

The Art of PRESIDENTIAL USURPATION

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Throughout the nation's history, presidents have been able to use executive orders to circumvent the Constitution's division of power.

DURING the recent presidential scandals, concluding with Pres. Clinton's impeachment, many called for the investigations to end so that the President could get back to "the business of running the country." How did we get to a point where so many Americans think of government as embodied in the president and liken him to a man running a business?

The answer rests in part with the growth of presidential rule through executive orders and national emergencies. The Constitution defines presidential powers very generally, and nowhere does it define, much less limit, the power of a president to rule by executive order--except by reference to the general language ("All legislative Powers herein granted shall be vested in a Congress of the United States") and the larger structure and function of the Constitution.

Presidential usurpation of legislative power has been a problem from the beginning, but grew exponentially with the 20th-century expansion of government. Moreover, Congress and the courts have not only failed to check, but have actually abetted, the expansion of presidential power. Nevertheless, recent developments offer hope that constitutional limits--and the separation and division of powers, in particular--may eventually be restored.

The Constitution divides powers between the Federal and state governments, leaving most powers with the states and the people. The powers delegated to the Federal government are further separated among three distinct branches, defined by their legislative, executive, and judicial functions. The states were to check Federal abuses of power and vice versa. Similarly, each branch of the Federal government was to check efforts by the other branches to enlarge or abuse their powers. However, when such a system ceases to function in an adversarial way, the rights and liberties of the people suffer.

Nowhere is that transformation more clear, perhaps, than in the growth of presidential lawmaking--usurping the powers delegated to the legislative branch and reserved to the states. James Madison warned that "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." Yet, all too often, that conflation of powers has occurred--at Americans' expense. A few examples from the Clinton Administration illustrate the problem and the extent to which our liberties are at risk as long as Congress, the courts, and the states fail to exercise their constitutional responsibilities to check presidential power.

In December, 1998, Rep. Ileana Ros-Lehtinen (R.-Fla.) observed that "The 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."

She spoke regarding Clinton's impeachment on articles unrelated to his usurpation of legislative powers. The principle applies even more strongly to legislative usurpations. Clinton has repeatedly used executive orders, proclamations, and other "presidential directives" to exercise

legislative powers vested in Congress or left with the states. Sen. Orrin Hatch (R.-Utah), observes that "This President has a propensity to bypass Congress and the states and rule by executive order; in other words, by fiat."

On March 8, 1995, Clinton issued Executive Order 12954 to overturn a 1938 Supreme Court decision (which held that the National Labor Relations Act gave employers the right to hire replacement workers and not to rehire strikers). In 1990, 1991, 1992, and 1994, Congress considered, but did not pass, legislation that would have amended the NLRA to prohibit employers from hiring permanent strike replacements. Following these failures to enact such legislation, Clinton issued EO 12954, prohibiting Federal contractors from hiring permanent strike replacements.

EO 12954 was challenged in court, where the Administration 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," if the president states he acted pursuant to statute. A Federal appeals court rejected that argument, though, and invalidated the executive order.

A few weeks before the 1996 presidential election, Clinton issued Proclamation 6920, establishing a 1,700,000-acre national monument in Utah. A Congressional review of his action found that the proclamation was "politically motivated and probably illegal," taken "to circumvent Congressional involvement in public land decisions." The House Committee on Resources concluded that "The White House abused its discretion in nearly every stage of the process of designating the monument."

On Sept. 11, 1997, Clinton's Executive Order 13061 established the American Heritage Rivers

Initiative. In addition to having created the program without Congressional authority, the President redesignated \$2,000,000 for the program. Rep. Owen Pickett (D.-Va.) expressed concern regarding "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."

As a final example of presidential rule, in 1999, Clinton waged war, through NATO against Yugoslavia, without a Congressional declaration of war. On June 9, 1998, he issued EO 13088, which declared a national emergency, seized the U.S.-based assets of Yugoslavia, and prohibited trade. In March, 1999, without Congressional authorization, Clinton deployed and engaged the U.S. Air Force to join NATO's bombing of Yugoslavia. He then deployed U.S. troops in neighboring Macedonia and Albania without authorization. Clinton's EO 13119 designated Yugoslavia and Albania as a war zone. Clinton's EO 13120 ordered military reserve units to active duty.

On Apr. 28, 1999, Congress overwhelmingly rejected a resolution to declare war against Yugoslavia as well as one "authorizing" continuation of the air war. Clinton continued the war, nevertheless. On May 1, he announced NATO's ban on trade with Yugoslavia. On May 26 and June 2, he notified Congress that he had sent additional troops and aircraft to participate in the war. On June 5, he notified Congress that he had sent more troops to the front. After NATO declared the war to be over, Clinton informed Congress that he would deploy 7,000 U.S. troops to Kosovo, where they remain to this day. Thus, Clinton continues the practice of presidents

since the Progressive Era: legislation and role by executive orders.

