

## Executive Orders

William Crawford Green

In David Schultz and John R. Vile  
*Encyclopedia of Civil Liberties in America*, 345-48  
M.E. Sharpe, 2005

An executive order is a document issued by the president which has the force of law. All Presidents have issued these orders to create and control executive branch agencies, to implement statutes, treaties, and executive agreements, and to accomplish their domestic and foreign policy objectives. No one knows how many orders have been issued. There is no commonly accepted definition of executive orders nor is there any clear distinction between them and a presidential proclamation. Some proclamations could be classified as executive orders: George Washington's 1793 proclamation of neutrality, Abraham Lincoln's 1863 Emancipation Proclamation, and Gerald Ford's proclamation pardoning Richard Nixon. The problem is compounded, because executive orders were not numbered until 1862, not systematically numbered until 1907, and not published in the *Federal Register* until 1935. As of April 2003, the numbered series totals 13,290 executive orders.

Presidents have used executive orders to create task forces, commissions, and advisory committees; to implement congressional statutes creating to government agencies and authorizing their reorganization; and to promulgate rules governing agency personnel and procedures and public participation in federal agency decision making. President Ronald Reagan relied upon Presidents Ford and James Earl Carter's orders for his Executive Order 12291 (1981) which enhance his power as chief executive by granting the Office of Management and Budget the authority to conduct cost-benefit analyses of proposed agency rules. Presidents have also issued executive orders to limit access to government information, outlaw racial discrimination, man-date the Japanese relocation, and ordered seizure of steel mills which have raised significant questions whether the president had the constitutional authority to issue these orders and whether they intrude upon congressional power and diminish individual freedom and equality.

Presidents have limited public access to national defense and foreign policy information held by federal agencies with the authority granted by an express congressional authorization in Exemption 1 of the Freedom of Information Act (FOIA) to use executive orders in establishing criteria for public access to this information. When the Nixon Administration denied Congress information on an underground nuclear test, even though the FOIA provides that the exemption does not apply to Congress, the U.S. Supreme Court held in *United States v. Mink*, 410 U.S. 73 (1973), that it had no authority to examine the documents and decide the issue of congressional access. The *Mink* decision prompted Congress to amend the FOIA in 1974 to require that agencies adopt rules to promote access and enhance judicial review. Since then presidents have used executive orders to alter to the Exemption 1 information available for disclosure. President Reagan's Executive Order 12,600 (1987) provided that information would be withheld if there was a "substantial legal basis." President William Jefferson Clinton's Executive Order 12598 (1995) replaced the Reagan policy with one which permitted the declassification of documents older than twenty-five years and provided that a more permissive classification standard: information would not be withheld unless there was a substantial doubt that its release would compromise national security. In 2003, President George W. Bush amended the Clinton order to delay for three years the information scheduled for release under the twenty-five year rule and expanded federal agency authority to classify information about critical infrastructures, such as the Internet, weapons of mass destruction, and defense against transnational terrorism.

President Franklin Roosevelt and his successors relied upon their Article 2 authority as chief executive to issue executive orders addressing the American dilemma of racial discrimination. Roosevelt's Executive Order 8802 (1941) forbade discrimination in defense industries in violation of federal contract equal employment provisions. President Harry Truman continuing this policy and in Executive Order 9981 (1948) outlawed racial segregation in the armed forces services. After the passage of the Civil Rights Act of 1964, President Lyndon Johnson issued Executive Order 11246 (1965) to supplemented Title 7 by providing that government contracts with private companies would prohibit employment discrimination on the basis of race, sex, religion or national origin and by creating an administrative apparatus to assure compliance by means of government inspections, court injunctions to enforce the non-discrimination contractual provision, and disqualification from future contracts. In his Philadelphia Plan, President Nixon extended Johnson's order by requiring private companies to set hiring goals for minority groups as a condition for receiving government contracts. The president executive order was challenged, but upheld by the Court of Appeals for the Third Circuit In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 311 F.Supp. 1002 (E.D. Pa. 1971), as a proper use of the president's implied power of economic procurement.

