Executive Orders and the Development of Presidential Power

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EXECUTIVE ORDERS AND THE DEVELOPMENT OF
PRESIDENTIAL POWER

I. INTRODUCTION

The Government of the United States functions on the basis of a separation of powers. The separation is maintained through a constitutionally delineated system of checks and balances exercised by each of the three branches in relation to the others. The powers of the executive, legislative and judicial branches are specifically provided for in various articles of the Constitution.

The executive power, with which this Comment is primarily concerned, is “vested in a President of the United States of America” by article II of the Constitution. This article names the President as “Commander in Chief of the Army and Navy” and delegates to him the authority to “take Care that the laws be faithfully executed.” Nowhere in the Constitution is there any specific reference concerning the power of the President to issue executive orders. Irrespective of this lack of constitutional sanction, all Presidents since Washington have issued orders and directives which could be technically classified as executive orders. This Comment will examine the uses which Presidents have historically made of this power to issue executive orders. Secondly, problems of constitutional import will be considered, including questions as to the sources of power available to the President and the scope of that power. With respect to enforcement of executive orders, emphasis will be placed on the various uses which have been made of them in the area of civil rights, including the controversial Philadelphia Plan. Also the constitutional issue concerning delegation of legislative power to the Executive will be considered with President Nixon’s Executive Order 11615, which instituted the ninety day wage-price freeze.

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2. Numerous examples of the ways in which the executive, legislative and judicial branches check each other’s powers can be seen by examining articles I, II and III of the United States Constitution. For example, article I, section 7, provides for a presidential check on the legislature by requiring that before a bill becomes law it must be signed by the President. U.S. Const. art. I, § 7. The same section goes on to provide that the legislature may override the presidential veto by a two-thirds vote of both houses, in which case the bill becomes law absent presidential assent. Id. The ultimate check on both the legislative branch and executive branch vis-à-vis legislation is vested in the judicial branch by article III, section 2, which provides in pertinent part that “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . .” Id. art. III, § 2.

3. Article I vests all legislative power in Congress; article II vests the executive power in the President; and article III vests the judicial power in the Supreme Court and such inferior courts as Congress may establish.

4. The landmark case of Marbury v. Madison arose as a result of President Jefferson’s order to his Secretary of State, James Madison, to withhold delivery of William Marbury's judicial commission. Although this order was not so specifically designated, it was in fact an executive order. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

II. HISTORICAL USE OF EXECUTIVE ORDERS

Beginning with the first administration in 1789, Presidents have issued orders which could be described as executive orders, even though they were not so entitled by their authors. The first administration used them for such purposes as withdrawing public lands for Indian use, military and naval functions, erection of lighthouses, and establishing, transferring and abolishing land districts and land offices. They were later used for creating, modifying and disposing of forest, oil, gas and coal reserves, and for the withdrawal of public lands from sale or entry.

In contrast to these rather routine uses of executive orders is the devastating use made of them by President Lincoln during the Civil War. He utilized the executive power to suspend the writ of habeas corpus to order the emancipation of slaves in the rebellious states, to blockade

6. The first executive order to be numbered was issued by President Lincoln in 1862. Comment, Presidential Legislation by Executive Order, 37 U. Col. L. Rev. 105 (1964).


8. Id.

9. Although President Lincoln's directives were not labeled or published as "executive orders" or "proclamations," by contemporary definition they could be technically classified as such. They were orders which Lincoln felt he was justified in issuing based on his view of the extent of executive power. "Probably no President has carried the power of proclamation and executive order (independently of Congress) so far as did Lincoln." J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 513 (rev. ed. 1964). See generally E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 1787-1957, at 228-34 (4th ed. 1957).

10. The Constitution provides, in article I, section 9, that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellions or Invasion the public Safety may require it." It does not specify who or what branch of the Government may suspend the writ. President Lincoln felt that a rebellion did exist. Since the provision for suspension was intended for emergencies and the Constitution was equivocal as to who had the power to suspend the writ, the inference was that the President should use this discretion in not allowing the emergency to run its course until Congress could be convened to act. J. RANDALL, supra note 9, at 122-23.

In Ex parte Merryman, 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861), Chief Justice Taney, while on circuit, rendered a forceful and well reasoned opinion in which he concluded that the power to suspend the writ lies exclusively with Congress. The constitutional issues as to who decides when an emergency exists which would warrant the suspension of the writ and who actually may suspend it, have never been decided by the Supreme Court.

See generally J. RANDALL, supra note 9, at 118-39, where the author concludes as to future suspensions of the writ that:

If due restraints are observed during the period of suspension; if it is merely a "suspension" and not a setting aside of guarantees; if the withholding of the writ is not taken as equivalent to the establishment of martial law or as a justification of summary execution, then no serious outrage upon American sensibilities is likely to be threatened.

Id. at 138.

11. The Emancipation Proclamation was issued by President Lincoln on January 1, 1863. He found authority for the Proclamation in his powers as Commander-in-Chief, and as warranted by the Constitution upon military necessity. J. RANDALL, supra note 9, at 372-73.

An immediate dispute arose as to the legal basis for the President's freeing of the slaves. As a result of this question Congress saw a legal necessity for a
southern ports,\textsuperscript{12} and to provide for the trial of civilians in military courts.\textsuperscript{13}

Theodore Roosevelt used executive orders to withdraw vast amounts of land for national parks, basing his action on legislation which authorized him to withdraw from private entry all lands in which "mineral deposits" had been found.\textsuperscript{14} However, he went beyond this statutory authorization in withdrawing land for wildlife preserves irrespective of whether minerals had been found on them.\textsuperscript{15} President Taft cancelled many of Roosevelt's orders, but himself withdrew a large tract in California in which oil had been discovered. The attitude of the Supreme Court toward these excessive executive actions can be seen in \textit{United States v. Midwest Oil Co.},\textsuperscript{16} in which the Court upheld President Taft's withdrawal on the ground that the long-continued practice of Presidents withdrawing land from public sale, coupled with the acquiescence of Congress, raised the presumption that the withdrawals had been made pursuant to congressional consent to a recognized administrative power of the executive.\textsuperscript{17}

The use of executive orders to deal with emergency economic situations was established during World War I,\textsuperscript{18} and fully utilized through the depression and up to World War II by Franklin Roosevelt, who

\begin{flushleft}
\begin{itemize}
    \item Id. at 229.
    \item In the case of \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court restricted the power of the President to order the trial of civilians by military commissions. Under the Act of March 3, 1863, 12 Stat. 755, the President was authorized to suspend the writ of habeas corpus during the rebellion. Milligan, a civilian, was arrested and tried by a military commission in Indiana. The Supreme Court held that the military commission was without power to try Milligan, and asserted that martial law can be constitutionally invoked only:
        \begin{itemize}
            \item If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, \textit{then}, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial law until the laws can have their free course. 
        \end{itemize}
    \item Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.
    \item \textit{Id.} at 127.
    \item E. \textit{Corwin}, supra note 9, at 120.
    \item \textit{Id.}
    \item 236 U.S. 459 (1915).
    \item Id. at 474. Thus the Court seems to have recognized a rather unique source of Presidential power — long standing executive action coupled with congressional acquiescence. \textit{See} note 71 and accompanying text \textit{infra}.
    \item Such agencies as the War Trade Board, the Grain Corporation, the Committee on Public Information and the Food Administration were created by presidential executive order. \textit{Study — Presidential Powers}, supra note 7, at 36.
\end{itemize}
\end{flushleft}
used them extensively. His view of the office of the President was that if Congress failed to act, the President should accept the responsibility and act to fill the power vacuum. He used the executive order to remove employees of the federal government, to attack discrimination in government contracts and housing, and to both initiate and terminate a wartime program of wage controls.

