuge; North Dakota	
08155	6/12/1939	Establishing the Lake Nettie Migratory Waterfowl Refuge; North Dakota	
08156	6/12/1939	Establishing Lake Patricia Migratory Waterfowl Refuge; North Dakota	
08157	6/12/1939	Establishing the Lake Susie Migratory Waterfowl Refuge; North Dakota	
08158	6/12/1939	Establishing the Lake Zahl Migratory Waterfowl Refuge; North Dakota	Revokes EO 6910
08159	6/12/1939	Establishing Lambs Lake Migratory Waterfowl Refuge; North Dakota	
08160	6/12/1939	Establishing Legion Lake Migratory Waterfowl Refuge; North Dakota	Revoked by Public Land Order 1211
08161	6/12/1939	Enlarging the Long Lake Migratory Bird Refuge; North Dakota	
08162	6/12/1939	Establishing the Maple River Migratory Waterfowl Refuge; North Dakota	
08163	6/12/1939	Establishing Pioneer Lake Migratory Waterfowl Refuge; North Dakota	
08164	6/12/1939	Establishing Pleasant Lake Migratory Waterfowl Refuge; North Dakota	
08165	6/12/1939	Establishing Rock Lake Migratory Waterfowl Refuge; North Dakota	
08166	6/12/1939	Establishing Shell Lake Migratory Waterfowl Refuge; North Dakota	
08167	6/12/1939	Establishing the Sibley Lake Migratory Waterfowl refuge; North Dakota	
08172	6/15/1939	Excluding Certain Tracts of Land From the Chugach and Tongass National Forests and Restoring Them to Entry	
08173	6/15/1939	Establishing the Talcot Lake Migratory Waterfowl Refuge; Minnesota	Revoked by Public Land Order 1660
08184	6/28/1939	Amending Executive Order No. 7532 of January 8, 1937, Establishing the Shinnecock Migratory Bird Refuge	Amends EO 7532

EO	Date	Name	Notes
08202	7/13/1939	Authorizing and Requesting the Federal Power Commission To Perform Certain Functions Relating to the Transmission of Electric Energy Between the United States and Foreign Countries and to the Exportat	Revoked by EO 10485
08289	11/22/1939	Establishing the Bosque del Apache National Wildlife Refuge	
08296	11/30/1939	Changing the Name of the Pathfinder Wildlife Refuge and Adding Certain Lands Thereto	Amends EO 7425
08331	1/24/1940	Enlarging the Upper Mississippi River Wildlife and Fish Refuge; Minnesota and Wisconsin	Revoked by Public Land Order 584 and Public Land Order 936
08380	3/19/1940	Changing the Name of the Cold Springs Reservation to Cold Springs National Wildlife Refuge and Adding Certain Lands Thereto; Oregon	Amends EO 1032, EO 1439, and EO 6910
08444	6/14/1940	Establishing the Noxubee National Wildlife Refuge; Mississippi	Amends EO 6964
08475	7/10/1940	Partial Revocation of Executive Order No. 924, of August 8, 1908, Establishing the Klamath Lake Reservation; Oregon	Revokes EO 924
08479	7/11/1940	Transferring Certain Lands From the Secretary of Agriculture to the Secretary of the Interior and Reserving Them as a Part of the Necedah National Wildlife Refuge	Amends EO 8065
08480	7/12/1940	Excluding Certain Land from the Chugach National Forest and Reserving it for Townsite Purposes; Alaska	Amended by Public Land Order 571, Revoked by Public Land Order 686 and Public Land Order 835
08505	8/8/1940	Excluding Certain Land From the Chugach National Forest and Withdrawing the Unreserved Portion for Townsite Purposes; Alaska	Revoked by Public Land Order 1649
08506	8/8/1940	Excluding Certain Tracts of Land From the Chugach and Tongass National Forests and Restoring them to Entry; Alaska	
08509	8/8/1940	Establishing the Missouri Wildlife Management Area; Missouri	Amends EO 7908, Revoked by Public Land Order 2003
08510	8/8/1940	Establishing the Carolina Sandhills Wildlife Management Area; South Carolina	Amends EO 7908
08515	8/15/1940	Setting Aside an Area Within the Canal Zone To Preserve and Conserve Its Natural Features for Scientific Observation and Investigation	

EO	Date	Name	Notes
08517	8/16/1940	Changing the Name of the Delta Migratory Waterfowl Refuge to Delta National Wildlife Refuge and Adding Certain Lands; Louisiana	Amends EO 7229, EO 7383, and EO 7538
08518	8/16/1940	Modification of Executive Order No. 2123 of Januar 20, 1915, Reserving Certain Public Land as a Native Bird Refuge; Washington	Amends EO 2123, Revoked by Public Land Order 1068
08519	8/16/1940	Reserving Certain Towsite Lots for the Use of the Forest Service; Wyoming	
08544	9/19/1940	Transfer of Lands From the Lolo National Forest to the Helena National Forest; Montana	
08548	9/24/1940	Establishing the North Carolina Wildlife Management Area; North Carolina	
08592	11/12/1940	Changing the Name of the Lake Bowdoin Migratory Waterfowl Refuge to Bowdoin National Wildlife Refuge and Adding Certain lands Thereto; Montana	Amends EO 7295
08598	11/18/1940	Reserving Certain Public Lands as Administrative Sites for the Cabeza Prieta Game Range and the Kofa Game Range; Arizona	Amends EO 6910, Revoked by Public Land Order 4617 and Public Land Order 4724
08600	11/20/1940	Changing the Name of the Minidoka Wildlife Refuge to Minidoka National Wildlife Refuge and Adding Certain Lands Thereto; Idaho	Amends EO 7417
08601	11/20/1940	Enlarging the Mud Lake National Wildlife Refuge; Montana	
08604	11/30/1940	Partial Revocation of Certain Executive Orders Creating Public Water Reserves	Revokes EO of Jan 13, 1915, EO of April 17, 1916, EO of July 10, 1919, EO of June 24, 1914, and EO of Feb 16, 1929
08622	12/22/1940	Reserving Certain Public Lands in Connection With the Squaw Creek Antelope Range and Wildlife Refuge; Washington	Supersedes EO 6964, Revoked by Public Land Order 949
08644	1/21/1941	Establishing the Evanston National Wildlife Refuge; Wyoming	Revoked by Public Land Order 3424
08645	1/22/1941	Establishing the Kit Carson National Wildlife Refuge; Colorado	
08646	1/22/1941	Establishing the San Andres National Wildlife Refuge; New Mexico	

