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EXECUTIVE POWER GRAB ON TAP AT WHITE HOUSE?

Attorneys: Bush's post-attack directives could lead to liberty-curbing restrictions

Published: 09/27/2001 at 1:00 AM

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With Congress hotly debating whether to grant sweeping police powers to federal law enforcement agencies in the name of combating terrorism, two attorneys who have studied presidential directives in depth are concerned that civil liberties will take a beating from the executive branch as well as the legislative – and no one would realize it until it was too late.

On Sept. 14 President Bush, responding to the terrorist attacks upon the World Trade Center and the Pentagon three days earlier, issued a [proclamation declaring a state national emergency](#) and reinforced it the same day with an [executive order \(EO 13223\)](#) calling the Ready Reserves of the Armed Forces to active duty.

For constitutional attorney William J. Olson, alarm bells started ringing.

“This is just the beginning,” he told WorldNetDaily. “I am certain that the proclamation and executive order by the president are the first of a series of executive orders that are likely to be issued as the administration identifies the powers it wants to invoke.”

Olson, who heads a law firm in McLean, Va., specializing in constitutional issues, is co-author of “Executive Orders and National Emergencies: Presidential Power Grab Nearly Unchecked,” an eight-page study he wrote with attorney Alan Woll in 1998 for the newsletter of the Abraham Lincoln Foundation, a nonprofit, public policy organization in Washington, D.C. The two attorneys took a critical look at the expansion of the executive branch through its use of arcane procedures that few Americans understand. [WorldNetDaily publicized their study in January 1999](#), a time when an alerted public was bringing the executive orders and states of emergency proclaimed by President Bill Clinton under close scrutiny.

“Once a national emergency is declared, presidents use executive orders to exercise emergency powers,” they wrote. “Some such powers come from Congress – (but) presidents assert other emergency powers without any statutory or constitutional authority. So long as the definition (and declaration) of a national emergency remains at the unbridled discretion of a president – with the Congress and the courts granting extensive, perhaps comprehensive authority to presidents whenever a national emergency is declared – Americans enjoy little protection from the prospect of oppressive, dictatorial government.”

Olson and Woll expanded their report into a 30-page, in-depth policy analysis for the [Cato Institute](#), a nonprofit think tank in Washington, D.C. The new analysis was given a new title: “[Executive Orders and National Emergencies: How Presidents Have Come to ‘Run the Country’ by Usurping Legislative Power.](#)”

16 ‘national emergencies’

When their report for the Cato Institute was published in October 1999, Clinton had declared and renewed 13 “national emergencies,” based on perceived threats to the national economy or American foreign policy objectives. By the time he left the White House early this year, the number was up to 15: the Taliban in Afghanistan (1999), Proliferation of Nuclear Weapons in the Russian Federation (2000) and Sierra Leone in Africa (2001). He signed his final declaration two days before he left office. Bush has not revoked any, and his recent declaration brings the total to 16.

Olson and Woll recently created a [website, www.lawandfreedom.com](http://www.lawandfreedom.com), where they’ve posted all presidential executive orders and proclamations declaring a state of national emergency, beginning with Woodrow Wilson, the first president to make such a declaration. Their reports and other articles are also posted.

Olson’s prediction that the Sept. 14 proclamation and executive order are the first of a series may prove prophetic.

On Monday, Bush signed a second executive order related to the terrorist attack. [EO 13224, “Terrorist Financing,”](#) freezes the assets of some 27 individuals and organizations, including Osama bin Laden and the al-Qaida/Islamic Army. The Taliban is not listed, presumably because it’s covered by EO 13129, signed by Clinton in 1999. Clinton specifically defined the Taliban as a “politicalmilitary entity,” not a government.

As described on the [White House website](#), Bush’s latest executive order “expands the Treasury Department’s power to target the support structure of terrorist organizations, freeze the U.S. assets and block the U.S. transactions of terrorists and those that support them, and increases our

ability to block U.S. assets of, and deny access to U.S. markets to foreign banks who refuse to cooperate with U.S. authorities to identify and freeze terrorist assets abroad.”

Having reviewed both executive orders, Olson has serious concerns about the second one.