Franklin Roosevelt was also the President to bring some order to the procedure of issuing, publishing and compiling executive orders and proclamations. During his first term in office, the Federal Register Act of 1935 was passed, which provided for the publication of all presidential proclamations and executive orders in the Federal Register.

During the Korean War period, President Truman also found it necessary to freeze wages and salaries, and made extensive use of executive orders to effectuate his plan. President Truman also holds the

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Id.

20. Comment, supra note 6, at 109.

21. This power to remove executive officials was limited by the Supreme Court in the case of Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935). Humphrey was appointed to the Federal Trade Commission by President Hoover and removed, without congressional approval, by President Roosevelt. An earlier case, Myers v. United States, 272 U.S. 52 (1926), involving the removal by the President of a postmaster, had broadly sanctioned the power of the President to remove officers which he had appointed. In Humphrey’s, the Court held that the President could not remove a member of a quasi-legislative, quasi-judicial body without complying with the removal procedure enunciated in the congressional act which created the office. The Court indicated that the power of the President to remove a governmental official will be determined by the character of the office. The Court specifically restricted the Myers decision to purely executive officers. 295 U.S. at 631-32.


23. Exec. Order No. 9250, 3 C.F.R. 1213 (Supp. 1943) was issued by President Roosevelt pursuant to the Act of Oct. 2, 1942, ch. 578, 56 Stat. 765, and established a national policy which brought voluntary wage adjustments under governmental control. On August 18, 1945, Executive Order No. 9599, 3 C.F.R. 104 (Supp. 1945) authorized the removal of controls on all wage increases that would not increase prices.

24. Executive orders were not even numbered until 1907 when the Department of State began to assign numbers to all executive orders it had on file. From that time until 1935 all executive orders were to be deposited with the State Department, but the majority of them never were and hence remained unnumbered. Former Secretary of the Interior, Harold U. Iches, estimated that unnumbered executive orders totaled 15,000, while others have placed the figure as high as 50,000. Study — PRESIDENTIAL POWERS, supra note 7, at 37. See also Griswold, Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation, 48 HARV. L. REV. 198 (1934).


26. President Truman’s freeze order was issued on January 25, 1951; and by Exec. Order No. 10161, 3 C.F.R. 339 (1949-53 Comp.), the Economic Stabilization
dubious distinction of issuing Executive Order 10340 which directed
the Secretary of Commerce to "seize" and operate the nation's major
steel mills. The Supreme Court held this order unconstitutional in one
of its very few decisions limiting the presidential power.

The use of executive orders to insure loyalty in public employees
was also established by President Truman with his issuance of Executive
Order 9835 in March of 1947. President Eisenhower superseded President
Truman's order and attempted to broaden the reach of the National
Security Act of 1950 by Executive Order 10450. This action was
struck down by the Supreme Court in the case of Cole v. Young, with
the Court holding that the dismissal of a Department of Health, Educa-
tion and Welfare food and drug inspector, without any evaluation as to
his danger to national security, was in violation of the Act.

Since the early 1960's, when the federal government began to take
an active role in civil rights, the executive order has become a tool for
presidents to ensure that federal funds are not used to further racial
discrimination. President Kennedy, by executive order, provided for
sanctions and penalties to be imposed against contractors who violated
executive orders relating to non-discrimination in government contracts.
By the same mode, he also acted to eliminate racial discrimination in

Agency was created. Authority for the order was found in the Defense Production
Act of 1950.

President Eisenhower terminated the freeze on February 6, 1953, by Exec.
Order No. 10434, 3 C.F.R. 929 (1949–53 Comp.).
27. 3 C.F.R. 861 (1949–53 Comp.).
28. Id. In 1952, with a steel strike threatening, President Truman by-passed
the procedures established in the Taft-Hartley Act and ordered the Secretary
of Commerce to seize and operate the country's major steel mills. The President based
his action not on any specific statutory grant of authority, but on the authority vested
in him by the Constitution and laws of the United States. Id.
32. 3 C.F.R. 936 (1949–53 Comp.). By section 12 of this order, President
Truman's Executive Order No. 9835 was revoked.
34. Id. at 557–58. Since President Eisenhower based his executive order on
authority granted him under a statute, the Court held that the validity of his action
must be determined solely by the congressional limitations which the President sought
to respect. No contention was made that the executive order might be sustained under
the President's executive power independent of Congress, so the point was not decided.
Id. at 557 & n.20.
35. All Presidents since Franklin Roosevelt have used executive orders in the
1964); Miller, Government Contracts and Social Control: A Preliminary Inquiry,
41 VA. L. REV. 27, 49–52 (1955); Pasley, The Nondiscrimination Clause in Govern-
ment Contracts, 43 VA. L. REV. 837 (1957); Speck, Enforcement of Nondiscrimina-
tion Requirements for Government Contract Work, 63 COLUM. L. REV. 243 (1963);
Van Cleve, The Use of Federal Procurement to Achieve National Goals, 1961 WISC. L.
REV. 565, 592–600.

President Johnson's Executive Order No. 11246, 3 C.F.R. 406 (Supp. 1969),
required that contractors take affirmative action to achieve non-discrimination in
government contracts. In implementing this order, the controversial Philadelphia
Plan was announced by the Labor Department. For a discussion of the Plan, see
note 88 and accompanying text infra.
federally funded housing. President Johnson continued these policies and during his term in office acted through executive order to compel contractors under government contracts to take affirmative steps to attain equality in employment.

The vast majority of executive orders issued relate to routine administrative matters of the office of the Chief Executive. It is during times of war or other national emergency that the potential for abuse of the executive order becomes apparent. The problem stems from the fact that the framers of the Constitution did not define the term "executive" when they lodged the "executive power" in the President. This lack of definition raises the question of how much power the President possesses when he acts under his executive powers independently of congressional authorization.