EO	Date	Name	Notes
08647	1/22/1941	Establishing the Havasu Lake National Wildlife Refuge; Arizona and California	Amended by Public Land Order 4703 and Public Land Order 5312. Revoked by Public Land Order 2852 (in part); Public Land Order 3099 (in part); Public Land Order 3522 (in part); Public Land Order 3720 (in part); Public Land Order 4374 (in part); Public Land Order 4430 (in part); Public Land Order 6044 (in part); Public Law 100-696, November 18, 1988 (Sec. 507, 102 Stat. 4595)
08648	1/23/1941	Changing the Name of the Killcohook Migratory Bird Refuge to Killcohook National Wildlife Refuge and Adding Certain lands Thereto; Delaware and New Jersey	Amends EO 6582 and EO 6960
08650	1/23/1941	Changing the Name of the Kellys Slough Migratory Waterfowl Refuge to Kellys Slough National Wildlife Refuge and Adding Certain Lands Thereto	Amends EO 7320
08653	1/28/1941	Mrs. Florence Bankhead Appointed Chief of National Memorials and Historic Sites, National Park Service	
08658	2/3/1941	Establishing the Prairie Lake National Wildlife Refuge; North Dakota	
08659	2/3/1941	Establishing the Pretty Rock National Wildlife Refuge; North Dakota	
08660	2/3/1941	Establishing the Snyder Lake National Wildlife Refuge; North Dakota	
08661	2/3/1941	Establishing the Springwater National Wildlife Refuge; North Dakota	
08663	2/3/1941	Establishing Stoney Slough National Wildlife Refuge; North Dakota	
08664	2/3/1941	Establishing Sunburst Lake National Wildlife Refuge; North Dakota	
08665	2/3/1941	Establishing Tomahawk National Wildlife Refuge; North Dakota	
08666	2/3/1941	Establishing White Lake National Wildlife Refuge; North Dakota	
08667	2/3/1941	Establishing the Wintering river National Refuge; North Dakota	

EO	Date	Name	Notes
08685	2/14/1941	Establishing the Imperial National Wildlife Refuge; Arizona and California	Revoked by Public Land Order 3032, Public Land Order 4367, Public Law 100-696, and Public Land Order 7045
08691	2/20/1941	Withdrawal of Pubic Land for Forest Lookout Station; Oregon	Revokes EO 6910, Revoked by Public Land Order 2611
08708	3/10/1941	Reserving Certain Public Lands in Connection With the Independence County Wildlife Refuge; Arkansas	Supersedes EO 6964, Revoked by Public Land Order 1517
08709	3/10/1941	Changing the Name of the Wyoming National Forest to Bridger National Forest; Wyoming	
08732	4/8/1941	Withdrawing Public Land in Aid of Flood Control, Arkansas	
08733	4/10/1941	Withdrawing Public Land in Aid of Flood Control, Oklahoma	
08763	5/27/1941	Establishing the Necedah Wildlife Management Area; Wisconsin	
08770	6/3/1941	Establishing the Lake Mason National Wildlife Refuge; Montana	
08776	6/10/1941	Withdrawal of Public Land for Radio Relay Station for Use in Forest Protection; California	Revokes EO 6910, Revoked by Public Land Order 6072
08779	6/11/1941	Excluding a Tract of Land from the Tongass National Forest and Restoring it to Entry; Alaska	
08819	7/5/1941	Excluding Land from the Humboldt National Forest and Reserving it for Townsite Purposes; Nevada	
08857	8/19/1941	Establishing the Kodiak National Wildlife Refuge; Alaska	Supersedes EO 8344, Revoked by Public Land Order 1634
08906	9/23/1941	Transfer of Lands From the Ouachita National Forest to the Ozark National Forest; Arkansas	
08992	2/3/1941	Establishing the Stewart Lake National Wildlife Refuge; North Dakota	
09028	1/20/1942	Withdrawl of Public Lands for Lookout Station for Use in Cooperative Forest Protection; California	Revokes EO 6910
09059	2/12/1942	Excluding Certain Tracts of Land from the Chugach and Tongass National Forests and Restoring Them to Entry; Alaska	
09060	2/12/1942	Including Certain Lands in the Fremont National Forest; Oregon	

