



Executive Orders: Issuance and Revocation

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March 25, 2010

Congressional Research Service

7-5700

www.crs.gov

RS20846

Summary

Executive orders and proclamations are used extensively by Presidents to achieve policy goals, set uniform standards for managing the executive branch, or outline a policy view intended to influence the behavior of private citizens. The Constitution does not define these presidential instruments and does not explicitly vest the President with the authority to issue them. Nonetheless, such orders are accepted as an inherent aspect of presidential power, and, if based on appropriate authority, they have the force and effect of law. This report discusses the nature of executive orders and proclamations, with a focus on the scope of presidential authority to execute such instruments and judicial and congressional responses thereto.

In the 111th Congress, several bills have been introduced regarding the revocation and modification of executive orders: H.R. 35, H.R. 500/S. 237, H.R. 603, H.R. 1228, H.R. 3465, H.R. 4453, and S. 2929. Other bills on executive orders proposed in this Congress are prescriptive and contain provisions that do not necessarily revoke or require alteration of executive orders: H.R. 21, H.R. 292, H.R. 669, H.R. 1082, H.R. 1367, H.R. 3293, S. 237, and S. 2929. In some cases, these bills may expand upon existing executive orders.

The 111th Congress has also passed several laws with provisions related to existing executive orders: P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA); P.L. 111-8, the Omnibus Appropriations Act, 2009; P.L. 111-80, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010; and P.L. 111-117, the Consolidated Appropriations Act, 2010. Additionally, President Obama has issued an executive order titled Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion, which was discussed during the House floor debate on H.R. 3590/P.L. 111-148.

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Definition and Authority

The Constitution does not contain any provisions that define executive orders or proclamations. The most widely accepted description appears to be that of the House Government Operations Committee in 1957:

Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority. The difference between Executive orders and proclamations is more one of form than of substance.¹

In addition to executive orders and proclamations, Presidents often issue “presidential memoranda.” The distinction of these instruments from executive orders and proclamations is likewise more a matter of form than of substance. Specifically, all three instruments can be employed to direct and govern the actions of government officials and agencies.² Further, if issued under a valid claim of authority and published, all three may have the force and effect of law, requiring courts to take judicial notice of their existence.³ Indeed, it would appear that the only technical difference between executive orders and proclamations in relation to presidential memoranda is that the former must be published in the *Federal Register*, while the latter are published only when the President determines that they have “general applicability and legal effect.”⁴

Just as there is no definition of executive orders and proclamations in the Constitution, there is, likewise, no specific provision authorizing their issuance. As such, authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that “the executive power shall be vested in a President of the United States,” that “the President shall be Commander in Chief of the Army and Navy of the United States,” and that

¹ Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* (Comm. Print 1957) [hereinafter *Orders and Proclamations*].

² For example, the Homeland Security Council (HSC) was first established by § 5 of Executive Order 13228 on October 8, 2001. 66 Fed. Reg. 51812-17 (Oct. 10, 2001). Its location was not specified in that executive order. Its organization and operation were addressed in a Homeland Security Presidential Directive on October 29, 2001, HSPD-1. See http://www.dhs.gov/xabout/laws/gc_1213648320189.shtm#1; CRS Report RS22840, *Organizing for Homeland Security: The Homeland Security Council Reconsidered*, by Harold C. Relyea, at 2. The HSC was later established within the Executive Office of the President in Title IX of the Homeland Security Act of 2002.

³ *Armstrong v. United States*, 80 U.S. 154 (1871); see also *Farkas v. Texas Instrument, Inc.*, 372 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964); *Jenkins v. Collard*, 145 U.S. 546, 560-61 (1893).

⁴ 44 U.S.C. § 1505. The Federal Register Act requires that executive orders and proclamations be published in the *Federal Register*. *Id.* Furthermore, executive orders must comply with preparation, presentation and publication requirements established by an executive order issued by President Kennedy. See Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

the President “shall take Care that the Laws be faithfully executed.”⁵ The President’s power to issue executive orders and proclamations may also derive from express or implied statutory authority.⁶ Irrespective of the implied nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic.⁷

Despite the amorphous nature of the authority to issue executive orders, Presidents have not hesitated to wield this power over a wide range of often controversial subjects, such as the suspension of the writ of *habeas corpus*;⁸ the establishment of internment camps during World War II;⁹ and equality of treatment in the armed services without regard to race, color, religion or national origin.¹⁰ President Obama recently issued an executive order pertaining to the abortion provisions in the new health care law, the Patient Protection and Affordable Care Act.¹¹ This broad usage of executive orders to effectuate policy goals has led some commentators to suggest that many such orders constitute executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.¹² The controversial nature of many presidential directives thus raises questions regarding whether and how executive orders may be amended or revoked.