III. CONSTITUTIONAL ISSUES CONCERNING THE EXERCISE OF PRESIDENTIAL POWER

A. Introduction

When Presidents act through executive orders, two sources of power are available to them; the Constitution, in particular article II, and acts of Congress, which delegate power to the President. The questions as to how much power the President possesses when he acts independently of Congress, and how much power may be delegated by Congress to the President are of major constitutional importance and remain largely unanswered.

B. The President's Independent Power Under The Constitution

The primary source of uncertainty concerning the powers of the President is the loose language employed by the framers in drafting article II. By this article, the President is entrusted with a variety of specific duties and by the last sentence of section 3 is made the executor of the laws of the United States. The most troublesome phrase in the

37. President Kennedy's Executive Order No. 11063, 3 C.F.R. 652 (1959-63 Comp.), was entitled Equal Opportunity in Housing. It directed the heads of all agencies and departments to take all necessary and proper action to prevent racial discrimination in housing which was funded in whole or in part by the federal government. To implement the policy embodied in the order, the President's Committee on Equal Opportunity in Housing was created and its functions delineated.

38. See note 88 and accompanying text infra.

39. Although the loose construction of article II has led to doubts concerning its proper interpretation, it is submitted that it is this very loose construction which has enabled the basic principles couched in this article, regarding the extent of presidential powers, to be applied by Presidents of widely divergent views. U.S. Const. art. II.

40. The President is named Commander-in-Chief of the Army and Navy; he is given the power to conclude treaties with the concurrence of two-thirds of the Senate, to appoint Ambassadors and other public Ministers as well as members of the Supreme Court and all other officers of the United States. U.S. Const. art. II.

41. This sentence is the source of the President's powers as Chief Executive. By it he must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.
article is the first sentence of section 1 which vests the “Executive Power” in the President. The question which has arisen is whether the term “Executive Power” refers merely to the specifically enumerated powers in article II, or whether it is an affirmative delegation of some all-pervasive independent power. 

Presidents themselves have differed as to the scope of power conferred upon them by the Constitution. The most conservative view of the office was that held by President Taft who argued that the President could exercise no power which could not be directly traced to some specific grant or implied from such grant. His view was that the President could exercise only those powers specifically delegated to him in accordance with article II.

In contrast, President Theodore Roosevelt was an exponent of what became known as the “stewardship” theory of the office. He asserted that the President had both a right and a duty to act to meet the needs of the nation unless such action was specifically forbidden by the Constitution or laws.

The logical extension of the “stewardship” theory is that the President can take any action which he deems to be for the public good regardless of whether Congress has already acted. This theory embodies the concept of Prerogative which John Locke described as the “power to act according to discretion for the public good, without the prescription of the law and sometimes even against it.” The danger present when one man takes it upon himself to act above the law for the public good was also recognized by Locke where he admits that if such a person should decide to “enslave or destroy,” the people would have no remedy on earth, only an appeal to heaven. Several Presidents have taken action...
in emergency situations which can be justified only by resort to this concept of the Prerogative.\textsuperscript{47}

It appears that the framers of the Constitution intended to negate the idea that the President possessed the power of Prerogative. One noted commentator on the debates of the Constitutional Convention asserts that in view of the very narrow powers granted to and exercised by the state executives, it cannot be doubted that the framers intended to vest in the President only such powers as specifically granted in article II, or as could be implied therefrom.\textsuperscript{48}

The Supreme Court has been of little aid in resolving the question of the limits of presidential power. In his excellent book on the presidency, Professor Corwin notes several reasons for the Court's reluctance to approach the issue, including the fact that the President has command of the physical forces of government, and the consideration that the Court can assert itself against the legislature by merely invalidating congressional acts, whereas presidential action often produces some immediate change which the Court is practically powerless to nullify.\textsuperscript{49} Further, the grant of power to the Supreme Court in article III is worded very similarly to the grant of executive power to the President in article II, so that in construing the grant of executive power liberally, the Court is adding to the argument that it is possessed of all judicial power.\textsuperscript{50}

When the President acts through executive orders, he does so in one or more of several capacities. The extent of power which he may wield is largely dependent upon the capacity in which he acts. When the President acts as Commander-in-Chief, he does so under specific Constitutional mandate,\textsuperscript{51} and consequently his authority in this area has gone largely unchallenged. As Commander-in-Chief he clearly has supreme command over the physical forces of the military, but in this capacity he also exercises broad domestic powers in time of war.

By Executive Order,\textsuperscript{52} President Roosevelt authorized the relocation of thousands of Japanese residents of the western states to "relocation centers," with his action being upheld in two Supreme Court cases.\textsuperscript{53}

\textsuperscript{47} Notable examples include several of Lincoln's actions during the Civil War, see notes 9-13 and accompanying text supra; Theodore Roosevelt's withdrawing of land from public sale in the face of congressional action authorizing such sale, see note 15 and accompanying text supra; and President Truman's seizure of the steel mills, ignoring the congressionally prescribed procedures for dealing with the threatened strike, see notes 27-29 and accompanying text supra. President Franklin Roosevelt asserted that it was the duty of the President to act whenever the public good demanded it. See \textit{Study of Presidential Powers}, supra note 7, at 15.


\textsuperscript{49} \textit{E. Corwin, supra} note 9, at 16.

\textsuperscript{50} Id.

\textsuperscript{51} The extent of the President's power as Commander-in-Chief was not considered by the Constitutional Convention, as the framers included this phrase in article II apparently without debate. \textit{C. Warren, supra} note 48, at 530.


\textsuperscript{53} In \textit{Korematsu v. United States}, 323 U.S. 214 (1944), the Supreme Court upheld the appellant's conviction for remaining in a "military area" contrary to an exclusion order issued pursuant to the President's Executive Order 9066. The Court
Drawing on his power as Commander-in-Chief he created a large number of executive agencies whose legal status was never resolved by the Supreme Court.\textsuperscript{54} Recognizing the emergency situation of the worsening depression, and its inability to deal with it, the Congress delegated broad power to the President, with the Supreme Court again finding no constitutional infirmity.\textsuperscript{55}

In only two areas has the Court acted to curb executive action taken pursuant to the Commander-in-Chief clause. The Court in \textit{Duncan v. Kahanamoku}\textsuperscript{56} and \textit{Ex parte Milligan}\textsuperscript{57} struck down convictions rendered by military tribunals, finding that the tribunals had no jurisdiction. Further, the Court in \textit{Youngstown} struck down President Truman’s seizure of the steel mills, holding that the seizures could not be justified under
the President's powers as Commander-in-Chief. It is submitted, however, that in wartime, presidential action taken pursuant to his powers as Commander-in-Chief is virtually beyond the ambit of judicial control. Interpretations of the Constitution are severely strained during wartime in order to allow the President to effectively deal with the emergency on a day-to-day basis.