EO	Date	Name	Notes
09061	2/12/1942	Placing Certain Lands Within the Fremont National Forest Under the Administration of the Department of the Interior; Oregon	
09091	3/6/1942	Establishing the Beltrami Wildlife Management Area; Minnesota	Amended by Public Land Order 495
09099	3/14/1942	Excluding Certain Lands from the Manistee National Forest; Michigan	
09119	4/1/1942	Enlarging the St. Marks National Wildlife Refuge; Florida	Supersedes EO 6964
09124	4/7/1942	Transfer of Lands From the Cache National Forest to the Caribou National Forest; Idaho and Utah	
09140	4/20/1942	Establishing the Safford National Wildlife Refuge; Arizona	Amended by EO 9192
09166	5/19/1942	Establishing the Lamesteer National Wildlife Refuge; Montana	
09167	5/19/1942	Establishing the Halfbreed Lake National Wildlife Refuge; Montana	
09185	6/23/1942	Establishing the Susquehanna National Wildlife Refuge; Maryland	
09192	7/3/1942	Amending Executive Order No. 9140 of April 20, 1942, Establishing the Safford National Wildlife Refuge; Arizona	Amends EO 9140
09234	8/31/1942	Establishing Ten Wildlife Management Areas	Revoked by Public Land Order 2261
09258	7/19/1946	Executive Order No. Authorizing the Secretary of the Interior to Take Possession of and To Operate Certain Coal Mines	
09292	12/31/1942	Establishing the Hailstone National Wildlife Refuge	
09311	3/6/1943	Enlarging the Squaw Creek National Wildlife Refuge	
09340	5/1/1943	Possession and Operation of Coal Mines	
09353	6/19/1943	Disposal of Electric Energy Generated at the Norfork Project	Amended by EO 9366 and EO 9373
09366	7/30/1943	Relating to the Operation and Disposition of Electric Energy at the Dennison Dam, Grand River Dam, and Norfork Dam in the States of Texas, Oklahoma, and Arkansas	Amends EO 8944 and EO 9353, Revoked by EO 9373
09369	8/16/1943	Providing for the Liquidation of the Affairs of the Office of the Bituminous Coal Consumers' Counsel	
09373	8/30/1943	Operation of, and Disposition of Electric Energy at, the Denison Dam, the Grand River Dam, and the Norfork Dam in the States of Texas, Oklahoma, and Arkansas	Revokes EO 9366
09390	10/25/1943	Transferring the Use, Possession, and Control of Certain Lands in the Nantahala National Forest From the Department of Agriculture to the Tennessee Valley	

EO	Date	Name	Notes
		Authority	
09391	10/26/1943	Transferring the Use, Possession, and Control of Certain lands in the Cherokee National Forest from the Department of Agriculture to the Tennessee Valley Authority	
09670	12/28/1945	Establishing the Tennessee National Wildlife Refuge	
09728	5/21/1946	Authorizing the Secretary of the Interior To Take Possession of and To Operate Certain Coal Mines	
09758	7/19/1946	Authorizing the Secretary of the Interior To Take Possession of and To Operate Certain Coal Mines	
09908	12/5/1947	Reservation of Source Material in Certain lands Owned by the United States	Revokes EO 9701, Revoked by EO 10596
10024	12/30/1948	Restoration of Lands to Location and Entry Under the Mining Laws of the United States	
10066	7/6/1949	Including Certain Lands in the Cherokee National Forest	
10095	1/3/1950	Establishment of the President's Water Resources Policy Commission	
10318	1/3/1952	Establishing the Missouri Basin Survey Commission	Amended by EO 10329
10355	5/26/1952	Delegating to the Secretary of the interior the Authority of the President to Withdraw or Reserve Lands of the United States for Public Purposes	Supersedes EO 9337, Amended by Public Land Order 6092, Public Land Order 6098
10374	7/15/1952	Enlarging the Nicolet and Chequamegon National Forests, Wisconsin	Revokes EO of July 21, 1971 (in part), Amended by EO 10932
10403	11/5/1952	Reserving Certain Lands comprising a Part of the Fort Missoula Military Reservation as an Addition to the Fort Missoula District of the Lolo National Forest	Revoked by Public Land Order 2187
10426	1/16/1953	Setting Aside Submerged Lands of the Continental Shelf as a Naval Petroleum Reserve	Revokes EO 9633, Revoked by Public Law 212
10445	4/10/1953	Reserving Certain Land Acquired Under Title III of the Bankhead-Jones Farm Tenant Act as Parts of National Forest	
10485	9/3/1953	Providing for the Performance of Certain Functions Heretofore Performed by the President With Respect to Electric Power and Natural Gas Facilities Located on the Borders of the United States	Revokes EO 8202, Amended by EO 12038
10571	10/18/1954	Including Certain Lands in the Nantahala National Forest	

EO	Date	Name	Notes
10584	12/18/1954	Prescribing Rules and Regulations Relating to the Administration of the Watershed Protection and Flood Prevention Act	Amended by EO 10913
10683	10/26/1956	Including Certain lands in the Cherokee National Forest	
10684	10/26/1956	Including Certain lands in the Cherokee National Forest	
10779	8/20/1959	Directing Federal Agencies to Cooperate With State and Local Authorities in Preventing Pollution of the Atmosphere	Superseded by EO 11282
10813	4/29/1959	Including Certain Lands in the Chattahoochee National Forest and the Nantahala National Forest	
10844	10/9/1959	Enlarging the Wasatch National Forest—Utah	Revokes in part EO 10046, Amended by EO 10993 and Public Land Order 2593
10850	11/27/1959	Modifying the Exterior Boundaries of Certain National Forests in Alabama, Florida, Louisiana, Mississippi, North Carolina, Oklahoma, and South Carolina	Modifies Proc of Dec 18, 1907, Proc of Nov 24, 1908, Proc of April 17, 1911, Proc of Jan 15, 1918, proc of Oct 17, 1927, Proc 1349, Proc 2169, Proc 2173, Proc 2174, Proc 2178, Proc 2187, Proc 2188, Proc 2189, Proc 2190, Proc 2285, Proc 2289, Proc 2293, EO 3820, EO 4436, EO 5814, and EO 7443
10851	11/27/1959	Enlarging the Chattahoochee, Kisatchie, Holly Springs, and Ouachita National Forests	Amended by EO 11178
10932	4/7/1961	Modifying the exterior boundaries of certain National Forests in Illinois, Michigan, Missouri, and Wisconsin	Modifies Proc 1844, Proc 1931, Proc 1932, Proc 1938, Proc 1035, Proc 2061, Proc 2218, Proc 2219, Proc 2313, Proc 2319, Proc 2336, Proc 2363, EO 7359, and EO 10374
10992	2/9/1962	Redefining the boundaries of the Caribbean National Forest—Puerto Rico	
10993	2/9/1962	Consolidating the Hiawatha and Marquette National Forests (Michigan) and correcting the land descriptions of Nebraska National Forest (Nebraska) and Wasatch National Forest (Utah)	Amends Proc 3379, EO 10844, and EO 10890