The issuance of executive orders, proclamations, and other documents known generally as presidential directives dates back to the first administration. On June 8, 1789, Pres. George Washington's first directive ordered acting officers of the holdover Confederation government "to impress [him] with a full, precise, and distinct general idea of the affairs of the United States" handled by each officer.

Washington called some directives "proclamations." His first proclamation was issued in response to a request by a joint committee of the House and Senate that he "recommend to the people of the United States a day of public thanksgiving." Washington's Oct. 3, 1789, proclamation identified Thursday, Nov. 26, 1789, as such a day of thanksgiving. Washington's Aug. 7, 1794, proclamation, which ordered persons participating in "combinations to defeat the execution of [Federal] laws" to cease their resistance and disperse, was issued pursuant to a 1792 statute.

However, Washington's Apr. 22, 1793, proclamation declaring the neutrality of the U.S. in foreign affairs cited neither constitutional nor statutory authority, yet sought to control the actions of U.S. citizens (albeit in the form of public notice that he had instructed Federal officers to institute prosecutions). This proclamation was viewed as unconstitutional by James Madison, among others.

Before 1861, presidential directives were issued infrequently. That practice changed dramatically with the inauguration of Pres. Abraham Lincoln, who unilaterally waged war for nearly three months by presidential directive, reducing Congress to a reactive, rubber-stamp role. Lincoln's Apr. 15, 1861, proclamation called for 75,000 militia to suppress the southern insurrection and

for Congress to convene on July 4, 1861. Apr. 19 and 27, 1861, proclamations declared a blockade of ports in several southern states. On Apr. 20, 1861, Lincoln directed the building of 19 warships and ordered the Secretary of the Treasury to advance \$2,000,000 to three private citizens for use "in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the government." Lincoln's May 3, 1861, proclamation enlarged the Army and Navy.

Not only did Lincoln lack constitutional authority for his actions, several of them expressly violated provisions of the Constitution. These included "No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law" and the clauses that empower Congress to raise and support armies and to provide and maintain a navy.

In Lincoln's speech to Congress when it convened on July 4, 1861, he stated that he had not exercised any powers not possessed by Congress. He asked Congress to ratify by statute his unilateral actions. Congress generally complied. (Lincoln continued his use of presidential directives throughout the war.)

After Lincoln was assassinated, presidents returned to a less abusive role. Pres. Rutherford Hayes (who issued no formally designated "executive orders") stated that "The executive power is large because [it is] not defined in the Constitution. The real test has never come, because the Presidents have down to the present been conservative, or what might be called conscientious men, and have kept within limited range. And there is an unwritten law of usage that has come to regulate an average administration. But if a Napoleon ever became President, he could make the executive almost what he wished to make it. The war power of President Lincoln went to lengths which could scarcely be surpassed in despotic principle."

However, the quality of the men, and therefore the scope of the office, changed dramatically at the dawn of the 20th century. Vice Pres. Theodore Roosevelt succeeded the assassinated Pres. William McKinley on Sept. 14, 1901, six months after McKinley was sworn in for a second term. Thus, McKinley served as president for four years, six months, while Roosevelt served for seven years, six months. Roosevelt issued 1,006 executive orders; McKinley, 51.

Roosevelt's aggressive use of executive orders and power ushered in the Progressive Era, where government assumed the role of solving social "problems." Although Roosevelt is well-known for calling the presidency a "bully pulpit," he clearly perceived far greater potential in that office. Asserting his stewardship theory of executive power, Roosevelt stated that it was his "duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."

Pres. Woodrow Wilson was inaugurated in 1913. In the 1970s, a Senate committee characterized Wilson's administration as marked by the acquisition and exercise of "dictatorial powers." Using a presidential directive, Wilson was the first president to declare a national emergency (two months before war was declared). Following that declaration, he used presidential directives to exercise emergency authority. He was the first president to create Federal agencies with presidential directives--for example, the Food Administration, the Grain Administration, the War Trade Board, and the Committee on Public Information.

Most of Wilson's emergency powers did not survive his administration. A joint resolution passed on March 3, 1921, the day before Pres. Warren Harding was inaugurated, repealed most wartime measures delegating powers to the president.

Pres. Franklin Roosevelt was inaugurated on March 4, 1933. Roosevelt's first official act, at 1 a.m.

on March 6, 1933, was to issue Proclamation 2038, declaring a state of national emergency and closing the banks. The proclamation cited the 1917 Trading with the Enemy Act as authority. (That act then applied only in wartime, and did not apply to transactions between U.S. citizens.)