In the area of foreign relations, the President and Congress share the entire power to conduct the nation's foreign policy. This power resides in the federal government exclusive of any direct action by the states. It is true that Congress plays an important part in the conduct of this country's foreign relations in that the Senate must confirm treaties and Congress retains the power to declare war. Nevertheless, it is also true that the President's function as the sole organ of the federal government in the field of international relations has been recognized by the Supreme Court and stands as a matter of governmental custom. Moreover, the President's power to conclude executive agreements with foreign states in absence of Congressional authorization has also been upheld by the Court.

In the area of domestic matters, four cases have been decided by the Supreme Court which tend to affirm the notion that the President's powers extend beyond those enumerated in article II.

59. See generally E. Corwin, supra note 9, at 227-62.
60. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), Justice Sutherland posited that when the external sovereignty of Great Britain ceased, vis-à-vis the colonies, it passed directly to the union, never residing in the states. Id. at 316. See also Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941); Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795).
63. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court recognized that the President is vested with "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which . . . must be exercised in subordination to the applicable provisions of the Constitution." Id. at 320.

When Congress delegates authority to the President to act in the area of foreign relations, the courts have required less in the way of standards to guide the President's action. See, e.g., Zemel v. Rusk, 381 U.S. 1, 17 (1965); Nielsen v. Secretary of Treas., 424 F.2d 833, 839 (D.C. Cir. 1970); Samora v. United States, 406 F.2d 1095, 1098 (5th Cir. 1969).

64. In United States v. Belmont, 301 U.S. 324 (1937), the Supreme Court upheld an agreement negotiated solely by the President with the Soviet Union adjusting claims between the citizens of the respective countries. The Court noted that if the agreement could be called a "treaty," senatorial consent would be necessary. This agreement was held to be an international compact, and as such did not require the participation of the Senate. Id. at 330. See generally Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345 (1955). See also United States v. Pink, 315 U.S. 263 (1942); Altman & Co. v. United States, 224 U.S. 383, 600 (1912).

In *In re Neagle*, the Court recognized broad powers in the President to provide marshals for the protection of federal judges. The Court found that this power was derived from that portion of article II which provides that the President "shall take care that the laws be faithfully executed." The power of the executive branch to remove obstructions to interstate commerce was recognized in the case of *In re Debs*. Here, the Court upheld the imprisonment of union officials who had been held in contempt for violating an injunction which barred a train boycott.

The Court reaffirmed the notion that the President could exercise far-reaching power absent specific congressional sanction in the case of *United States v. Midwest Oil Co.* Here, the Court upheld President Taft's withdrawal of a large tract of land from public entry because such withdrawals had been undertaken for the previous eighty years with no congressional attempt to repudiate this assertion of presidential power.

The question concerning the scope of the President's power to remove government officials was decided by the Court in *Myers v. United States*. The Court held unconstitutional that portion of an Act of Congress which required Senate action on the removal of postmasters appointed by the President, asserting that the President was constitutionally empowered to remove any executive officer appointed by him, and that this power was not subject to Senate assent, nor could it be made so subject by an act of Congress. The Court stated unequivocally that the "vesting of executive power in the President was essentially a grant of the power to execute the laws."

When the President acts under powers specifically granted to him by the Constitution, the Court will give wide latitude to the determination that his action is predicated upon that grant. This is especially true in emergency situations, when the President may well act in accordance with Locke's notion of the Prerogative.

When the President bases his action on broad powers granted him by the Constitution, there is an area of "twilight" in which he and Congress may have concurrent authority, or in which distribution of power

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66. 135 U.S. 1 (1890).
67. Id. at 64. It is noteworthy that in this very early case the Court recognized that the President's power as Chief Executive extended beyond the mere execution of acts of Congress, to the execution of "rights, duties and obligations growing out of the Constitution itself." Id.
68. 158 U.S. 564 (1895).
69. Id. at 599. The case was not primarily concerned with the power of the executive branch to remove obstructions to interstate commerce, but with the power of the national government, operating through the federal courts, to secure such removals. The Court did, in dicta, affirm the competency of the executive branch, through the use of purely executive power, to remove all such obstructions. Id.
70. 236 U.S. 459 (1915).
71. Id. at 469–71.
72. 272 U.S. 52 (1926).
73. Id. at 119–25.
74. Id. at 117.
75. See note 45 and accompanying text supra.
is uncertain. The failure of Congress to take prompt action may invite presidential action, and as Justice Jackson has noted, any judicial test of power in this area is likely to depend on "contemporary imponderables rather than on abstract theories of law."

When a subject is within the purview of congressional power, and Congress has acted, the President may not act in contravention of the stated legislative policy. The Supreme Court affirmed this maxim in the case of Youngstown Sheet and Tube Co. v. Sawyer, where it struck down as unconstitutional President Truman's Executive Order 10340 which directed the Secretary of Commerce to seize and operate most of the nation's steel mills. The President based this order on his powers as Commander-in-Chief, asserting that a threatened strike of steel workers would impair the national defense. The Court held that the order could not be sustained under the Commander-in-Chief clause because the power to sanction the seizure of property to promote production is a legislative power, not a war power.

The Court also held that the order could not be sustained under the provisions of the Constitution which grant executive power to the President. Construing this grant of executive power very narrowly, the Court noted that the Constitution limits the President's lawmaking functions to the "recommending of laws he thinks wise and the vetoing of laws he thinks bad." This statement is contrary to earlier cases which recognized that the President does possess something more than the powers specifically mentioned in article II.

The primary reason for the Court's striking down this order was the fact that when Congress passed the Taft-Hartley Act, it had considered but rejected an amendment which would have authorized just such governmental seizures in cases of emergency. In his concurring opinion in Youngstown, Justice Frankfurter intimated that the result of the case may have been different had there been no congressional action in the

77. Id.
80. 3 C.F.R. 861 (1949–53 Comp.).
81. 343 U.S. at 587.
82. Id.
83. See, e.g., Myers v. United States, 272 U.S. 52, 118 (1926). Chief Justice Taft reasoned that the specifically enumerated powers following the general grant of executive power to the President in article II, were intended either for mere emphasis or as limitations on the grant of executive power.
84. 93 CONG. REC. 3637–45 (1947). See also 93 CONG. REC. 3835–36 (1947).
area or had the seizure been only for a short time.\textsuperscript{85} Thus the value of the case as a polestar in determining the extent of independent presidential power is seriously hampered by the fact that Congress had already expressed a negative attitude toward such seizures.