“I thought the proclamation declaring the emergency and the first executive order were quite reasonable, in that they were limited to the call up of the military, and that’s necessary to set things in motion,” he said. “But freezing the assets of these groups and people – that’s an extraordinary power to be able to do this.”

This asset freezing is accomplished by invoking the [International Emergency Economic Powers Act](#), or IEEPA, which is the successor of the “Trading With the Enemy Act” of 1917, which was repealed in 1977. It is found in [Title 50 of the U.S. Code, War and National Defense](#) following the [National Emergency Act](#).

Powers ‘sweeping beyond description’

“It’s an incredibly powerful statute, and the powers it gives to the president are sweeping beyond description,” said Olson. “These purport to give him virtually all power necessary to crack down financially on people, without any involvement or review by Congress. It’s among the broadest grants of power from any legislature to any executive.”

But Congress didn’t create IEEPA for Bush, nor is he the first president to invoke it to implement a declared state of emergency.

Alan Woll described Monday’s EO as “traditional.”

“It cited the National Emergency Act; it cited IEEPA, as most of them do,” he said. “This was another one dealing with freezing of assets, but it freezes the assets of bin Laden and people associated with him.”

Woll said that identification of individuals and groups whose assets would be frozen by the United States under IEEPA was one of the “most popular uses of the National Emergency Act during the Clinton administration and, I believe, during the first Bush administration.”

“That’s basically what’s going on with the one that was issued yesterday,” he said.

But there are differences between this EO and those earlier ones. A substantial difference is that non-U.S. banks and lending institutions are brought within its scope.

“After listing the people suspected of being terrorists and in the high command of terrorist organizations, Bush lists the organizations and prohibits financial transfers – then he purports to impose sanctions on foreign banks that don’t do what he tells them to do,” Olson said. “Even though IEEPA is broadly written, that doesn’t give the United States of America jurisdiction over a bank in another country; so it remains to be seen what he is relying on for his authority for the international financial sanctions.”

A U.N. operation?

Olson also is disturbed by Bush’s reliance upon resolutions passed by the United Nations Security Council and the [United Nations Participation Act](#) as authorization for his actions – something he did not mention in the proclamation declaring a state of emergency.

“In this EO, Bush not only uses the National Emergency Act and IEEPA, he *intermixes* Security Council resolutions and the U.N. Participation Act,” said Olson. “That’s the one that authorizes military forces to be committed to the U.N. projects. It looks like the president is turning this into a U.N. operation.”

While Bush is not the first president to cite the United Nations as the source of his authority, instances of similar invocations are few and far between. Truman made general references to the “peaceful purposes” of the United Nations when he proclaimed the “[Existence of a National Emergency](#)” in December 1950, prompted by “recent events in Korea.” Clinton, in three of his declarations (UNITA, Angolan anti-communists, 1993; Yugoslavia, 1994; and Sierra Leone, 2001), cited recently passed UNSC resolutions, one in each case.

Bush goes much further, citing *six* such resolutions and the U.N. Charter.

Said Olson, “I feel better when American presidents invoke U.S. law rather than U.N. Security Council resolutions and the U.N. Charter. I would prefer that the president act under his constitutional authority as commander in chief or pursuant to some federal law, rather than rely on a purported grant of power from some multinational organization.”

Reagan’s blueprint for control

These presidential powers are scattered through the U.S. Code (the statutes passed by Congress) and the body of executive orders. Woll and Olson recently ran across one from the final days of the Reagan administration that authorizes dramatic increases in federal control over American life in a national emergency. Essentially a blueprint for executive control, EO 12656, signed by Reagan, Nov. 18, 1988, following the election of George Bush as president, replaced two earlier ones issued by Truman

and Nixon. Nixon's had combined a series of about a dozen EOs that had been issued by Kennedy.

