

Clintonian Usurpation by Executive Order

By William J. Olson and Alan Woll
Attorneys-at-Law

In December 1998, Rep. Ileana Ros-Lehtinen (R-FL) observed that: “[t]he greatest challenge of free peoples is to restrain abuses of governmental power. The power of the American presidency is awesome. When uncontrolled and abused, presidential power is a grave threat to our way of life, to our fundamental freedoms.”¹ If more Members of Congress had shared these convictions, President Clinton might have been impeached for usurpation of legislative powers through the use of executive orders and other forms of executive action. In fact, a former Chief Counsel of the House Judiciary Committee presented a draft article of impeachment to Rep. Bob Barr (R-GA) of the House Judiciary Committee in November 1998 incorporating a charge concerning President Clinton’s proclamation establishing the Grand Staircase Escalante National Monument.² The establishment of this national monument, discussed *infra*, is only one example of Clintonian “legislating essentially by executive order, [whereby] Clinton ... set aside nearly 4 million acres of Western land at 10 sites.”³

While inexcusably passive, Congress has not been wholly oblivious to these abuses. In May 2000, President Clinton issued an executive order addressing the provision of AIDS drugs and medical technology to Africa after an amendment with the same purpose had been rejected by a conference committee, leading Senate Majority Leader Trent Lott (R-MS) to observe that “there seems to be a pattern now of [President Clinton issuing] executive orders that exceed what he should be doing.”⁴ Senator Orrin Hatch (R-UT) has said that “[t]his President has a propensity to bypass Congress and the States and rule by executive order; in other words, by fiat.”⁵ Senator Ben Nighthorse Campbell (R-CO) also criticized President Clinton’s use of

executive orders: “[t]his president continues to usurp Congress, abandon the role of public participation in public lands matters and abuse his authority in a frantic war on the West that won’t end until he leaves office. He has proven once again that governing by imperial decree is a lousy way to run a democracy.”⁶

Contrary to such public perception as exists, not all Clintonian exercises of executive authority have been through executive orders and proclamations. Many important unilateral executive policy decisions have been implemented informally, using forms less easily discovered by the public. These include implementing the “don’t ask, don’t tell” rule regarding homosexuals in the military,⁷ as well as eliminating the bans on abortion counseling by recipients of Title X funds,⁸ abortions in military hospitals,⁹ fetal tissue experimentation,¹⁰ Agency for International Development funding to abortion counseling organizations,¹¹ and the importation of the abortifacient drug RU-486 well before FDA approval was arranged,¹² as well as efforts to reduce the number of federally-licensed firearms dealers.¹³ These important policy changes were implemented by means of orders to subordinates, or “memoranda.”

Even his defenders acknowledge that President Clinton has chosen to use executive orders, proclamations, and other “presidential directives” to exercise the legislative powers which the Constitution vests in Congress. Expressing his admiration for the ease with which Clinton was able to exercise Congressional powers unilaterally, then-White House advisor Paul Begala said: “Stroke of the Pen. Law of the Land. Kinda Cool.”¹⁴ Bruce Reed, President Clinton’s assistant for domestic policy, stated that “[w]e joke about it, but we expect that we’ll be producing executive orders until the morning he leaves office.”¹⁵ This aggressive program of substituting presidential directives for Congressional legislation has been called the “Podesta

plan,” named for President Clinton’s chief of staff.¹⁶ This plan (or at least this practice) has been in place for some time; in 1998 there were reports that “President Clinton plans a blitz of executive orders ... part of a White House strategy to make progress on Clinton's domestic agenda with or without congressional help.”¹⁷ In fact, Interior Secretary Bruce Babbitt has even dismissed efforts to work with Congress. “We've switched the rules of the game. We're not trying to do anything legislatively.”¹⁸ U.S. Trade Representative Charlene Barshefsky appeared to admire Clinton’s misuse of power on the Africa AIDS executive order, explaining that “[t]he fact that the amendment did not survive conference was disappointing, and led the administration to issue essentially the same policy in executive-order form.”¹⁹ It appears that there are numerous senior Clinton appointees who fail to recognize any constitutional distinction between legislative and executive power.