\textit{Youngstown} represents the most recent view of the Supreme Court on independent presidential powers under article II. The decision clearly indicates that when a subject is within the ambit of Congress, and that body has acted, the President may not act in contravention of that expressed policy. The majority opinion by Mr. Justice Black indicates quite clearly that the separation of powers concept remains viable.\textsuperscript{86}

A most recent example of the extent of power and influence which the President may wield in enforcing executive orders promulgated under his broad authority as Chief Executive can be seen in the implementation of non-discrimination requirements in executive orders relating to hiring practices of government contractors. The order currently controlling this area is President Johnson's Order 11246, issued in 1965, which requires that government contractors take affirmative action to insure that hiring and employee relations are conducted without regard to race, creed, color or national origin.\textsuperscript{87}

The full potentiality of this requirement of affirmative action has recently been realized in the Department of Labor's promulgation of what is termed the Philadelphia Plan.\textsuperscript{88} Under the Plan, a government agency soliciting bids in the Philadelphia area must include in its solicitations specific goals for minority manpower utilization. When a contractor submits a bid he must set forth an affirmative program for employing minority group members. The bids submitted which fail to do so are disregarded and in the final awarded contract the specific requirements relating to minority group employment are included. If a contractor breaches the minority employment provisions of his contract, the contracting agency may impose one or more of a variety of sanctions.

The constitutionality of the Philadelphia Plan has been recently upheld in the case of \textit{Contractors Association of Eastern Pennsylvania v.}
Secretary of Labor. The petitioning contractors argued, *inter alia*, that the Plan constituted action by the executive branch not authorized by the Constitution or laws of the United States. The court found that the promulgation of the Plan was within the purview of executive power, holding that:

When the Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests.

In addition, the court noted that Congress had been aware of presidential action of this sort for many years and had continued to make requested appropriations. The court's reasoning closely resembles that of the Midwest Oil Court in that both assert that even though the President's action may have been questionable as an original proposition, if he has so acted for a number of years and Congress acquiesces, it will be deemed to approve and sanction such action.

To date, the Philadelphia Plan represents the most vigorous type of affirmative action required by the executive branch in securing compliance with non-discrimination provisions in executive orders. Because of the large volume of government contracting it would seem that the requirement of this type of affirmative action on a nationwide scope would have a profound effect on the attempt to achieve racial balance in employment. Clearly the Philadelphia Plan marks another step in the growing powers of the executive branch of the federal government.

In summary, it may be seen that the co-existence of three elements has been primarily responsible for the expansion of the President's power. First is the procession of strong personalities: Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt and Harry Truman. The second is the series of emergency situations: the Civil War, the labor problems of Theodore Roosevelt, the World Wars and periods of economic depression which faced these assertive personalities. The third is the failure of Congress to act expeditiously to meet rapidly developing emergencies. It is during these crisis periods that the executive power is most likely to expand to fill the void created by the failure of Congress to cope with the situation. Thus, through the use of the Lockian Prerogative — strong men reacting aggressively in emergency situations to promote public good — the power of the President has grown to the

89. 442 F.2d 159 (3d Cir. 1971).
90. *Id.* at 165. The validity of the Plan was challenged on six separate grounds including assertions that it violated Titles VI and VII of the Civil Rights Act of 1964, and that it constituted a violation of due process of law.
91. *Id.* at 171.
92. *Id.*
93. *Id.* See note 71 and accompanying text supra.
extent that the office bears little resemblance to what the framers intended in 1787.94

C. Delegation of Legislative Power to the Executive

When a President's action is not based solely on his independent powers under the Constitution, but upon express or implied statutory authorization, his action is virtually unassailable in the courts. Justice Jackson stated the proposition most succinctly in his concurring opinion in Youngstown:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all he possesses in his own right plus all that Congress can delegate.95

The threshold constitutional issue which arises is whether Congress may delegate legislative power to the Executive. Locke asserted that:

The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.96

In the early case of Field v. Clark,97 the Supreme Court echoed this maxim, which has come to be known as the non-delegation doctrine, and has reasserted it as late as 1932.98 Nevertheless the Court has in the interim upheld numerous delegations of essentially legislative power to the President and administrative agencies.99 In our complex society

94. Writing in 1783, Thomas Jefferson described the executive powers as those powers which are “necessary to execute the laws (and administer the government), and which [arc] not in [their] nature either legislative or [judicial].” The framers clearly intended to limit presidential power to executing laws or carrying into effect the expressed will of Congress. They could not envision a place for the prerogative of the English King in the American constitutional scheme. C. WARREN, supra note 48, at 526-27.

95. 383 U.S. at 635 (Jackson, J., concurring). Justice Jackson also argued that if a presidential act is held unconstitutional when based upon statutory authorization, “it usually means that the Federal Government as an undivided whole lacks the requisite power.” Id. at 636-37.


96. J. LOCKE, supra note 45, at 193.

97. 143 U.S. 649, 692 (1892).

98. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932). The Court asserted “[t]hat the legislative power of Congress cannot be delegated is, of course, clear.” Id. at 85.

which requires governmental regulation of both industry and commerce, it is simply not a realistic statement to assert that legislative power cannot be delegated to the President. The more pertinent question is under what circumstances and standards may legislative power be so delegated.

The earliest case in which the Supreme Court passed upon a delegation of power by Congress to the President was *The Brig Aurora v. United States.* The Court sustained a delegation by which the President could, by proclamation, revive a law relating to international commerce whenever he found a given factual situation existed.

In *Field v. Clark,* there appeared the first intimation by the Court of what it would require in the way of standards to uphold a delegation. Congress had granted the President power to suspend portions of an import law relating to the free introduction of specified commodities whenever he found that foreign nations were imposing duties upon the export of those commodities which were reciprocally unequal or unreasonable. The Court upheld the delegation, finding that the President was acting as a mere agent of Congress, with nothing involving the expediency or just operation of the legislation being left up to him.

In two subsequent cases, *United States v. Grimaud* and *Buttfield v. Stranahan,* the Court began to move away from its earlier non-delegation doctrine and recognized the need for delegations of power in order to provide the executive with flexibility in dealing with complex problems of regulation. The Court in *Grimaud* refused, however, to completely abdicate its earlier position that legislative power could not be delegated. Rather it asserted that administrative power to make rules could be delegated. The difficulty with this approach is that it is virtually impossible to make any meaningful distinction between legislative power to make laws and administrative power to formulate rules.

The more realistic view was that adopted by Mr. Justice White in *Buttfield* in which a broad delegation of power to the Secretary of the Treasury was upheld on the ground that Congress had legislated as far as practicable and that necessity demanded that the task of accomplishing

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100. 11 U.S. (7 Cranch) 382 (1813).
101. Counsel for the appellee successfully argued that Congress had not transferred legislative power to the President by allowing him to make the factual determination as to when a law should be revived. *Id.* at 385.
102. 143 U.S. 649 (1892).
103. *Id.* at 680.
104. The Court asserted that the legislative power was exercised when Congress enunciated the contingency which would trigger the suspension of the free entry of the commodities. The President, by ascertaining when the contingency existed, was not making law but executing it. *Id.* at 692–93.
105. 220 U.S. 506 (1911).
106. 192 U.S. 470 (1904).
107. 220 U.S. at 521.
108. *Id.*
the goal of the statute be left to executive officials. The Court did not adopt the legislative-lawmaking, administrative-rulemaking dichotomy suggested in Grimaud, but enunciated a rule of expediency requiring only that Congress legislate as far as it possibly can.