EO	Date	Name	Notes
11028	6/9/1962	Transferring lands between the Clark and Mark Twain National Forests (Missouri) and adding certain lands to the Hiawatha National Forest (Michigan)	
11066	11/27/1962	Including certain tracts of land in the Cherokee and Jefferson National Forests, in Tennessee and Virginia	
11067	11/27/1962	Including certain tracts of land in the Nantahala and Cherokee National Forests, respectively	
11072	12/28/1962	Extending the exterior boundaries of the Superior National Forest in Minnesota and the Clark National Forest in Missouri	
11163	7/28/1964	Including a certain tract of land of Fannin County, Georgia, in the Chattahoochee National Forest	
11178	9/18/1964	Providing for the transfer of lands in Georgia from the Chattahoochee National Forest to the Oconee National Forest; the addition of land in Indiana to the Hoosier National Forest; the addition of lan	Amends EO 10851, Supersedes Proc 2263
11200	2/26/1965	Providing for establishing user fees pursuant to the Land and Water Conservation Fund Act of 1965	
11212	4/2/1965	Including certain lands within the boundaries of the Allegheny National Forest in Pennsylvania	
11220	5/6/1965	Transferring lands in the State of Washington from the Okanogan National Forest to the Wenatchee National Forest	
11258	11/17/1965	Prevention, control, and abatement of water pollution by Federal activities	Supersedes EO 10014, Superseded by EO 11288
11278	5/4/1966	Establishing a President's Council and a Committee on Recreation and Natural Beauty	Supersedes EO 11017, EO 11069, EO 11218, Amended by EO 11359A and EO 11402, Revoked by EO 11472
11282	5/26/1966	Prevention, control, and abatement of air pollution by Federal activities	Supersedes EO 10779, Superseded by EO 11507
11288	7/2/1966	Prevention, control, and abatement of water pollution by Federal activities	Supersedes EO 11258, Superseded by EO 11507
11331	3/6/1967	Establishment of the Pacific Northwest River Basins Commission	Amended by EO 11613, EO 12038, EO 12148, Revoked by EO 12319
11345	4/20/1967	Establishment of the Great Lakes Basin Commission	Amended by EO 11613, EO 11646, EO 11882, EO 12038, and EO 12148, Revoked by

EO	Date	Name	Notes
			EO12319
11359	6/20/1967	Establishment of the Souris-Red-Rainy River Basins Commission	Amended by EO 11613 and EO 11635, Superseded by EO 11737
11359 A	6/29/1967	Adding the Secretary of Transportation to the membership of the President' Council on Recreation and Natural Beauty	Amends EO 11278, Revoked by EO 11472
11371	9/6/1967	Establishment of the New England River Basins Commission	Amended by EO 11528, EO 11613, EO 11707, EO 11882, EO 12038, and EO 12148, Revoked by EO 12319
11472	5/29/1969	Establishing the Environmental Quality Council and the Citizens' Advisory Committee on Environmental Quality	Revokes EO 11278, EO 11359, and EO 11402, Amended by EO 11514, EO 11541, and EO 12007, Committee continued by EO 11827 and EO 11948, Committee terminated by EO 12007
11477	8/7/1969	Authorizing the Atomic Energy commission to make certain awards without the approval of the President	Amended by EO 12038
11488	10/13/1969	Including certain lands in the Cherokee National Forest	
11507	2/4/1970	Prevention, control, and abatement of air and water pollution at Federal facilities	Supersedes EO 11282 and EO 11288, Superseded by EO 11752
11514	3/5/1970	Protection and enhancement of environmental quality	Amends EO 11472, Amended by EO 11541 and EO11991
11523	4/9/1970	Establishing the National Industrial Pollution Control Council	Council terminated on Jan 5, 1975, by Pub. L. 92-463 (86 Stat. 770, 5 U.S.C. App.)
11528	4/24/1970	Changing the jurisdiction and membership of the New England River Basins Commission	Amends EO 11371, Revoked by EO 12319
11548	7/20/1970	Delegating functions of the President under the Federal Water Pollution Control Act, as amended	Superseded by EO 11735
11578	1/13/1971	Establishment of the Ohio River Basin Commission	Amended by EO 11882, EO 12038, and EO

EO	Date	Name	Notes
			12148, Revoked by EO 12319
11593	5/13/1971	Protection and enhancement of the cultural environment	
11602	6/29/1971	Providing for administration of the Clean Air Act with respect to Federal contracts, grants or loans	Superseded by EO 11738
11608	7/19/1971	Termination of Federal Field Committee for Development Planning in Alaska	Revokes in part EO 11182 and EO 11386
11613	8/2/1971	Membership of Environmental Protection Agency on Established River Basin Commissions	Amend EO 11331, EO 11345, EO 11359, and EO 11371, Amended by EO 12319
11628	10/18/1971	Establishing a seal for the Environmental Protection Agency	
11629	10/26/1971	Delegation of authority to the Secretary of State to perform the function vested in the President by article IV of the Convention Between the United States of America and Mexico for the Protection of	
11643	2/8/1972	Environmental safeguards on activities for animal damage control on Federal lands	Amended by EO 11870 and EO 11917, Revoked by EO 12342
11658	3/22/1972	Establishment of the Missouri River Basin Commission	Amended by EO 11882, EO 12038, and EO 12148, Revoked by EO 12319
11659	3/22/1972	Establishment of the Upper Mississippi River Basin Commission	Amended by EO 11737, EO 11882, EO 12038, and EO 12148, Revoked by EO 12319
11707	3/12/1973	Change in boundaries of New England River Basins Commission	Amends EO 11371, Revoked by EO 12319
11712	4/18/1973	Special Committee on Energy and National Energy Office	Superseded by EO 11726
11726	6/29/1973	Energy Policy Office	Supersedes EO 11712, Superseded to extent inconsistent by EO 11748, Superseded by EO 11775
11735	8/3/1973	Assignment of functions under section 311 of the Federal Water Pollution Control Act, as amended	Supersedes EO 11548, Amended by EO 12418, Revoked by EO 12777
11737	9/7/1973	Enlargement of the Upper Mississippi River Basin Commission	Amends EO 11659, Supersedes EO 11359 and EO 11635, Revoked