Far more than prior presidents, President Clinton has used presidential directives systematically to circumvent Congress. A Wall Street Journal editorial observed that Clinton has “pursued an ‘executive order strategy’ that goes way beyond trying to guide federal agencies in how to implement laws.”²⁰ Even the Washington Post accurately observed that “President Clinton is signing two executive orders . . . circumventing congressional resistance to his proposals....”²¹ The Los Angeles Times quoted David Schoenbrod, a New York Law School professor, as observing that “Clinton is pushing the envelope. He's consistently trying to take more power than Congress gives him.”²² Demonstrating the ability to “compartmentalize,” even to the point of ignoring deserved criticism from ideological allies, President Clinton has not exercised restraint. However, his efforts to undercut Congress have

not met with uniform success. He earned the dubious distinction of being only the second President to have an executive order struck down by a federal court.

Permanent Striker Replacement

On March 8, 1995, President Clinton issued Executive Order (“EO”) 12954, to overturn a 1938 U.S. Supreme Court decision interpreting the National Labor Relations Act (“NLRA”). The Supreme Court had held that an employer enjoyed the right “to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.”²³ Congress considered legislation in 1990, 1991, 1992, and 1994 that would have amended the NLRA to prohibit employers from hiring permanent striker replacements.²⁴ Following these repeated failures to enact such legislation, Clinton issued EO 12954, prohibiting federal contractors from hiring permanent striker replacements.

EO 12954 was challenged in court.²⁵ In the ensuing litigation, the Clinton Administration brazenly asserted “that there are no judicially enforceable limitations on presidential actions, besides claims that run afoul of the Constitution or which contravene direct statutory prohibitions,” as long as the president states he has acted pursuant to a federal statute.²⁶ However, the U.S. Court of Appeals for the District of Columbia Circuit rejected this argument.²⁷ The court explained, “no federal official can alter the delicate balance of bargaining and economic power that the NLRA establishes.”²⁸ It struck down the executive order.

Clinton did not appeal this decision to the Supreme Court, but still continued his aggressive use of presidential directives.

Grand Staircase-Escalante Monument

Weeks before the 1996 presidential election, Clinton used Proclamation 6920²⁹ to establish the 1.7 million acre Grand Staircase-Escalante National Monument in Utah.³⁰ A congressional review of this action found that the action had been “politically motivated and probably illegal,” taken “to circumvent congressional involvement in public land decisions.”³¹

The House Committee on Resources found:

The White House abused its discretion in nearly every stage of the process of designating the monument. It was a staff driven effort, first to short-circuit a congressional wilderness proposal, and then to help the Clinton-Gore re-election campaign. The lands to be set aside, by the staff’s own descriptions, were not threatened. ‘I’m increasingly of the view that we should just drop these Utah ideas ... these lands are not really endangered’ — Kathleen McGinty, chair, Counsel on Environmental Quality.³²

The intent to both bypass and pre-empt Congress was plain:

As you know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas.... Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the Administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that could be made unsuitable for future wilderness designation if opened for development by Congress.”³³

President Clinton has also used executive orders to undermine the Congressional power over appropriations.

American Heritage Rivers Initiative

President Clinton's American Heritage Rivers Initiative (AHRI), established by Executive Order 13061,³⁴ requires that land use decisions affecting designated rivers receive approval from the AHRI “river navigator.” Among the identified concerns of this program is the expenditure of funds not appropriated by Congress, a violation of Art I., Sec. 9, Cl. 7 of the Constitution.³⁵ Rep. Owen Pickett (D-VA) expressed concern regarding the precedent being established:

the unusual nature of the arrangement being proposed where the executive branch of the U. S. Government, through its agencies, was undertaking the implementation of a new Federal program that has not been authorized by Congress and for which no moneys have been appropriated by the Congress to these agencies to be expended for this purpose. This strikes me as being quite unusual and if successful, reason for alarm. Federal agencies are generally considered to be creatures of Congress but this will no longer be true if they can, by unilateral action of their own, extend their reach and usurp moneys appropriated to them for other purposes to pay for their unauthorized activities.³⁶