The traditional rhetoric that legislative power cannot be delegated was soundly repudiated by Chief Justice Taft in Hampton v. United States. The delegation of broad tariff regulating power to the President was upheld on the ground that Congress had laid down an intelligible principle to which the person authorized to fix the tariffs was directed to conform. Reading Buttfield together with Hampton, the principle which evolves is that if Congress acts as far as reasonably possible and provides an intelligible principle to guide the execution of the statute, the delegation is valid. The labeling of the delegated power as legislative or administrative is no longer crucial; what is crucial is that Congress act and not abdicate its lawmaking function completely.

It was through the use of this requirement of an intelligible principle that the Court struck down two New Deal delegations. Panama Refining Co. v. Ryan and Schechter Poultry Corp. v. United States are the only two cases in which the Supreme Court has struck down congressional delegations of power to the President.

In the Panama delegation, the President was given the power to prohibit the shipment in interstate commerce of oil in excess of state quotas. No rule was laid down to guide him in his determination as to when to invoke the power granted him under the Act, and the Court found this to be the fatal flaw. The Court reviewed the entire legislative scheme in light of the principles announced in earlier delegation cases and found no qualification upon delegated power in the specific section under which the President acted, and none in the general “declaration of policy” which preceded the Act.

In Schechter the Court struck down a “Poultry Code” promulgated under section three of the National Industrial Recovery Act, holding

110. 192 U.S. at 496.
111. 276 U.S. 394 (1928).
112. Id. at 409. If the rule which is to guide rate making is established by Congress, then the actual making of rates by the President pursuant to the rule does not violate the separation of powers concept.
113. E. CORWIN, supra note 9, at 126.
114. 293 U.S. 388 (1935).
116. This power was derived from section 9(c) of Title I of the National Industrial Recovery Act of June 16, 1933, ch. 90, 48 Stat. 195. The President invoked the terms of the Act by Executive Order. 293 U.S. at 405-07.
117. Id. at 415.
118. Id. at 416-20. The critical distinction drawn by the Court in this case was between the functions of laying down standards and policies, which it found to be the job of Congress, and the job of making subordinate rules within prescribed limits, which it held could be delegated. Id. at 421.
that the delegation of power to the President to approve codes of fair
competition was unconstitutional.\textsuperscript{120} The discretion allowed the President
in approving the Codes was virtually unfettered,\textsuperscript{121} with no congres-
sional statement of objectives or standards to guide him. The Court re-
viewed the entire Act searching for some congressionally enunciated
principle, but could find none.\textsuperscript{122}

The contemporary significance of these decisions has been seriously
questioned.\textsuperscript{123} The flaw in the legislation involved in \textit{Panama}
could easily
have been remedied,\textsuperscript{124} and it has been suggested that political factors
motivated the Court in that it was anxious to quell the rising tide of
New Deal legislation.\textsuperscript{125} \textit{Schechter} is probably of more lasting significance.
The delegation involved was extremely broad,\textsuperscript{126} almost entirely without
standards, and would certainly be struck down if it were to be again
tested today. \textit{Schechter} mandates that Congress must at least state the
policy which prompts its action and provide some minimal standards to
guide the President in realizing the goal of that policy.

No federal delegation has been struck down since \textit{Schechter} and in
sustaining subsequent New Deal measures, the Court generally distin-
guished between the delegation it was scrutinizing and that involved in
\textit{Schechter}.\textsuperscript{127} The present state of the law as to delegation can be gleaned
from two of these cases. In \textit{United States v. Rock Royal Co-Op., Inc.},\textsuperscript{128}
the Court upheld an order of the Secretary of Agriculture issued pursuant
to the Agricultural Marketing Agreement Act of 1937,\textsuperscript{129}
regulating the handling of milk in the New York metropolitan area.
In examining the legislation, the Court asserted that:

\begin{quote}
\textit{[E]ach enactment must be considered to determine whether it states
the purpose which the Congress seeks to accomplish and the standards
\end{quote}

\begin{itemize}
\item \begin{itemize}
\item 120. \textit{Id.} at 541–42.
\item 121. The unlimited discretion which the Act lodged in the President to approve
codes of competition for entire industries was the crux of the Court's decision. The
overriding principle which guided the Court was that:

\textit{[C]ongress cannot delegate legislative power to the President to exercise an un-
fettered discretion to make whatever laws he thinks may be needed or advisable
for the rehabilitation and expansion of trade or industry.}
\end{itemize}
\end{itemize}

295 U.S. at 537–38. Clearly the Court recognized that legislative power could be
delegated to the President, but Congress must erect some limits to the President's
discretion.

\begin{itemize}
\item 122. \textit{Id.} at 538–41.
\item 123. \textit{See} 1 K. \textit{Davis}, Administrative Law Treatise \textit{§} 2.06, at 101 (1958); L.
\item 124. The Act was in fact redrafted so as to provide standards to guide presidential
\item 125. L. \textit{Jaffe}, \textit{supra} note 123, at 63. \textit{See also} K. \textit{Davis}, \textit{supra} note 123, at 99–100;
\item 126. Professor Davis asserts that \textit{Schechter} "involved the most sweeping congres-
sional delegation of all time." The President was given authority to approve
codes to govern all business subject to federal authority. K. \textit{Davis}, \textit{supra} note 123,
at 100.
\item 127. \textit{See}, \textit{e.g.}, Yakus v. United States, 321 U.S. 414, 424 (1944); United States
\item 128. 307 U.S. 533 (1939).
\end{itemize}
by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits.\textsuperscript{130}

The Court also intimated that a delegation lacking in such standards may be saved by adequate procedural safeguards which protect against an arbitrary use of the delegated authority.\textsuperscript{131}

In \textit{Yakus v. United States},\textsuperscript{132} the Court sustained the delegation of power to the President, under the Emergency Price Control Act of 1942,\textsuperscript{133} to stabilize prices and wages. In passing on action taken under a congressional delegation, the Court asserted that it need only determine whether the will of Congress had been obeyed.\textsuperscript{134} In order to meet this test the delegation must sufficiently mark the field in which the administrator is to act.\textsuperscript{135} Congress is not required to adopt the "least possible delegation of discretion,"\textsuperscript{136} and the standards provided need only be precise enough so as "to enable Congress, the courts and the public to ascertain whether the Administrator . . . has conformed to those standards."\textsuperscript{137}

These principles continue to guide courts in evaluating the constitutionality of delegations of legislative power to the President.\textsuperscript{138} A most recent example of such a broad delegation of power to the President is the Economic Stabilization Act of 1970,\textsuperscript{139} pursuant to which President Nixon initiated the ninety day wage-price freeze and the subsequent phase II economic regulations.\textsuperscript{140} The futility of applying the \textit{Rock Royal-Yakus} type of analysis becomes evident when one attempts to test the 1970 Act by those standards.