EO	Date	Name	Notes
			by EO 12319
11738	9/10/1973	Providing for administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts, grants or loans	Supersedes EO 11602
11742	10/23/1973	Delegating to the Secretary of the State certain functions with respect to the negotiation of international agreements relating to the enhancement of the environment	
11743	10/23/1973	Modifying Proclamation 3279, as amended, with respect to the Oil Policy Committee	Amend Proc 3279, Supersedes EO 11703, Superseded by EO 11775
11747	11/7/1973	Delegating certain authority of the President under the Water Resources Planning Act, as amended	Amended by EO 12608
11748	12/4/1973	Federal Energy Office	Supersedes in part EO 10480 and EO 11726, Revoked by EO 11790
11752	12/17/1973	Prevention, control, and abatement of environmental pollution at Federal facilities	Supersedes EO 11507, Amended by EO 12038, Revoked by EO 12088
11770	2/21/1974	International Symposium on Geothermal Energy—1975	
11775	3/25/1974	Abolishing the Energy Policy Office	Amends Proc 3279, Supersedes EO 11726 and EO 11743, Revoked in part by EO 11790
11790	6/25/1974	Providing for the effectuation of the Federal Energy Administration Act of 1974	Amends Proc 3279, Revokes EO 11748, Revokes in Part Proc 3279 and EO 11775, Amended by EO 12038 and EO 12919
11812	10/11/1974	Activation of the Energy Resources Council	Amended by EO 11819 and EO 11855, Revoked by EO 12083
11870	7/18/1975	Environmental safeguards on activities for animal damage control on Federal lands	Amends EO 11643, Revoked by EO 12342
11911	4/13/1976	Preservation of endangered species	Revoked by EO 12602
11912	4/13/1976	Delegation of authorities relating to energy policy and conservation	Amended by EO 12003, EO 12038, EO 12148, EO 12375, Superseded or revoked in part by EO 12919

EO	Date	Name	Notes
11915	5/10/1976	Abolishing the Energy Research and Development Advisory Council	Amends EO 11827, Superseded by EO 11948
11917	5/28/1976	Amending Executive Order No. 11643 of February 8, 1972, relating to environmental safeguards on activities for animal damage control on Federal lands	Amends EO 11643, Revoked by EO 12342, EO 11870
11930	7/30/1976	Performance by the Federal Energy Office of energy functions of the Federal Energy Administration	Revoked by EO 11933
11932	8/4/1976	Classification of certain information and material obtained from advisory bodies created to implement the international energy program	
11933	8/25/1976	Termination of the Federal Energy Office	Revokes EO 11930
11953	1/7/1977	Assigning emergency preparedness functions to the Energy Research and Development Administration and Nuclear Regulatory Commission	
11969	2/2/1977	Administration of the Emergency Natural Gas Act of 1977	
11987	5/24/1977	Exotic organisms	Revoked by EO 13112
11988	5/24/1977	Floodplain management	Revokes EO 11296, Amended by EO 12148
11989	5/24/1977	Off-road vehicles on public lands	Amends EO 11644
11990	5/24/1977	Protection of Wetlands	Amended by EO 12608
11991	5/24/1977	Relating to protection and enhancement of environmental quality	Amends EO 11514
12003	7/20/1977	Relating to energy policy and conservation	Amends EO 11912
12009	9/13/1977	Providing for the effectuation of the Department of Energy Organization Act	Revoked by EO 12553
12020	11/8/1977	Payment of educational benefits to veterans and dependents when schools are temporarily closed to conserve energy	
12038	2/3/1978	Relating to Certain Functions Transferred to the Secretary of Energy by the Department of Energy Organization Act	Amends Proc 3279, EO 8526, EO 10127, EO 10480, EO 10485, EO 10865, EO 10899, EO 11057, EO 11177, EO 11331, EO 1135, EO 11371, EO 11477, EO 11490, EO 11578, EO 11647, EO 11652, EO 11658, EO 11659, EO 11752, EO 11761, EO 11790, EO 11902, EO 11905, EO 11921, EO 11969. Amended by EO

EO	Date	Name	Notes
			12156
12040	2/24/1978	Relating to the Transfer of Certain Environmental Evaluation Functions	Revoked by EO 12553
12062	5/26/1978	President's Commission on the Coal Industry	Revoked by EO 12103
12083	9/27/1978	Energy Coordinating Committee	
12088	10/13/1978	Federal Compliance With Pollution Control Standards	Revokes EO 11752, Amended by EO 12580, Revoked by EO 13148
12103	12/14/1978	President's Commission on the Coal Industry	Revokes EO 12062, Amended by EO 12176, Revoked by EO 12258
12113	1/4/1979	Independent water project review	Revokes EO 9384, Amended by EO 12141, Revoked by EO 12322
12114	1/4/1979	Environmental effects abroad of major Federal actions	
12121	2/26/1979	Energy Coordinating Committee	Amends EO 12083, Revoked by EO 12379
12123	2/26/1979	Offshore oil spill pollution	Amended by EO 12418, Revoked by EO 12777
12129	4/5/1979	Critical Energy Facility Program	Revoked by EO 12553
12130	4/11/1979	President's Commission on the Accident at Three Mile Island	Revoked by EO 12258
12140	5/29/1979	Delegation of authorities relating to motor gasoline end-user allocation	Amended by EO 12162, Revoked by EO 12553
12141	6/5/1979	Independent water project review	Amends EO 12113, Revoked by EO 12322
12142	6/21/1979	Alaska natural gas transportation system	
12153	8/17/1979	Decontrol of heavy oil	Amended by EO 12186 and EO 12189, Revoked by 12553
12176	12/7/1979	President's Commission on the coal industry	Amends EO 12103, Revoked by EO 12258
12185	12/17/1979	Conservation of petroleum and natural gas	
12186	12/21/1979	Change in definition of heavy oil	Amends EO 12153, Revoked by 12553
12189	1/16/1980	Definition of heavy oil	Amends EO 12153, Revoked by 12553
12229	7/29/1980	White House Coal Advisory Council	Revoked by 12399
12231	8/4/1980	Strategic petroleum reserve	