At the same time, one president relied upon his Article 2 diplomatic and military authority to engage in racial discrimination. President Roosevelt relied upon his Commander-in-Chief power when he issued Executive Order 9066 (1942) authorizing the Secretary of War to identify military areas of the country, impose travel restrictions in these areas, and exclude Japanese persons from these areas. This executive order, quickly supported by Congress, provided the authority for the military to evacuate Japanese nationals and Japanese-American citizens from West Coast military zones. In Executive Order 1902, Roosevelt also relied upon his Commander-in-Chief power to create the War Relocation Authority which assisted the military evacuations and operated the relocation/detention centers. When these actions were challenged, the Supreme Court avoided the constitutional issues of racial discrimination and the detention program. *Hirabayashi v. United States*, 320 U.S. 81(1943), upheld the military curfew as a valid exercise of the presidential and congressional war powers; *Korematsu v. United States*, 323 U.S. 214 (1944), found the West Coast evacuations were a matter of military necessity; and *Ex parte Endo*, 323 U.S. 283 (1944), authorized a writ of habeas corpus only because the War Relocation Authority had detained a citizen whose loyalty had been proven. In sum, the court decisions authorized presidential and congressional actions which violated the constitutional guarantees of the presumption of innocence, equality, freedom of movement, and private property.

Presidents have also used their Article 2 Commander-in-Chief authority to seize and operate private businesses. President Roosevelt used executive orders to seize ship building, cable, and coal companies for which Congress later provided statutory authorization by passing the War Labor Disputes Act. President Truman also relied upon the Commander-in-Chief power in 1952 to avoid a strike in the steel industry and assure continued steel production for the Korean war by issuing an Executive Order 10340 (1952) authorizing the Secretary of Commerce to seize and operate the steel mills. Instead of invoking the Taft-Hartley Act, enacted over his veto, but enabling him to forestall the strike for eighty days, he informed Congress of his seizure action and invited it to take action. In *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court struck down his executive order. Justice Black's majority opinion denied that the president had authority under his Commander-in-Chief power to take private property in order to keep a labor dispute from stopping the production of war materiel, because the seizure was too far removed from the actual theatre of war where the president had the right to set policy. Nor could the seizure be justified under the president's executive authority, because Article 2 states that the president must carry out law, not make it. The Defense Production Act governed seizure, but not in these circumstances and Congress had rejected an amendment to Taft-Hartley authorizing seizure in an emergency. In sum, the Court's decisions reminded him that he did not have unrestrained discretion in domestic affairs, even to further international military policy. Without congressional consent, the president's seizure order was a usurpation of legislative power.

In *Dames and Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court was much more deferential when it examined President Reagan's Executive Order 12294. The order implemented an executive agreement, negotiated by President Carter to release American embassy personnel held hostage in Iran, terminate all litigation involving the Government of Iran, and submit the litigation to binding arbitration by an international claims tribunal. Dames and Moore who had received a judgment against the Atomic Energy Organization of Iran, challenged the executive order. The court limited its analysis to statutory sources for the president's power and found that even though neither the International Economic Emergency Powers Act, nor the Hostage Act provided specific authorization to suspend claims against Iranian property, that Congress had enacted other legislation which implicitly approved of claim settlement by executive agreement as a necessary incident to the resolution of a major foreign policy dispute. As a consequence, the court's decision created doubt as to whether *Youngstown Sheet and Tube* required that President to obtain fairly explicit legislative authorization for his actions.

Executive orders have become a necessary component and accepted practice of the modern presidency. Only a few of the more than 13,000 orders have generated intense political controversies and even fewer have provoked constitutional challenges when they have intruded upon congressional power and diminished individual freedom and equality. The courts have been reluctant to strike them down as executive law making even when they have limited access to information, permitted racial discrimination, and authorized the seizure of private property, as long as they clearly draw upon the constitutional powers of the president or are not incompatible with the express or implied will of Congress.

### Bibliography

- Fisher, Louis, *Constitutional Conflict Between Congress and the President*, 4<sup>th</sup> ed. rev. Lawrence, KS: 1997  
Irons, Peter. *Justice at War*. NY: Oxford University Press, 1983..  
Marcus, Maeva, *Truman and the Steel Seizure Case*. NY: Columbia University Press, 1977.  
Tribe, Laurence. *American Constitutional Law*, 3<sup>rd</sup> ed., vol. 1. NY: Foundation Press, 2001.

