

## Constitutional Corner – Presidential Executive Orders

First off, Happy Constitution Day! You planned something exciting for the kids, no doubt.

This Labor Day, Monday, 7 September, [President Obama signed](#) his 218th Presidential Executive Order (#13706): “Establishing Paid Sick Leave for Federal Contractors.” As the title implied, the order would require all businesses operating under government contract to provide paid sick leave for their employees. Without explanation, the order was designed to not go into effect until January 1, 2017, perhaps because it would require re-negotiation of most existing federal contracts (a contract is a contract is a contract, most of the time). The President remarked: “Unfortunately, only Congress has the power to give this security to all Americans, but where I can act, I will.”

In May 1962, Soviet Premier Nikita Khrushchev decided to deploy strategic, nuclear-tipped missiles in Cuba, despite the misgivings of his Ambassador to Cuba who argued that Castro would not accept the deployment. The USSR faced a dilemma; they perceived the U.S. to have a "splendid first strike" capability that put the Soviet Union at a huge disadvantage. To everyone’s surprise, Castro accepted.

The previous year, in the aftermath of the Berlin Crisis (Jun-Nov 1961), the Soviets had judged President John F. Kennedy weak and indecisive. Speaking to other Soviet officials, Nikita Khrushchev had stated, *"I know for certain that Kennedy doesn't have a strong background, nor, generally speaking, does he have the courage to stand up to a serious challenge."*<sup>1</sup>

President Kennedy’s Executive Orders in 1961 had been an assortment of innocuous, routine actions (ex: Executive Order 10980 established the “President's Commission on the Status of Women,” Executive Order 10975 created a board to “investigate a dispute between Pan American World Airways, Inc., and certain of its employees”).

The year 1962 would be different, however. On January 12, Kennedy signed Executive Order 10985 “relating to safeguarding official information in the interests of the defense of the United States.”<sup>2</sup>

A month later, on February 16th, Kennedy quietly signed ten more Executive Orders dealing with national preparedness. Preparedness for what? The public, at that date, suspected nothing; but the government, at least the CIA, knew: nuclear war with the USSR had become a real possibility. With titles like “Assigning emergency preparedness functions to the Secretary of...,” the orders, one by one, passed under Kennedy’s pen, putting every aspect of modern American life under the control of the federal government should a “national emergency” be

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<sup>1</sup> [https://en.wikipedia.org/wiki/Cuban\\_Missile\\_Crisis](https://en.wikipedia.org/wiki/Cuban_Missile_Crisis)

<sup>2</sup> <http://www.archives.gov/federal-register/executive-orders/disposition.html>

declared. The government would control all communications media (10997), all electrical power, gas, petroleum, fuels and minerals in the country (10997), all food resources and farms (10998), and all health, education and welfare functions (11001). E.O. 11000 gave the Secretary of Labor the authority to mobilize civilians into work brigades under government supervision. Under E.O. 11002, the Postmaster General would create a national registration of all persons. E.O. 11003 gave the Administrator of the FAA control of all airports and aircraft, including commercial aircraft. The Interstate Commerce Commissioner would control all railroads, inland waterways and public storage facilities under E.O. 11005. Under E.O. 11004 - the Housing and Finance Authority would have the power to relocate communities, build new housing with public funds, designate areas to be abandoned, and create new locations for populations. Just the sort of responsibilities you would want your government to have in the wake of a nuclear war, right?

Finally on September 27, 1962, Executive Order 11051 brought it all together by prescribing responsibilities of the Office of Emergency Planning in the Executive Office of the President and giving authorization to put all Executive Orders into effect in times of increased “international tensions” and economic or financial crisis (isn’t that today’s standard milieu?); just in time for the [“Thirteen Days That Shook the World – and Nearly Ended It”](#) as some would later characterize it. From October 16 to October 28, 1962, the USA and the USSR stared each other in the nuclear-tipped face – and then Khrushchev blinked.

The chance of a nuclear exchange today seems much more remote, even considering [North Korea’s recent saber-rattling](#) and Iran’s hardly restrained [quest for similar weapons](#). China, Russia and the US could each wipe the others off the face of the globe, yet we no longer conduct “duck and cover” exercises in our schools.

Nevertheless, all of JFK’s 1962 Executive Orders remain in effect today awaiting only the declaration of a state of national emergency, which Congress, according to the National Emergencies Act,<sup>3</sup> would be prevented from reviewing for six months. And, these orders have been added to:

E.O. 11310 (Lyndon Johnson) allows the Department of Justice to control all aliens, and operate correctional institutions. E.O. 11921 (Gerald Ford) gives the Emergency Preparedness Agency authority to control energy sources, wages, salaries, credit and the flow of money in U.S. financial institutions in any undefined national emergency. E.O. 12656 (Ronald Reagan) appoints the National Security Council as the principal body that would consider the use of emergency powers. This last E.O. allows the government to increase domestic intelligence and surveillance of U.S. citizens and would restrict freedom of movement within the United States. It grants the government the right to isolate large groups of civilians.

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<sup>3</sup> <http://www.treasury.gov/resource-center/sanctions/Documents/nea.pdf>

On April 1<sup>st</sup> of this year (definitely not an April Fool's joke), President Obama signed [Executive Order 13694](#). Not only does this E.O. declare a state of national emergency regarding cyber threats, it provides the government the power to confiscate all "property and interests in property that are in the United States" belonging to "any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States." Now, hacking is a great threat to our economic, even physical security and certainly needs to be fought with vigor. But are you comfortable with the Secretary of the Treasury, Attorney General and Secretary of State playing judge and jury if the persons involved are American citizens operating overseas, or wherever? Just asking.