EO	Date	Name	Notes
12234	9/3/1980	Enforcement of the Convention for the Safety of Life at Sea	
12235	9/3/1980	Management of natural gas supply emergencies	
12247	10/15/1980	Federal Actions in the Lake Tahoe region	
12261	1/5/1981	Gasohol in Federal motor vehicles	
12286	1/19/1981	Responses to environmental damage	Revoked by EO 12316
12287	1/28/1981	Decontrol of crude oil and refined petroleum products	
12316	8/14/1981	Responses to environmental damage	Revokes EO 12286, Amended by EO 12418, Revoked by EO 12580
12342	1/27/1982	Environmental safeguards for animal damage control on Federal lands	Revokes EO 11643
12501	1/28/1985	Arctic Research	Amended by EO 13286
12503	1/28/1985	Presidential Commission on Outdoor Recreation Resources Review	Amended by EO 12529, Revoked by EO 12610
12659	12/15/1988	Delegation of authority regarding the naval petroleum and oil shale reserves	
12737	12/12/1990	President's Commission on Environmental Quality	Revoked by EO 12852
12759	4/17/1991	Federal energy management	Revoked by EO 12902 and EO 13123
12777	10/18/1991	Implementation of section 311 of the Federal Water Pollution Control Act of October 18, 1972, as amended, and the Oil Pollution Act of 1990	Amends EO 12580, Amended by EO 13286, Revokes EO 11735, EO 12123, and EO 12418
12852	6/29/1993	President's Council on Sustainable Development	Revokes EO 12737, Amended by EO 12855, EO 12965, EO 12980, EO 13053, EO 13114, Revoked by 13138
12873	10/20/1993	Federal acquisition, recycling, and waste prevention	Revokes EO 12780, Amended by EO 12995, Revoked by EO 13101
12898	2/11/1994	Federal actions to address environmental justice in minority populations and low-income populations	Amends EO 12250, Amended by EO 12948
12902	3/8/1994	Energy Efficiency and water conservation at Federal facilities	Revokes EO 12759, Revoked by EO 13123
12904	3/16/1994	Commission for Environmental Cooperation, Commission for Labor Cooperation, Border Environment Cooperation Commission, and North American Development Bank	
12905	3/25/1994	Trade and Environment Policy Advisory Committee	Amended by EO 1294, EO 13062, EO 13138, EO 13225, EO 13316, and EO 13385

EO	Date	Name	Notes
12915	5/13/1994	Federal implementation of the North American Agreement on Environmental Cooperation	
12916	5/13/1994	Implementation of the Border Environment Cooperation Commission and the North American Development Bank	Amended by EO 13380
12929	9/29/1994	Delegation of authority regarding the naval petroleum and oil shale reserves	
12948	1/30/1995	Amendment to Executive Order No. 12898	Amends EO 12898
12962	6/7/1995	Recreational fisheries	
12969	8/8/1995	Federal acquisition and community right-to-know	Revoked by EO 13148
12995	3/25/1996	Amendment to Executive Order No. 12873	Amends EO 12873
12996	3/25/1996	Management and general public use of the National Wildlife Refuge System	
13045	4/21/1997	Protection of Children from Environmental Health Risks and Safety Risks	Revokes EO 12606, Amended by EO 13229 and EO 13296
13057	7/26/1997	Federal Actions in the Lake Tahoe Region	
13089	6/11/1998	Coral Reef Protection	
13112	2/3/1999	Invasive Species	Amended by EO 13286, Revokes EO 11987
13123	6/3/1999	Greening the Government Through Efficient Energy Management	Revokes EO 12759, EO 12845, and EO 12902, Revoked by EO 13423
13134	8/12/1999	Developing and Promoting Biobased Products and Bioenergy	Revoked by EO 13225 and EO 13423
13142	11/16/1999	Environmental Review of Trade Agreements	
13158	5/26/2000	Marine Protected Areas	
13178	12/4/2000	Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve	Amended by EO 13196
13186	1/10/2001	Responsibilities of Federal Agencies to Protect Migratory Birds	
13196	1/18/2001	Final Northwestern Hawaiian Island Coral Reef Ecosystem Reserve	Amends EO 13178
13211	5/18/2001	Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use	
13212	5/18/2001	Actions to Expedite Energy-Related Projects	Amended by EO 13286 and EO13302
13221	7/31/2001	Energy Efficient Standby Power Devices	
13229	10/9/2001	Amendment to Executive Order 13045, Extending the Task Force on Environmental Health Risks and Safety Risks to Children	Amends EO 13045

