



Executive Orders Historically and a Modern Application

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Abstract: Executive Orders has created conflict between the president and Congress. To maintain a separation of powers, the framers of the U.S. Constitution set in place a series of checks and balances wherein each branch of government has some means of ensuring that its counterparts do not abuse their power. This system was put into place to prevent tyranny, not to promote efficiency.

Though the power of making laws was vested within the legislative branch, every president since George Washington (except for William Henry Harrison who was only president for a month), has utilized a tool that is now referred to as Executive Orders. These are orders issued by the president that have the full force and effect of law. Executive Orders are meant to be made pursuant to enforcing the laws present in the constitution or present in statutes generated by Congress. Presidents usually refer to powers mentioned in the second article of the United States Constitution as their authority for issuing these orders, however, the right of presidents to issue Executive Orders is not explicitly stated in the constitution or in any statute passed by Congress.

For this reason, the use of Executive Orders has been controversial since the first ones were issued. Even George Washington was heavily criticized by James Madison over a 1793 Executive Order that declared the United States' stance on the French war with England. Madison said "The accumulation of all power, legislative, executive, and judiciary in the same hands...may justly be pronounced the very definition of tyranny."

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INTRODUCTION

The use of Executive Orders has created conflict between the president and Congress. To maintain a separation of powers, the framers of the U.S. Constitution set in place a series of checks and balances wherein each branch of government has some means of ensuring that its counterparts do not abuse their power. (U.S. Const. art. I, II, III) This system was put into place to prevent tyranny, not to promote efficiency.

Though the power of making laws was vested within the legislative branch, every president since George Washington (except for William Henry Harrison who was only president for a month), has utilized a tool that is now referred to as Executive Orders (Gaziana, 2011 p.267). These are orders issued by the president that have the full force and effect of law. Executive Orders are meant to be made pursuant to enforcing the laws present in the constitution or present in statutes generated by Congress. Presidents usually refer to powers mentioned in the second article of the United States Constitution as their authority for issuing these orders, however, the right of presidents to issue Executive Orders is not explicitly stated in the constitution or in any statute passed by Congress.

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States' stance on the French war with England. Madison said "The accumulation of all power, legislative, executive, and judiciary in the same hands...may justly be pronounced the very definition of tyranny." (Levi, 1976)

The question that then arises is, if presidents are abusing power, what can be done to stop it? It might first be thought that the United States legislature would be the most effective body in combatting issues with Executive Orders, since it is their power that is being usurped. While there are cases in history where Executive Orders have been overturned by Congress, this is not always a feasible solution. Particularly in recent years during which Congress has become increasingly partisan (McCarty, 2014), it is more likely that members of congress will try to sue the president than have a successful two thirds vote.

If the legislative branch cannot effectively check the power of the president, then that leaves the judicial branch under the United States Federal Court system. This avenue of combatting issues with Executive Orders has been used since 1804 and has been highlighted heavily in the news, as various parties question the constitutionality of some of President Barack Obama's Executive Orders.

Because the constitutional basis for Executive Orders is vague, there are not strict guidelines with regard to their purpose or limits. What, then, goes into a court's decision with respect to determining whether or not an Executive Order is valid? In Part I this paper seeks to examine this question through the analysis of several federal cases in history where the courts did in fact invalidate a president's executive order.

There has also recently been controversy over President Obama's use of something called an Executive Action. This is similar to an Executive Order, however, the terms are not interchangeable. Rather than officially making something a law himself, an Executive Action is where a president instructs one of his agencies to make something that has the force and effect of law. The outcome is the same in the end, but there is a difference in who files the actual documents. Does this affect the ways that a court analyzes the presidential policymaking? Part II of this paper then compares the analysis in Part I to the recent lawsuits against Obama for his Executive Action over immigration, and predicts how future cases might proceed.

COURT LIMITATIONS OF EXECUTIVE ORDERS

Over the years there have been many decisions made by the courts in which executive orders have been upheld. This, combined with increases in the breadth of orders at certain times in history, has led in an increase in the powers wielded by the Presidents using executive orders. (Wetzel (2007), pt. II) There have also, however, been several times in which federal courts have invalidated orders in some way. Four of these cases placing limits on executive orders are analyzed below.