I think we can all agree that in the right hands, in trustworthy hands, prudence would dictate precisely the kind of emergency preparedness these E.O.s enact. In the wrong hands, however, they represent "license to steal," literally. In time of emergency, the government has the authority to come into your home, confiscate any emergency food you may have stockpiled that they deem surplus to your needs and "re-distribute the wealth" to others less prepared – a frightening thought in the age of IRS and EPA malfeasance, where even local police are becoming ever more militarized.

In 2014, 87% of Americans said they [don't trust their government](#) "always or most of the time." This puts trust in our government [at or near historic lows](#). We don't trust our government, yet we seem reluctant to engage with it. Anytime we the people give (by our acquiescence) our government such manifold power, we must be vigilant that it is used legitimately.

So, is Obama's, or even JFK's use of [Executive Orders](#) legitimate? Where precisely does the Constitution grant the president such plenipotentiary power? Let's see.

*"The executive Power shall be vested in a President of the United States of America."* So begins Article 2 of the Constitution. This is called the vesting clause and Article 2's is noticeably different than the vesting clause of Article 1, which reads *"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."* (Emphasis added). Article 1's vesting clause clearly points to an enumeration of specific powers that will follow, but Article's 2 is more ambiguous. This has led to two schools of thought, leading all the way back to the First Congress: 1) that Article 2's vesting clause, following the form of most legal documents of the time, is not a grant of power, merely a designation of the President's title<sup>4</sup> or, 2) that it indeed vests the President with broad "typical" executive powers, one being the implied power to "order" his executive branch employees to perform their duties.

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<sup>4</sup> For a fuller explanation of both theories see: *"The Original Constitution, What it Actually Said and Meant"* by Robert Natelson.

Various Supreme Court opinions have concluded that the vesting clause itself provides the President with at least these powers: removal and supervisory powers over executive officers, law enforcement power, responsibility over foreign affairs, and control over prosecutions.

Various U.S. Presidents have interpreted the President's powers differently. Twenty-seventh President, William H. Taft took the traditional approach: *"The president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."* Conversely, Twenty-sixth President, Teddy Roosevelt felt that: *"The executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers."* After the War for Southern Independence, 16th President, Abraham Lincoln recognized the limits the Constitution placed on the President, but used the "national emergency" to rationalize their violation: *"I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."*

Section 2 of Article 2 enumerates specific powers of the President and Section 3 assigns some responsibilities, with the generally recognized "high duty" being "tak[ing] care that the laws be faithfully executed." While I agree with most commentators that this should indeed be the President's "high duty," I wish the framers had made that explicit by listing it first instead of next to last.

As I said, the President has an implied or inherent power to issue orders (and memoranda, directives, proclamations, etc) as necessary to carry out his enumerated powers. But what are we to think when a President uses Executive Orders to bypass the will of Congress?

The will of Congress, is by definition, the will of the people (although it may not always seem that way). The people are the earthly source of all political power and are the "owners" of the Constitution.<sup>5</sup> When the President circumvents the will of the people we have the very definition of tyranny.

What are the remedies when this happens? The good news is that there are several; the bad news is that they all require political will to be effective. Congress has the power to overturn an improper executive order by passing legislation in conflict with it. Congress can also refuse to provide funding necessary to carry out certain policy measures contained in the order. To provide Congress with the political will to employ these remedies, "We The People," the rightful owners of the Constitution, need to express our concerns to our Representatives in Congress.

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<sup>5</sup> *"The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."* Chief Justice John Marshall, *Cohens v. Virginia*, (1821)

The final remedy is through the federal courts; they can be asked to intervene by bringing suit, as was done to put a stop to President Obama's [improper order](#) shielding millions of unauthorized immigrants from deportation.

In the 1930s, President Franklin Roosevelt issued more than 3,500 executive orders (over 3+ terms of office), many of them patently unconstitutional. On March 6, 1933, he declared a bank "holiday," forbidding banks to release any gold coin or bullion. Executive Order 6102 prohibited the hoarding of gold coin, bullion and gold certificates. Another executive order required all newly mined domestic gold be delivered to the Treasury instead of allowing it to be sold to the public. And the constitutional power for these actions is found, where again?

The Supreme Court overturned only five of FDR's executive orders (6199, 6204, 6256, 6284 & 6855). In 1952, the Supreme Court overturned President Truman's order that his Secretary of Commerce take control of the country's steel mills. President Truman had declared a state of emergency (due to the Korean War) and then used that as justification to intervene in the face of an impending steelworker strike. President Clinton's 1995 Executive Order (E. O. 12954) attempting to prevent the federal government from contracting with organizations that had strike-breakers on its payroll was also overturned, as was his E. O. 13155.

In the end, we must ask the question of ourselves: what kind of government are we willing to insist upon? One where the Congress responds to the people or responds to corporate donors? One where the President acts within his enumerated powers or acts unilaterally and unconstitutionally? One where the judges rule responsibly or where they ignore natural and revealed law? The choice is ours, but we must not sit idle.

p.s.

We will be discussing this subject tomorrow morning, 7 am, on WFYL Radio, AM1180. I would welcome your comments and questions. You may monitor the broadcast at [www.1180wfyl.com](http://www.1180wfyl.com) using the "Listen Live" button, and then call in your comments or questions at 610-539-8255 or 610-539-1783/1784. Hope you'll join us, this is an important topic.

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