War by Executive Order

President Clinton has also used a flurry of executive orders to conduct a shooting war against the Federal Republic of Yugoslavia, usurping the power of Congress to declare war. First, on June 9, 1998, he issued EO 13088, declaring a national emergency, seizing the assets of the Yugoslavian government, and prohibiting trade with that country, as well as its constituent republics of Serbia and Montenegro. In March 1999, without prior Congressional authority, Clinton deployed and engaged the United States Air Force to participate in NATO's bombing of Yugoslavia. He then deployed U.S. troops in neighboring Macedonia and

Albania, merely informing Congress of his actions. On April 13, 1999, President Clinton issued EO 13119, designating Yugoslavia and Albania as a war zone. On April 20, 1999, he issued EO 13120, ordering reserve units to active duty. It is believed that there may have been other presidential directives related to the war which were issued as classified Presidential Decision Directives.³⁷ President Clinton's use of executive power was never expressly authorized by Congress. On April 28, 1999, Congress overwhelmingly rejected a resolution to declare war against Yugoslavia, and also rejected a concurrent resolution to continue the air war.

New Rights and Entitlements

Most recently, Clinton executive orders have been used to establish new rights without Congressional approval. On August 11, 2000, President Clinton signed Executive Order 13166, which provides that services provided by federal agencies and recipients of federal funding must be made accessible to persons not proficient in the English language. Reportedly, the Justice Department's Office of Civil Rights extends this standard to zoos and movie theaters.³⁸ Assistant Attorney General Bill Lann Lee, Clinton's recess appointment as head of the Justice Department's Civil Rights Division (following the Senate's rejection of his nomination), states that failure to comply with this executive order may be treated as a violation of Title VI of the Civil Rights Act of 1964 — discrimination based on national origin.

Circumventing Congress, Clinton created a federal hiring preference based on sexual orientation, Executive Order 13087.³⁹ This executive order, which placed sexual orientation on a par with race, gender, creed, and national origin, sought to create a federal policy which

had previously been rejected by Congress in 1994, 1995, and 1996.⁴⁰ The term “sexual orientation” is not defined either in the executive order or in the U.S. Code.⁴¹ However in congressional hearings, Assistant Attorney General Lee offered the glib observation that “he knew it when he saw it.”⁴² Efforts to overturn the order in the House were unsuccessful.

Legislative Remedies

Rep. Ron Paul (R-TX) has sponsored the Separation of Powers Restoration Act (H.R. 2655), which is designed to restore the separation of powers between Congress and the President as set forth in Articles I and II of the U.S. Constitution. Testifying in support of his bill, Rep. Paul observed that it is undeniable that the powers of Congress have been usurped, “and that our system is out of balance is evident to the most casual of observers.

We have the opportunity to more perfectly balance our system and restrict potential abuses.

While kings may have the right to promulgate laws simply by decree, it is Rule of Law which is king in our form of government. A co-sponsor of the Paul bill, Rep. Jack Metcalf (R-WA), observed that a President “has absolute dictatorial powers under the present law.”⁴³ A history teacher turned Congressman, Mr. Metcalf added these sobering words, “if this Republic falls — and I don’t think it’s going to, but if it ever does — it will be because of executive orders . .

. . .”⁴⁴

William J. Olson heads a McLean, Virginia law firm (www.lawandfreedom.com) that focuses on constitutional, administrative, and civil litigation. Alan Woll is an attorney in Blevins, Arkansas (akewoll@arkansas.net). They co-authored *Executive Orders and National Emergencies: How Presidents Have Come to “Run the Country” by Usurping Legislative Power* (www.cato.org).