EO 12656, "Assignment of Emergency Preparedness," would apply during a national security emergency defined as "any occurrence, including a natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States." Each federal department and agency was instructed to "*develop plans to set priorities and allocate resources among civilian and military claimants*" [Section 203 (4)]. A few examples:

The secretary of agriculture was to plan for "*the domestic distribution of seed, feed, fertilizer, and farm equipment to agricultural producers*" [Section 301 (1)], the provision of "*food and agricultural products to meet international responsibilities*" [Section 301 (2)], and for the allocation of "*water to be used in agricultural production and food processing*" [Section 301 (5)];

The secretary of commerce was to participate in the preparation of "*plans to regulate and control exports and imports*" [Section 401 (6)] and "*provide for the collection and reporting of census information on human and economic resources, and maintain a capability to conduct emergency surveys to provide information on the status of these resources*" [Section 401 (7)];

The secretary of defense was to participate in development of "*overall plans for the management, control, and allocation of all usable waters from all sources within the jurisdiction of the United States*" including all drinking water [Section 501 (6)] and in the development of "*specific procedures by which military assistance to civilian law enforcement authorities may be requested, considered, and provided*" [Section 501 (12)];

The secretary of energy was tasked with participating in the development of "*plans and operational systems for ... allocation of all energy resource requirements for national defense and essential civilian needs*" [Section 701 (1) (b)];

The secretary of health and human services was to "*develop national plans to set priorities and allocate health, mental health, and medical services' resources among civilian and military claimants*" [Section 801 (3)];

The attorney general was to "*develop intergovernmental and interagency law enforcement plans to respond to civil disturbances*" [Section 1101 (8)] ;

The secretary of labor was to "*develop plans and procedures for wage, salary, and benefit caps*" [Section 1201 (2)];

The secretary of transportation was charged with directing *"implementation of priorities for all transportation resource requirements for service, equipment, facilities and systems"* [Section 1401 (2) (a); *"Emergency management and control of civil transportation resources and systems, including privately owned automobiles, urban mass transit and intermodal transportation systems"* [Section 1401 (2) (c); and coordinating *"the management of all Federal, State, city, local, and other highways, roads, streets, bridges, tunnels, and publicly owned highway maintenance equipment to assure efficient and safe use of road space"* [Section 1401 (5)].

None of these plans were to be executed unless "authorized by law," but in Woll's opinion, that clause offers little protection to rights and civil liberties.

"It depends a great deal on who is president," Woll said. "The order is written in such a way as to provide different people with different understandings of what is intended. But remembering what Paul Begala (Clinton's adviser) said, 'Stroke of the pen, law of the land – kinda cool,' it's clear that there are those who feel that presidential directives have the force of law and that no congressional enactment would be necessary to implement them."

"You could say that EO 12656 really doesn't make a difference, since it's only putting on paper powers that the president already has the capacity to exercise," said Woll. "Or you could say that it's laying the groundwork so that if somebody wanted to get really serious about establishing a dictatorship, the mechanism was in place."

As Woll sees it, the only thing that would hold a president back from implementing EO 12656 would be his sense of public willingness to accept the terms and his subordinates' willingness to implement them.

"There would have to be a sense of emergency great enough that the general public would tolerate the implementation of its terms. Again, different presidents might have a different sense of what it is necessary. In a way, EO 12656 does us a favor by putting everything out there in black and white," he said.

Because it is such a deep reservoir of powers, Olson fears this EO could pose a greater threat to civil liberties than the wiretapping and surveillance bills currently being debated in Congress.

"Any time you have a state of emergency it triggers other powers," he said. "The Reagan EO doesn't have any wiretap authority, nor could it. It doesn't deal with that sort of thing. It deals with how you allocate resources. But in some respects, it's more sweeping than a wiretap bill, which doesn't tell you what you must or must not produce at your plant or what crops to grow."

Olson hopes Congress, as it debates the expansion of federal power, will not “abdicate its process of debate or its constitutional function of retaining all legislative powers.” He recommends that if there are to be “upgrades” to federal law enforcement authority – which Ashcroft is demanding – that these are sunsetted in six months to allow Congress to “revisit them so it can proceed *deliberately*, without the emotion of the moment, to determine what powers it can entrust to the federal government.”

“There’s no question that historically the liberties of a people are at greatest risk in times of war, because it is in times of war that people are willing to sacrifice liberty for security and for their country,” Olson warned. “The American people are particularly vulnerable to this because we are so trusting of our government and are patriotic in a good sense. But I wish we could season that patriotism with a healthy vigilance against our own government to defend liberty.

“As a safeguard, we’ve got to insist that constitutional processes are followed to the ‘T,’ and that every branch of government carries out its constitutional responsibilities,” he concluded.

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