Section 202 of the Economic Stabilization Act simply authorizes the President to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less

\begin{itemize}
  \item \textsuperscript{130} 307 U.S. at 574. Beyond this the Court reasserted the \textit{Buttfield} principle that Congress need be only as specific as is reasonably practicable. \textit{Id.} See note 110 and accompanying text supra.
  \item \textsuperscript{131} 307 U.S. at 576. The Court's allusion to the possible saving nature of procedural safeguards foreshadows the current emphasis on this factor. \textit{See} note 163 and accompanying text infra.
  \item \textsuperscript{132} 321 U.S. 414 (1944).
  \item \textsuperscript{134} 321 U.S. at 425.
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.} at 426.
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{139} 12 U.S.C. § 1904 (1970).
  \item \textsuperscript{140} The freeze was instituted by Exec. Order No. 11615, 36 Fed. Reg. 15727 (1971), and phase II policies and planning agencies were established in Exec. Order No. 11627, 36 Fed. Reg. 20139 (1971).
\end{itemize}
than those prevailing on May 25, 1970."\textsuperscript{141} The orders and regulations can be adjusted if necessary to prevent gross inequities.\textsuperscript{142} The President is restricted from acting with respect to a particular industry or segment of the economy unless he determines that prices or wages in that industry or segment have increased at a rate grossly disproportionate to those in the economy generally.\textsuperscript{143}

When this delegation is examined under traditional tests, it would appear to be lacking in standards to guide the President's action. The first question is whether the Act states the purpose which Congress sought to accomplish. There is no statement of policy accompanying the Act, so that any congressionally provided standards must come from the text of the Act itself. Obviously Congress felt that it would be in the interests of a healthy economy to stabilize wages and prices, but this is not the kind of policy statement that would enable a court to determine whether an administrator's action is within the scope of the legislative intent. Thus under the \textit{Rock Royal} requirement that the congressional purpose be stated with sufficient exactness to enable those affected to ascertain the limits of the legislation,\textsuperscript{144} the 1970 Act is wanting.

The next question is whether the legislation provides standards to guide the administrative action. Again under the \textit{Rock Royal-Yakus} rules the standards must be sufficiently precise so that Congress, the courts and the public can determine whether the administrator is conforming to them.\textsuperscript{145} The 1970 Act provides virtually no express standards. Section 202 authorizes the President to issue such regulations as he deems "appropriate," with no further congressional statement as to exactly what was intended. Moreover, the same section states that the above regulations are to be utilized to make adjustments to prevent "gross inequities." Congress made no effort to clarify what sort of deviations it considered grossly inequitable, so that the President is given almost complete discretion to make such adjustments.

Regulating the wages and prices of an economy of the magnitude of the United States is an extremely complex task, and it is conceded that Congress could not have foreseen all the problems which would arise. It is submitted, however, that Congress could have given some indication by setting standards of the course it intended the President to follow.

In the 1970 Act, there are no standards to guide the President in selecting a base period upon which to ground the stabilization order, and no mention of whether particular segments of the economy should be exempt from controls. Congress did not provide any indication of whether it intended to freeze such things as fringe benefits, nor did it

\textsuperscript{142} Id.
\textsuperscript{144} See note 130 and accompanying text \textit{supra}.
\textsuperscript{145} See notes 131-40 and accompanying text \textit{supra}.
enunciate any guides to aid the President in solving complex problems such as the valuation of real estate. Furthermore, it did not state whether it authorized the impairment of pre-existing contracts by the freeze order.

In terms of traditional delegation doctrine, Congress would at least be required to state its policy objectives and provide some minimal standards so that a reviewing court could determine whether the President or the proper administrator was acting within the scope of his delegated power.

In Rock Royal, the Court intimated that a delegation lacking in specificity could be saved by provision for safeguards against arbitrary administrative action. There are no safeguards provided within the four corners of the 1970 Act, although it is clear that judicial review of alleged arbitrary action could be obtained. The question remains, then, as to the utility of procedural safeguards when, because of a lack of standards in the delegating legislation, it would be impossible for a reviewing court to determine whether the administrator is acting within the scope of the delegation.

In Amalgamated Meat Cutters v. Connally, the most significant case to pass on the constitutionality of the 1970 Economic Stabilization Act, a three-judge District of Columbia court upheld the Act. The court was reluctant to apply the Schechter holding and asserted that Yakus provided a more meaningful starting point. The court recognized the lack of policy statement, objectives and findings under the 1970 Act, especially when compared to those found in the statute in Yakus, but found the difference to be one merely of drafting style.

It is obvious that the two statutes are drafted differently, but this observation does not answer the constitutional objection that standards are lacking. The court paid lip-service to the notion that Congress cannot delegate unlimited authority to the Executive, but found sufficient limits and standards in the 1970 Act. Thus, the court found that implicit in the Act were standards of fairness and equity, and therefore

146. See note 131 and accompanying text supra.
149. Id. at 745.
150. Id. at 749-50.
152. 337 F. Supp. at 750.
held that these were sufficient to save this legislation from "foundering on a constitutional rock." 153

The court also found the President's authority to be limited in that any action taken subsequent to the initial freeze must be in accordance with further standards developed by the executive.154 Thus, regardless of how broad the discretion of the executive may have been at the outset, it will become more limited as further standards are enunciated. However, the standards required by earlier delegation cases were congressional in derivation, not administrative. The Meat Cutters court found that administrative standards would be adequate and in this respect the case marks a departure from traditional delegation doctrine.

It may be argued that if the 1970 Economic Stabilization Act provides sufficient limits, then the courts have in fact eliminated the requirement that Congress provide standards to guide delegated power. It is difficult to imagine a delegation that would be invalidated by application of the analysis of the Meat Cutters court.

Subsequent to the initiation of the ninety day freeze President Nixon sought an extension of his authority to control the economy which he was granted by Congress until April 30, 1973. 155 At the same time Congress also enacted a series of amendments to the Economic Stabilization Act of 1970. These amendments contain the type of limits, standards and procedural safeguards that are more in keeping with the requirements of the early delegation cases. 156

In this respect, the current law is radically different from the original Act under which the freeze and initial phase II regulations were promulgated. Section 203 of the current Act sets forth a wide range of reasonably precise standards to guide executive conduct. 157 Section 210 provides a variety of remedies for individuals injured by operation of the Act, including the possibility of bringing a civil suit in federal district court without regard to the amount in controversy. 158 Further, section 211 makes far-reaching provisions for judicial review of regulations and other action taken by administrators under the Act. 159

Congressional assertions concerning the reasons for incorporating more stringent standards and more adequate safeguards into the Act indicate that Congress recognized the possible constitutional flaw in the

153. Id. at 755. Even without the mention of fairness and equity in the Act, certainly a court would confine the President's action to these parameters. In this respect, then, the Act provides nothing in the way of standards.
154. Id. at 758.
156. It is interesting to note the parallel between the action taken by Congress with respect to the legislative scheme which precipitated the Yakus case (see note 133 supra), and the action it took with respect to the Economic Stabilization Act of 1970. In both instances Congress "recaptured" initially broad delegations of power and re-enacted more narrowly drawn legislation less susceptible to constitutional attack.
158. Id. § 210.
159. Id. § 211.
Act as originally drafted. These amendments mark a healthy re-assertion by Congress of its paramount duty to exercise the lawmaking function, and in enacting them Congress was evidently cognizant of its historic responsibility to guard against unwarranted assumption of power by the executive branch.