Youngstown V. Sawyer (Supreme Court)

On April 4, 1952 the United Steelworkers of America announced a strike that was to begin in five days. This came as a result of failed mediations after a collective bargaining dispute arose between steel companies and their employees. Before the strike could happen, however, President Harry S. Truman issued Executive Order No. 10340. (Enlow, 2006)

This Order gave the Secretary of Commerce the authority to seize many steel plants across the country and ensure continued operation. The justification for the order was that "steel is an indispensable component of substantially all... weapons and materials" and that the strike would "immediately jeopardize and imperil our national defense ... and would add to the continuing danger of our soldiers, sailors, and airmen" who were engaged in the Korean War. (Exec. Order No. 10,340, 17 Fed. Reg. at 3,144) Truman identified his authorization for the order as stemming from general presidential rights granted in the second article of the Constitution.

While the steel companies complied with the Order, they immediately took legal action against it. After a district court issued a preliminary injunction against the President's Order and an appellate court stayed the decision, the Supreme Court agreed to see the case. In a six-three vote, the Court affirmed the previous rulings. (Youngstown)

Before examining the Court's rationale for invalidating the Executive Order it is important to note a few things. First, Truman had brought the order to Congress on April 9, 1952. Congress, however, chose not to take action. It is also important to mention that this order essentially ignored the Taft-Hartley Act which had been approved by Congress in 1947, despite a veto from President Truman. This Act outlined procedures for what was to be done in a situation such as the one described above. (Enlow, 2009)

The majority opinion in this case was written by Justice Black; however, four other concurring opinions were filed. Black's opinion was written based on the theory that the President does not have the power to seize private property even in the case of an emergency. Like the Court's opinion, the opinion of Justice Douglas emphasized the lack of constitutional authority for the President's actions. Alternatively, the opinions of Frankfurter, Jackson, and Burton emphasize that, regardless of whether or not the President has the authority to seize private property in the case of an emergency, he was precluded from doing so in this case by existing legislation detailing a different course of action for the particular situation. (Youngstown)

Though only a concurring opinion, Justice Jackson's analysis of the case has remained an important judicial tool for what he said about statutory authority granted by Congress. It is now referred to as the "Jackson Test". (Wetzel (2007, p.408) His opinion identified three main categories for presidential actions. First, the president's power is at its fullest when the "President acts pursuant to express or implied authorization of Congress." It is at this time that the president has the combined force of the legislative and executive branches behind him. (Youngstown at 635) The second category is the "zone of twilight" in which the president acts without any authorization from Congress. There can, however, be a zone where "he and Congress may have concurrent authority or in which its distribution may be uncertain". Jackson emphasized that in this zone power should be dependent upon the circumstances of the situation. The third category is where "the President takes measures incompatible with the express or implied will of Congress." This is when Presidential power is at its lowest, and this is the category into which Jackson placed Truman's Executive Order. (Youngstown at 637)

Justice Wilson wrote the dissenting opinion, concurred by Reed and Minton. They upheld that the President's Order was not prohibited by an Act of Congress. They maintained the seizure of the mills was an appropriate action for faithfully executing and preserving the defense program enacted by Congress until the latter could take appropriate action. (Youngstown)

Although there is a lack of uniformity in the opinions of the justices in this case, the case is still very significant with regards to the limits of presidential authority, particularly pertaining to Executive Orders. It was the first major case in which a federal court ruled against an executive order. The opinions in this case provided two possible reasons for which an executive order might be invalidated. First, as Justice Black pointed out, an order may be invalidated if the order is beyond the presidential authority of the president. Second, an executive order might be invalidated if it is precluded by a statute, as was pointed out in the opinions of several other judges.

Liberty Mutual V. Friedman

In October 1977, Liberty Mutual Insurance Company was notified by letter that it was a government subcontractor under the definition found in 41 C.F.R. § 60-1.3, and therefore was subject to the requirements of Executive Order No. 11246. This letter meant that the company would be required to follow the recordkeeping and

affirmative action requirements of federal contractors. In the original case, Liberty contested the government's determination that providers of workers' compensation insurance to government contractors are government subcontractors. The district court rejected the challenge to the government's authority to classify Liberty as a subcontractor. (Friedman at 165)

In its appeal, Liberty essentially had a three tiered argument. First, they argued that they were outside of the definition of subcontractor under the regulation. Second, if they were found to be subcontractors, Liberty argued the regulation was outside the scope of Executive Order No. 11246. Then, if that were not the case, Liberty contended that Executive Order No. 11246 was beyond the scope of any grant of congressional authority. The Court addressed each of these contentions in turn.