Endnotes:

1. 144 Cong. Rec. H11817 (Dec. 18, 1998).
2. November 18, 1998 Memorandum from Jerome Zeifman to Rep. Bob Barr, House Judiciary Committee, Capitol Hill Press Releases, 11-18-1998.
3. Carl Cannon, "Lands Legacy Gains Ground," National Journal, June 10, 2000.
4. Press conference held by U.S. Senator Trent Lott (R-MS) (May 9, 2000).
5. U.S. Congress, House Committee on Resources, April 29, 1997 Hearings, "Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996," p. 12.
6. Press release, Sen. Campbell's office, June 9, 2000.
7. President Clinton stated on July 19, 1993, in a speech before the National Defense University, that he had ordered Defense Secretary Les Aspin to issue a directive implementing his policy on homosexuals in the military. *See Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 Weekly Comp. Pres. Doc. 1369-73 (July 19, 1993).*
8. Memorandum on the Title X "Gag Rule," 58 *Fed. Reg.* 7455 (1993).
9. Memorandum on Abortions in Military Hospitals, 29 *Weekly Comp. Pres. Doc.* 88 (Jan. 22, 1993).
10. Memorandum on Fetal Tissue Transplantation Research, 29 *Weekly Comp. Pres. Doc.* 87 (Jan. 22, 1993).
11. Memorandum on the Mexico City Policy, 29 *Weekly Comp. Pres. Doc.* 88 (Jan. 22, 1993).
12. Memorandum on Importation of RU-486, 29 *Weekly Comp. Pres. Doc.* 89 (Jan. 22, 1993).
13. Memorandum on Gun Dealer Licensing, 29 *Weekly Comp. Pres. Doc.* 1605-07 (Aug. 11, 1993).
14. James Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," New York Times, July 5, 1998, section 1, p. 10.
15. Alexis Simendinger, "An Executive Endgame Takes Shape," National Journal, February 25, 2000.

16. *Id.*
17. Elizabeth Shogren, “Clinton to Bypass Congress in Blitz of Executive Orders,” Los Angeles Times, page A1, July 4, 1998.
18. Audrey Hudson, “Clinton Woos Environmentalists, Plans to Ban Use of Public,” The Washington Times, page A4, June 14, 1999.
19. “Clinton Aims to Get Africa More AIDS-Drugs Access,” Wall Street Journal, p. A28, May 11, 2000.
20. “Executive Rules,” Editorial, The Wall Street Journal, page A14, August 6, 1998.
21. Charles Babington, “President to Sign Orders On Parents’ Rights, Schools,” Washington Post, page A2, May 3, 2000.
22. Shogren, *supra*.
23. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938), *quoted in U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996).
24. Michael H. LeRoy, Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements, 37 B.C. L. Rev. 229, 279-80 (1996).
25. Reich, 74 F.3d 1322.
26. *Id.* at 1332.
27. *Id.* at 1333.
28. *Id.* at 1337.
29. There is no significant legal distinction between a proclamation and an executive order.
30. September 18, 1996.
31. House Committee on Resources, Behind Closed Doors: The Abuse Of Trust And Discretion In The Establishment Of The Grand Staircase-Escalante National Monument, 105th Cong., 1st sess. (“Committee on Resources Report”).
32. *Id.*
33. March 19, 1996 draft letter from McGinty to Interior Secretary Bruce Babbitt. *Id.*
34. September 11, 1997.

35. “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;...”
36. House Committee on Resources, “Oversight Hearing on the Clinton Administration’s American Heritage Rivers Initiative,” 105th Cong., 1st Sess., July 15, 1997, p. 64.
37. President Clinton has issued classified executive orders known as presidential decision directives (PDDs) to deal with issues of national security and foreign policy. Generally, the only knowledge about these PDDs comes from veiled references during White House press briefings, the release of sanitized summaries, and, occasionally, the disclosure by the National Security Council of incomprehensible redacted versions in response to Freedom of Information Act requests. Members of Congress have complained that they are also denied access to these classified PDDs.
38. Jim Boulet, “Clinton’s Tower of Babble,” National Review Online, August 22, 2000.
39. May 28, 1998.
40. “Employment Discrimination Against Gays & Lesbians,” www.religioustolerance.org/hom_empl.htm. This paper suggests that the policy also applies to federal contractors.
41. House Committee on Judiciary, Subcommittee on the Constitution, Oversight Hearing on the Civil Rights Division of the U.S. Department of Justice, July 17, 1998, testimony of Donald Devine.
42. Donald Devine, “Risks of Keeping a Low Profile,” *Washington Times*, August 21, 1998, p. A18.
43. Simendinger, *op cit*.
44. *Id*.