Professor Davis has suggested that what is needed is a complete abandonment of the non-delegation concept and a shift in focus toward protecting against arbitrary action. He asserts that:

The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards.

The standards he mentions are not statutory but administrative, because he feels that requiring legislative standards is unrealistic in that legislators are generally unwilling or unable to supply them. The safeguards he talks about are also administrative rather than legislative with the crucial consideration being not what the statute says but what the administrator does.

Under Professor Davis' scheme, the traditional concept of a separation of powers is altered to the point that it becomes unrecognizable. His emphasis on administrative rule-making, standards and safeguards creates a fourth branch of government — the administrative agency. If the delegation is to the President, and he erects the standards, safeguards and rules, then it is submitted that Congress has abdicated its legislative function completely, with the result that the President becomes law maker as well as law executor.

It is proper to require safeguards and standards, but in keeping with our constitutional system it would be more appropriate to require that they emanate from the legislature. For example, under the Economic Stabilization Act of 1970 the President is given almost complete discretion in controlling the entire economy for one year. The separation of powers concept mandates that Congress provide him with standards to follow so that a reviewing court can determine whether he is acting within the scope of his authority.

160. The legislative history of the amendments indicates that Congress was concerned about the kind of constitutional attack that was made on the Act as originally drafted in the Meat Cutters case. U.S. CODE CONG. & AD. NEWS 4008-09 (1972).
161. Id. at 4023.
163. Id. at 713.
164. Id. at 728.
165. Id. at 729. It is submitted that the reluctance of the Congress to provide standards is a wholly inadequate reason for the courts to cease requiring them. One of the primary functions of judicial review of administrative action is to ascertain whether the administrator is acting within the ambit of his authority. Absent congressional standards defining this ambit, a court has no real basis for such a determination. Rather than abandon the requirement of congressional standards it would be more in keeping with the concept of judicial review for the courts to hold Congress to its duty of lawmaking and require standards to guide administrative action.
166. Id. at 728.
Professor Corwin has suggested that both objectives — allowing a broad scope of discretion in the delegate and retention of control by the legislative — could be achieved by providing that the delegated authority could be revoked at any time by "concurrent resolution." Since the resolution would not be a law it would not be subject to presidential veto. He recognizes that this use of the resolution may be unconstitutional, but advances strong arguments that it should not be so held by the courts.

In attempting to maintain a line between congressional delegation and abdication, the use of the concurrent resolution to revoke delegated authority would at least insure that Congress will have some control over the President or administrator. To expedite the execution of the delegated power safeguards provided either by Congress or by the administrator is a necessity. To allow courts to scrutinize the action of administrators, standards are needed against which such action may be tested. These standards should be supplied by the legislature, not the administrative body. The legislature represents the collective will of the people and it is the function of that body to formulate policy and prescribe rules of conduct to effectuate that policy.

IV. CONCLUSION

This Comment has examined the varied sources of power available to the President, and the few judicially established limits on that power. It is clear that the conception of the office of the President held by the framers of the Constitution would not even approximate its current status. It would probably be impossible, or at the very least unrealistic, to strictly constrain the Chief Executive to the precise functions granted him by article II of the Constitution. Because of the intricate nature of regulating interstate commerce, the delicate job of conducting foreign relations and the demanding task of confronting and dealing with national emergencies, it is mandatory that the President have available to him broad non-expressed powers to insure the needed flexibility.

It is clear that when the President acts under his independent powers, the Supreme Court has been very reluctant to limit or invalidate such action. In the most significant case striking down a presidential exercise of power, the Court indicated that it may have upheld the exercise had

168. E. Corwin, supra note 9, at 129.
169. The constitutional problem arises under article I, section 7, which requires that all orders, resolutions or votes which require the concurrence of the House and Senate must be presented to and approved by the President. Professor Corwin argues that since delegations may be made until a certain date, it would be a similar approach to provide that they could be valid only so long as the two Houses sanction them. Id. at 130.
170. As Justice Harlan succinctly noted:

The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged. Arizona v. California, 373 U.S. 546, 626 (1963) (dissenting opinion).
it not been for the previously expressed congressional disfavor toward such action. This reluctance of the Court may at first blush appear to pose a dangerous situation, considering that the Court is the ultimate check on presidential power. There is, however, a more effective check on excessive executive action in expedient congressional action. If Congress asserts itself in relation to some specific pressing issue or crisis, it seems certain that the President would be reluctant to act contrary to that assertion. Thus the primary responsibility for the continued viability of the separation of powers concept and the system of checks and balances lies with the Congress.

The separation of powers notion also mandates that Congress exercise the law-making function and the President exercise the law-administering function. It is simply a fact of governmental life that it is necessary for Congress to delegate a measure of its law-making power to the President and administrative agencies. It could be argued that Congress may constitutionally delegate only administrative rule-making power, but the distinction between law-making and rule-making is meaningless and unnecessary if Congress properly delegates its power.

A proper delegation of power states the purpose or policy reasons which motivated Congress to act. This requirement enables a reviewing court to determine whether administrative action tends to effectuate the congressional intent. The delegating act must also prescribe the specific standards to guide the administrator in resolving specific problems. This enables persons affected by administrative action and courts reviewing such action to determine whether, in a particular case, Congress would contemplate this particular result. Congress must also provide for adequate judicial review of all administrative action taken, and regulations promulgated, pursuant to the delegated authority. The requirements of a stated policy and precise standards tend to render the judicial review requirement more meaningful. Absent these first two requirements, judicial review would become a matter of courts guessing as to congressional intent.

Contrary to what Professor Davis has suggested, the courts should continue to require that the standards and safeguards emanate from the legislature and not from the various administrative agencies. It is the duty of Congress to legislate as far as it possibly can, and we have seen by the amendments to the Economic Stabilization Act of 1970 that Congress is capable of delegating authority to conduct a complex job of economic regulation, and at the same time provide adequate standards and safeguards.

In deference to their function of maintaining our constitutional scheme of separation of powers, courts should not abandon the standards and safeguards requirements, nor permit them to be supplied by an administrative agency. It is Congress’ job; Congress is capable of doing it; and it is the constitutional duty of the courts to see that it does.

William Hebe