The appellate Court agreed with the district court that Liberty fit under the definition of a subcontractor. In its opinion, the Court also found that the "definition of subcontract is arguably consistent with the purposes of the Executive Order". (Friedman at 167) The third tier of Liberty's argument was more difficult to analyze since, as is often the case, the congressional authority base for the Order was obscure. The Court thus referred heavily on the results of *Chrysler Co. v. Brown* where the Supreme Court determined that even in the case of statutory authority, the authority would need to "reasonably contemplate" the regulations issued. This indicates that when an executive order is traced back to a particular grant of authority, the order and the regulations based on that Order may not exceed the scope of that statute's grant of authority. (Friedman at 168) (No indention)

With this reasoning the Court found that the applications of the Order were not "reasonably within the contemplation of any statutory grant of authority" and ruled in favor of Liberty.

Though this case did not completely invalidate Executive Order No. 11246, it did indicate that there were limits on the amount of presidential authority which could be extrapolated from a statute. An executive order may be invalidated if it goes beyond the scope of a congressional grant of authority.

Ozonoff V. Berzak

Ozonoff v. Berzak, a case occurring in the mid-1980s, dealt with Executive Order No. 10422. Starting in 1953 under President Harry S. Truman, this Order required that United States citizens seeking employment with international organizations, such as the United Nations and the World Health Organization, must pass a loyalty test. Truman issued the Order in response to a report about U.S. citizens in the U.N. Secretariat. (Ozonoff at 225-234)

In this case, the First Circuit Court of Appeals found that this Order was overbroad under the First Amendment, or at least that it was overbroad with regards to applicants for the World Health Organization. The plaintiff, Dr. Ozonoff, claimed that the loyalty screening program inhibited him from joining the organizations he wanted to join and from expressing views or opinions that he may have held. The Court made it clear that the First Amendment prohibits the federal government from putting limitations on free political speech, which would include the federal government making employment conditional on the exercise of political free speech.

Thus, Executive Order No. 10422 was found to be unconstitutional and was invalidated. Though this case dealt specifically with the First Amendment of the Constitution, the arguments of the Court indicate that the Constitution in general puts limitations upon the power of executive orders. An executive order may be invalidated if it is found to be in conflict with some part of the Constitution.

Chamber of Commerce V Reich

Executive Order No. 12964 was an Order issued by President Clinton that dealt with collective bargaining. Specifically, the Order declared that "contracting agencies shall not contract with employers that permanently

replace striking employees” (Exec. Order 12964). This Order was, however, in conflict with prohibitions set forth in the National Labor Relations Act.

In an initial district court hearing, the Court found that the Order was not authorized because it was pre-empted by rights given to employers in the NLRA. (Reich at 1324) The government petitioned for an appeal and modified their argument by pointing towards section 474 of the Procurement Act. This section states that “the authority conferred by [the Procurement Act] shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith...”. Essentially, the argument was that this statute gave the government authority to create an executive order with regards to procurement which could ignore any other statute.

The Court of Appeals for the District of Columbia denied the petition. They held that a broad interpretation of section 474 would give the President too much power in issuing executive orders ignoring other statutes. The Court stated that this section of the Procurement act needed to be interpreted as being limited by other superseding procurement statutes. (Reich at 1333-39)

The logic of the Court in this case could be applied to other executive orders not related to the NLRA or procurement policies. By this logic any executive order may be invalidated, even if it were based on a statute, if that authorizing statute is in conflict with another statute.

Conclusion

While executive orders still do not have strict guidelines, the cases mentioned above give some examples of reasons Courts may invalidate an executive order. Youngstown shows that an order may be invalidated if it is beyond the scope of a president’s constitutional authority while Liberty shows that an order may be overturned if it exceeds some type of statutory authority. Ozonoff shows that an executive order may be invalidated if it creates an infringement on Constitutional rights, and Reich shows that an argument can be made even if there is statutory authority, given that authority is in conflict with some other statute. These cases indicate that there are precedents for a plaintiff to use these arguments in a federal court in order to invalidate an executive order.

A MODERN APPLICATION

This part of the paper will look at a recent case in which an Executive Action of the president and a subsequent memorandum made by one of his agents was put under scrutiny. This part will first give some background about the case, discuss why the principles of executive orders may be applied to this Executive Action, and then will predict what might happen in the next stages of the case.

Background of Executive Action

On November 20, 2014, President Barrack Obama addressed the nation to announce his executive action involving steps to fix “our nation’s broken immigration system”. His action entailed offering temporary legal status to millions of illegal immigrants, along with an indefinite reprieve from deportation. The Executive Action contains two main components.