EO	Date	Name	Notes
13261	3/19/2002	Providing an Order of Succession in the Environmental Protection Agency and Amending Certain Orders on Succession	Amends EO 13241, EO 13242, EO 13243, EO 13244, EO 1324, EO 13246, EO 13247, EO 13250, and EO 13251, Amended by EO 13344
13296	4/18/2003	Amendment to Executive Order 13045, Extending the Task Force on Environmental Health Risks and Safety Risks to Children	Amends EO 13045
13302	5/15/2003	Amending EO 13212, Actions to Expedite Energy-Related Projects	Amends EO 13212
13337	4/30/2004	Issuance of Permits With Respect to Certain Energy-Related Facilities and the Land Transportation Crossings on the International Boundaries of the United States	Amends EO 11423
13340	5/18/2004	Establishment of Great Lakes Interagency Task Force and Promotion of a Regional Collaboration of National Significance for the Great Lakes	
13352	8/26/2004	Facilitation of Cooperative Conservation	
13366	12/17/2004	Establishes committee on Ocean Policy	
13423	1/24/2007	Strengthening Federal Environmental, Energy, and Transportation Management	Amends EO 13327, Revokes EO13102, EO 13123, EO 13134, EO 13148, and 13149

[1] Every executive order from 1937 through January 2007 was reviewed for any of a number of key words relating to environmental or energy issues. These executive orders were compiled and various data stored in a database. This table is an excerpt of the information in the database. Every record is represented in this table; however, not every field has been included. The fields not included in this table are: (1) issuing President; and (2) each authority cited at the beginning of the executive order.

Appendix C

Table: Statutory Authority for Energy and Environmental Executive Orders[1]

Authority	Codified	Status
Act "To authorize the President of the United States to make withdrawals of public lands in certain cases" of June 25, 1910		Repealed
Act "to revise the boundaries of the Fremont National Forest in the State of Oregon" of April 14, 1934		
Act of August 24, 1912 (giving effect to an international convention relating to seals and otter), 37 Stat. 501		Repealed
Act of February 9, 1871 (joint resolution to protect food fishes)		
Act of July 14, 1955 (relating to air pollution control)		Amended by Act Dec. 17, 1963
Act of July 2, 1940 (relating to the Canal Zone)		
Act of July 9, 1937, (relating to Yosemite National Forest)		
Act of June 4, 1897 (General Appropriations)	16 U.S.C. 473	Valid through 7/5/2007
Act of March 1, 1911, Section 11 ("Weeks Law" for the Conservation of watersheds and navigable waters)	16 USC 521	Valid as of 7/5/2007
Act of March 2, 1931, Section 1	7 USC 426 contains the Amended version of the text	Amended
Act of March 3, 1891, as amended, Section 24	16 USC 471	Repealed
Act of May 29, 1928, Section 2 (concerning water resources and public lands in Los Angeles County)		
Antiquities Act of 1906	16 USC 431	Valid
Arctic Research and Policy Act of July 31, 1984	15 USC 4102	Valid
Atomic Energy Act of 1946	42 USC 2011 et seq	Valid
Bald and Golden Eagle Protection Acts	16 U.S.C. 668-668d	Valid as of 7/5/2007
Bankhead-Jones Farm Tenant Act	7 U.S.C. 1011 (c), Title III	Amended
Budget and Accounting Procedures Act of 1950	31 U.S.C. 701 et. seq.	Valid
Clarke-McNary Act of June 7, 1924 (protection of forest lands and production of timber)	16 U.S.C. 568-70, 505	Valid

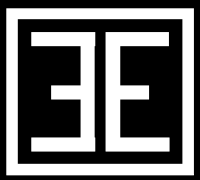
Authority	Codified	Status
Clean Air Act as Amended	42 U.S.C. 7401 et. Seq.	Valid
Clean Water Act	33 U.S.C. 1251 et seq.	Valid
Coastal Zone Management Act	16 U.S.C. 1451 et seq.	Valid
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)	42 U.S.C. 9615	
Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., on March 3, 1973 (CITES)		Valid
Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere		Valid
Defense Production Act of 1950, as amended	50 App. U.S.C. 2061 et seq	Valid
Department of Energy Organization Act	42 U.S.C. 7101	Valid
Economic Stabilization Act of 1970, as amended	50 App. 2166, 2152, 2168, 2091	Expired
Emergency Natural Gas Act of 1977	15 USC 717	Valid
Emergency Petroleum Allocation Act of 1973, as amended	15 U.S.C. 751 et seq.	Expired
Emergency Wetlands Resources Act	16 U.S.C. 3901, 3922	Partially repealed
Emergnecy Relief Appropriation Act of April 8, 1935		Expired
Endangered Species Act of 1973	16 U.S.C. 1531-1544	Valid
Endangered Species Conservation Act of 1969	16 U.S.C. 668aa	Repealed
Energy Policy Act of 1992		Valid
Energy Policy and Conservation Act	42 U.S.C. 6201 et seq.	Valid
Energy Reorganization Act of 1974	42 U.S.C. 5801 et seq.	Valid
Energy Security Act	42 U.S.C. 8871	Valid
Energy Supply and Environmental Coordination Act of 1974	15 U.S.C. 791 et seq.	Valid
Environmental Quality Improvement Act of 1970	42 U.S.C. 4371 et seq.	Valid
Federal Advisory Committee Act, as amended	5 U.S.C. App.	Valid
Federal Energy Administration Act Amendments of 1976	15 U.S.C. 787	Valid
Federal Energy Administration Act of 1974	15 U.S.C. 761 et. seq.	Valid
Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972	7 U.S.C. 136	Valid
Federal Noxious Weed Act of 1974, as amended	7 U.S.C. 2801 et seq.	Repealed
Federal Plant Pest Act	7 U.S.C. 150aa et seq.	Repealed
Federal Power Act, approved August 26, 1935	16 USC 792-825	Valid
Federal Property and Administrative Services Act, as amended	40 U.S.C. 121	Valid
Federal Vacancies Reform Act of 1998	5 U.S.C. 3345	Valid