On March 9, 1933, passing a bill that no Congressman had read, Congress "approved and confirmed ... actions, regulations, orders and proclamations heretofore and hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury" pursuant to the Trading with the Enemy Act (which was amended to apply to U.S. citizens at any time).

Afterwards, Roosevelt exercised legislative powers aggressively, even seizing private businesses months before the U.S. entered World War II. Roosevelt's EO 9066, citing his authority as commander-in-chief, sent more than 112,000 U.S. citizens and residents of Japanese descent into detention camps. Congress later ratified it.

The Supreme Court steps in

Pres. Harry Truman followed Roosevelt's example, using presidential directives in peacetime to seize manufacturing plants, textile mills, slaughterhouses, coal mines, refineries, railroads, and other transportation companies facing threatened or actual strikes. This seizure of businesses was eventually checked by the Supreme Court.

In *Youngstown Sheet & Tube v. Sawyer*, the Court found that EO 10340, seizing steel mills to give steel workers a raise, was unconstitutional. The Court determined that, for the executive order to be valid, the president's power to issue it "must stem either from an Act of Congress or from the Constitution itself." When neither statutory nor constitutional authority was found, the Court concluded that Truman lacked authority to issue the order. Therefore, the Court invalidated the

order, observing that "Congress has ... exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution `in the Government of the United States, or any Department or Officer thereof."

Youngstown is the high-water mark for judicial limitation of executive usurpation. In the next major test, *Dames & Moore v. Regan*, the Supreme Court upheld Pres. Ronald Reagan's EO 12294 (implementing an executive agreement) on the theory that Congress had delegated its authority to the president by "acquiescence." No statutory or constitutional authority was needed.

Congress has not been entirely silent regarding presidential power--especially Pres. Richard Nixon's use of emergency powers. In 1972, a special Senate committee was created to study the problem of presidential usurpation through declarations of national emergency. The committee focused on the states of national emergency that undergirded many of the most aggressive executive usurpations of lawmaking power. Rechartered in 1974 as the Special Committee on National Emergencies and Delegated Emergency Powers, it unanimously recommended legislation to regulate and oversee presidential declarations of national emergency. That legislation became the National Emergencies Act.

This act terminated all powers and authorities possessed by any member of the executive branch as a result of the existence of a declaration of national emergency in effect. It further required that, before the president could exercise an extraordinary power on the basis of a national emergency, he had to declare such an emergency to Congress and publish that declaration in the Federal Register.

The act provided for the termination of national emergencies either by joint resolution of

Congress, presidential proclamation, or if the president fails to "publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect" on an annual basis. The act requires the president to identify all powers and authorities being activated pursuant to the declaration of national emergency and requires certain reports to Congress.

After the National Emergencies Act became law, Congress amended the Trading with the Enemy Act. It now applies only after Congress has declared war.

Next, Congress passed the International Emergency Economic Powers Act, seeking to limit the emergency powers available to the president during peacetime. Nevertheless, since the passage of IEEPA, there has been an explosive growth in the number of declared national emergencies.

Clinton has used executive orders to generate multiple concurrent states of national emergency, enabling him to prevent U.S. residents from providing humanitarian aid to various groups he disfavors, including UNITA (anti-communist participants in the Angolan civil war), Cubans, Burmese, Sudanese, and certain residents of Bosnia-Herzegovina. Obviously, there is no objective standard defining what constitutes a national emergency when UNITA, Burma, or Sudan qualify. Previously, Pres. George Bush banned humanitarian aid to certain Iraqis, Haitians, and Yugoslavians.

Congress must take more effective action to check presidential usurpations of legislative power and restore the constitutional structure of government. There is currently a proposal before Congress that would accomplish this goal--HR2655, the Separation of Powers Restoration Act, cosponsored by Reps. Ron Paul (R.-Tex.) and Jack Metcalf (R.-Wash.).

St. George Tucker, a prominent early-American jurist, understood well the critical need for the

division and separation of powers, stating that "Power thus divided, subdivided, and distributed into so many separate channels, can scarcely ever produce the same violent and destructive effects, as where it rushes down in one single torrent, overwhelming and sweeping away whatever it encounters in its passage."

In the 20th century, the point was well stated by Supreme Court Justice Louis Brandeis: "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 governmental powers among three departments, to save the people from autocracy."

Presidential power has too often rushed down in a single torrent. If Americans are to be saved from the autocracy that follows, Congress, the states, and the courts must meet their responsibilities.

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