The action offers a legal reprieve to the undocumented parents of U.S. citizens and permanent residents who’ve resided in the country for at least five years. The idea is that these people will not have to fear a constant threat of deportation. Many of these parents may also receive work permits under the Executive Action. This is referred to as the “Deferred Action for Parental Accountability”, or DAPA.

The program expands DACA, the Deferred Action for Children Arrivals program. This program, started in 2012, allowed for immigrants under the age of 30 who had arrived in the U.S. as children to apply for deferred

deportation. The recent action expands this to immigrants who are over thirty, and also expands the program to include more recent arrivals.

People in both of these groups will be required to reapply every three years.

Also as a result of the action, there are intentions to create a program to facilitate the generation of visas for people who invest in the United States, or for those who plan to pursue science, technology, engineering, or math (STEM) majors. The action also entails modifying federal immigration detention procedures and adding resources to strengthen security at the borders. (Ehrenfreund, 2014)

Two days before President Obama's action was to go into effect, allowing millions of illegal immigrants to apply for work visas and legal protection, a federal judge ordered a last-minute preliminary injunction for the programs. The Obama administration was thus forced to put an indefinite halt to the programs, which was a significant setback for Obama's plans. The order was made by Judge Andrew S. Hanen, of Federal District Court for the Southern District of Texas. He ruled in favor of Texas and 25 other states who were challenging President Obama's executive action. The White House, in response, maintains that the Action was within the president's authority and that an appeal will definitely be filed. Though Obama says he is confident they will win the appeal, applications for the programs will not open until the matter is settled. (Shear, 2015)

Why This Action Can be Analyzed Like an Order

Many media articles referring to the case mentioned above have referred to Obama's Action as an "Executive Order". This is technically not correct, as the terms are not interchangeable. There are several reasons why the term is confused in this situation, and it makes sense to later analyze the Action like an Order.

First, it is difficult for anyone to distinguish between the two because both terms are historically vague and do not have strict guidelines. There are various sources that attempt to differentiate between the two tools used for congressional circumvention, however, these explanations differ and there is no official source that provides a definition.

Second, the way that President Obama uses executive actions is different than the way that past presidents have used them. Particularly in this case, Obama notes that he is not doing anything more than past Republican presidents have done. The White House gave specific examples of actions taken by President George W. Bush and President Ronald Reagan. The fundamental difference between these actions and the action of President Obama is that these actions were attempts by Bush and Reagan to address ambiguities in an immigration law that was passed by Congress while Obama's executive actions are a response to congressional failure to pass a law. Obama's action is also much more powerful as it affects a much larger number of immigrants currently living in the country illegally. The level of the Action is on the level of an Executive Order. (Farley, 2014)

Third, the way that the Action has been presented is misleading. Contrary to statements made by the President and the White House, it was not the Executive Action that created the programs described above. Rather, it was a memorandum made by the Secretary of the Department of Homeland Security in response to the Action. This matter was so confusing that Judge Hanen actually makes a point to describe this at the very beginning of the Court's opinion before the case is analyzed. He also states that "Although this Court is not faced with either a Congressional Action or an Executive Order, the sentiment expressed.....is nonetheless applicable."

In the situation analyzed in this paper, the Action would be an Order if Obama had created the programs himself. Instead, he delegated the founding of the programs to one of his agents. The ultimate result would be the same; the difference was that Obama, contrary to what he had said, passed the actual task onto one of his agents.

Judge Hanen's Opinion

The case that has made headlines for setting back President Obama's plans for immigration occurred at the District Court for the Southern District of Texas. It is important to note that the case only examined the DACA program for the way in which it related to the new DAPA program. The reasoning was that DACA began in 2012 under DHS Secretary Janet Napolitano, and it was not her actions that were under complaint. Thus the court focused on the DAPA program created in the memorandum by DHS Secretary Jeh Johnson.

Judge Hanen's opinion for this case was thorough and amounts to over 100 pages. It consisted of three major points. First, it was found that the States did in fact have standing in order to bring the case to federal court. They had standing because the States, particularly Texas, stood to suffer damages if the programs in question were enacted, and the agency actions were reviewable under the Administrative Procedures Act. Second, the opinion determined that, despite arguments made by the DHS, the actions were not reviewable. The case was subject to the APA because the DAPA program was a final act under which the States fell into a zone of interest. DAPA was not preempted from the APA and even if it were, this preemption was rebutted. The third point in the opinion justified a preliminary injunction on the programs based on the facts that the States had proven a likelihood of success on their merits of the case. In particular, these merits were that DAPA was a "legislative" or "substantive" rule that violated the APA's procedural requirements. If the program were to be implemented, the states would suffer irreparable harm without the preservation of the status quo.