Authority	Codified	Status
Federal Water Pollution Control Act	33 U.S.C. 1321	Incorporated within the Clean Water Act
Findings of the Administrator of the Environmental Protection Agency (September 29, 1975)	40 F.R. 44726-44739	Valid
First War Powers Act, 1941	50 App. U.S.C.A. 32-37	Valid
Fish and Wildlife Act of 1956	16 U.S.C. 742a	Valid
Fish and Wildlife Coordination Act	16 U.S.C. 661-666c	Valid
Flood Disaster Protection Act of 1973	42 USC 4002, 4003, 4012a, 4104-07, 4128	Valid
Historic Sites Act of 1935	16 U.S.C. 461 et seq	
International Organizations Immunities Act	22 U.S.C. 288	Valid
Lacey Act, as amended	16 U.S.C. 3371-3378	Valid
Land and Water Conservation Fund Act of 1965	16 U.S.C. 460l-4	Valid
Magnuson-Stevens Fishery Conservation and Management Act	16 U.S.C. 1801 et seq.	Valid
Marine Mammal Protection Act	16 U.S.C. 1362 et seq.	Valid
Marine Protection, Research, and Sanctuaries Act	33 U.S.C. 1401 et. seq.	Valid
Marine Protection, Research, and Sanctuaries Act of 1972	16 U.S.C. 1431	Valid
Migratory Bird Conservation Act	16 U.S.C. 715	Valid
Migratory Bird Treaty Act	16 U.S.C. 703-711	Valid
Migratory Birds Conventions		Unknown
Motor Vehicle Information and Cost Savings Act, as amended		repealed
Mutual Educational and Cultural Exchange Act of 1961	22 U.S.C. 2451, 2454	Valid
National Energy Conservation Policy Act	42 U.S.C. 8252 et seq.	Valid
National Environmental Policy Act of 1969	42 U.S.C. 4321-4347	Valid
National Flood Insurance Act of 1968, as amended	42 U.S.C. 4001 et seq.	Valid
National Historic Preservation Act	16 U.S.C. 470 et seq.	Valid
National Industrial Recovery Act		Expired
National Marine Sanctuaries Act	16 U.S.C. 1431 et seq.	Valid
National Marine Sanctuaries Amendments Act of 2000		Valid
National Park Service Organic Act	16 U.S.C. 1 et seq.	Valid
National Wildlife Refuge System Administration Act	16 U.S.C. 668dd-ee	Valid
Natural Gas Act, approved June 21, 1938	15 U.S.C. 717	Valid
Natural Gas Policy Act of 1978	15 U.S.C. 3364(d), section 304(d)	Valid
Noise Control Act of 1972	42 U.S.C. 4903	Valid
None		Unknown

Authority	Codified	Status
Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended	16 U.S.C. 4701 et seq.	Valid
North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act")	19 U.S.C. 3301	Valid
North American Wetlands Conservation Act	16 U.S.C. 4401	Valid
Oil Pollution Act of 1990	33 U.S.C. 2701 et seq.	Valid
Outer Continental Shelf Lands Act	43 U.S.C. 1331 et seq.	Valid
Powerplant and Industrial Fuel Use Act of 1978	42 U.S.C. 8301	Valid
Public Health Service Act, as amended by the Safe Drinking Water Act	42 U.S.C. 300j-6	Valid
Refuge Recreation Act	16 U.S.C. 460k	valid
Reorganization Plan No. 1 of 1977		
Reorganization Plan No. 1 of 1979		Valid
Reorganization Plan No. 2 of 1966		
Resource Conservation and Recovery Act (RCRA)	42 U.S.C. 6901-6907	Valid
Second War Powers Act, 1942		Valid
Selective Training and Service Act of 1940 (54 Stat. 892) (sec 9) as amended by the War Labor Disputes Act (57 Stat. 163)		Valid
Solid Waste Disposal Act		Valid
Solid Waste Disposal Act, as amended	42 U.S.C. 6961	Valid
Taylor Grazing Act of June 28, 1934	43 USC 315L	Valid
Tennessee Valley Authority Act of 1933		Valid
Title 10 U.S.C., Sections 7427 and 7428 (Naval Petroleum Reserves)	10 U.S.C. 7427-28	Valid as of 7/18/2007
Title 3 of the United States Code, Section 301 (General authorization to delegate functions; publication of delegations)	3 U.S.C 301	Valid
Title 38 of the United States Code, Section 3680 (Payment of educational assistance or subsistence allowances)	38 U.S.C. § 3680 (new location)	Valid
Title 49 U.S.C., Section 60133 (Coordination of Environmental Reviews)	49 U.S.C 60133	Valid as of 7/18/20007
Title 5 of the United States Code (Government Organization and Employees)	5 U.S.C 3301	Valid as of July 18, 2007
Toxic Substances Control Act	15 U.S.C. 2621	Valid
Trade Act of 1974, as amended	19 U.S.C. 2155(c)(1))	Valid
Trade Expansion Act of 1962, as amended	19 U.S.C. 1862	Valid
Upper Mississippi River Wildlife and Fish Refuge Act		Valid

Authority	Codified	Status
Water Quality Improvement Act of (April 3rd) 1970		Valid
Water Resources Planning Act (July 22, 1965)	42 U.S.C. 1962b, b-1	Valid
Watershed Protection and Flood Prevention Act	16 U.S.C.A. 1003-1006	Valid
Wilderness Act	16 U.S.C. 1131 et seq.	Valid

[1] A compilation of authorities was produced from the executive order compilation described in Appendix B and Chapter 4(A). Every type of authority used in the executive orders from the first compilation was extracted, including "by authority as President" as well as specific statutory citations. This table is an excerpt of the information in the database. Every record is represented in this table, however, not every field has been included. The fields not included here are: (1) the language of the delegation from the statutory provision; (2) relevant notes; and (3) the executive order number for all of the energy and environmental executive orders in the executive order table that cite the provision for authority.



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