Thus, the preliminary injunction was issued by the court. The injunction is, however, temporary. This fact, combined with statements made by the White House and the President, make it clear that the case will be reviewed again. The next section of this paper proposes potential successful arguments that could be made against the DAPA program implementation based on past cases analyzed in Part I of this paper.

Moving Forward

First, the Action can be examined in relation to the Youngstown case, particularly using the Jackson test. The Action is clearly not within the first category of presidential authority, as deferred action is not a status created or authorized by law or by Congress. The Department of Homeland Security was not able to point to any specific law or statute that gave it the authority to create these programs. An argument could be made that the Action does not even fall into the second category, but rather the third category described by Jackson in which executive power is at its lowest. This would mean that the Action is in conflict with Congress and, by Congressional Act, the DAPA residents are in fact illegally present in this country. It is also clear that Congress is not in favor of the programs, which is evidenced by statements made by Obama about how he chose to act when Congress would not. (Press Release, Remarks by the President on Immigration — Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014)) Also as discussed earlier, a case could be made that the actions of the Department of Homeland Security are beyond the scope of any constitutional grant of authority. Since the Department of Homeland Security came well after the Constitution, this is more of a matter as to whether or not the action is beyond the scope of executive authority. While there is a clear establishment given to the Executive Branch for prosecutorial discretion, a case could be made that these programs go beyond prosecutorial discretion. This is not merely a case where the Executive is choosing not to prosecute, but one in which certain rights, such as work authorization, would be positively granted to illegal aliens. This moves the matter from prosecutorial discretion to executive legislating, something that is obviously unconstitutional.

The point is further emphasized by Supreme Court explained (Shaughnessy, 342 U.S. 580, 596-97, 72 S. Ct. 512, 96 L. Ed. 586 (1952)) that "the conditions for entry [or removal] of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds for which such determinations should be used, have been recognized

as matters solely for the responsibility of Congress.” . The plaintiffs also refer to specific statements made by President Obama that he did not have the authority under the Constitution or the laws of the country to change the immigration laws. He asserted that only Congress could implement these changes in that area of law. If the President does not have the authority to implement these changes, then the DHS certainly does not.

Another potential issue discussed earlier is limits placed on actions based on the scope of statutory authority. Though established that there is no specific grant of statutory authority, the Department of Homeland Security may try to rely on general grants of authority given by Congress in the Immigration Naturalization Act and in the Homeland Security Act of 2005. Each of these will be looked at in turn.

The INA gives the DHS Secretary the authorization to establish regulations that he deems necessary to execute the laws generated by Congress. Section 202(4) of the HSA gives the Secretary the authority to establish and administer rules that govern the various forms of acquiring legal entry into the United States under 6 U.S.C. § 236.. The HSA also makes the Secretary responsible for establishing enforcement policies and priorities. Though the DHS may use these statutes to argue that they are within their authority, for example, in using the DAPA program to prioritize their enforcement policies, the States may argue that this is beyond the scope of the statutory authority. The statutes do not give the DHS the authority to award legal status and, as is discussed in Hanen’s opinion, the discretion given to the DHS through these statutes is not unlimited.

The matter of previous statutes being restrictive for this Action, as discussed in the Reich analysis, is also important to this case. The plaintiffs argue that the Department of Homeland Security violated procedures and guidelines set forth in the Administrative Procedures Act. Though the DHS attests that they are not subject to the APA in this situation, Hanen’s opinion suggests otherwise. If it is maintained in the future that DAPA is reviewable under the APA, it could continue to be a roadblock for Obama’s Executive Action. The APA roadblock is unique to the Executive Action because it applies to agencies and would not be considered if an Executive Order had been issued.

Conclusion

The Executive Branch of the government has a lot of authority; however, this authority is not unlimited. When it comes to executive legislating, federal courts have become an important tool in combatting executive overreach. This paper has analyzed some of the few situations in which federal courts have invalidated executive orders in whole or in part, and has applied this analysis to a recent Executive Action regarding the establishment of immigration programs. Though it is by no means a given that a further analysis of the case will permanently disable the programs, there are precedents suggesting that the States may be able to make a successful argument. There’s a good chance that this case will make its way to the Supreme Court who will determine what powers the Executive has in regards to Executive Action on the immigration program.

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