⁵ U.S. Const., Art. II, § 1, 2, and 3. See Orders and Proclamations, *supra* note 1, at 6-12.

⁶ See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷ President George Washington’s order of June 8, 1789, asking the heads of executive departments “to submit ‘a clear account’ of affairs connected with their [d]epartments,” is listed as the first executive order in a 1943 publication. THE NEW JERSEY HISTORICAL RECORDS SURVEY, WORK PROJECTS ADMINISTRATION, LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS, at 1 (1943). President Washington’s first proclamations concerned A National Thanksgiving and treaties with Indian nations. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, Vol. I, at 64, 80-81 (1896).

⁸ See, e.g., Executive Order from President Lincoln to Major-General H.W. Halleck, Commanding in the Department of Missouri (Dec. 1861) in JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 99 (Vol. VI) (“General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of *habeas corpus* within the limits of the military division under your command and to exercise martial law as you find it necessary, in your discretion, to secure the public safety and the authority of the United States.”); see also *Ex Parte Milligan*, 71 U.S. 2, 115 (1866).

⁹ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); see also *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁰ Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) (“It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.”)

¹¹ Press Release, The White House, Executive Order—Patient Protection and Affordable Care Act’s Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion (Mar. 24, 2010) <http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>. Past Presidents have issued memoranda on abortion, including statements on the “Mexico City Policy” announced by President Reagan in August 1984, which concerned the Agency for International Development’s funding of nongovernmental organizations “that engage in a wide range of activities, including providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available.” Memorandum on the Mexico City Policy, Pub. Papers 10 (Jan. 22, 1993); see also Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) Mexico, D.F., Aug. 6-13, 1984, at 4-5, http://www.populationaction.org/Publications/Reports/Global_Gag_Rule_Restrictions/MexicoCityPolicy1984.pdf; Memorandum of March 28, 2001, Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 29, 2001).

¹² See William J. Olson and Alan Woll, Policy Analysis, Executive Orders and National Emergencies: How Presidents Have Come to “Run the Country” by Usurping Legislative Power, Cato Institute (Oct. 28, 1999).

Judicially Enforced Limitations

The proper framework for analyzing executive orders in the judicial context may be found in *Youngstown Sheet & Tube Co. v. Sawyer*.¹³ There, the Supreme Court dealt with President Truman's executive order directing the seizure of steel mills, which was issued in an effort to avert the effects of a workers' strike during the Korean War. Invalidating this action, the majority held that under the Constitution, "the President's power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁴ Specifically, Justice Black maintained that presidential authority to issue such an executive order "must stem either from an act of Congress or from the Constitution itself."¹⁵ Applying this reasoning, Justice Black's opinion for the Court determined that as no statute or Constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act. Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining "the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."¹⁶

While Justice Black's majority opinion in *Youngstown* seems to refute the notion that the President possesses implied constitutional powers, it is important to note that there were five concurrences in the case, four of which maintained that implied presidential authority adheres in certain contexts.¹⁷ Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion.

Justice Jackson's Concurrence

Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.¹⁸ Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."¹⁹ Secondly, Justice Jackson maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."²⁰ In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported

¹³ 343 U.S. 579 (1952).

¹⁴ *Id.* at 587.

¹⁵ *Id.* at 585.

¹⁶ *Id.* at 586-89.

¹⁷ *Id.* at 659 (Burton, J., concurring); *id.* at 661 (Clark, J., concurring in result only); *id.* at 610 (Frankfurter, J., concurring); *id.* at 635 (Jackson, J., concurring).

¹⁸ 343 U.S. at 635-38.

¹⁹ *Id.* at 635, 637.

²⁰ *Id.* at 637.

pursuant only to the President's "own constitutional powers minus any constitutional powers of Congress over the matter."²¹ In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."²²

Applying this scheme to the case at hand, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that President Truman's seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly. Justice Jackson also determined that the second category was "clearly eliminated," in that Congress had addressed the issue of seizure, through statutory policies conflicting with the President's actions.²³ Employing the third category, Justice Jackson noted that President Truman's actions could only be sustained by determining that the seizure was "within his domain and beyond control by Congress."²⁴ Justice Jackson established that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."²⁵

These standards remain applicable in the modern era. In 1996, the United States Court of Appeals for the District of Columbia invalidated an executive order issued by President Clinton on the grounds that it conflicted with the National Labor Relations Act (NLRA).²⁶ The order at issue prohibited federal agencies from contracting with employers that permanently replaced striking employees. Upon determining that the order conflicted with a provision of the NLRA guaranteeing the right to hire permanent replacements during strikes, the court of appeals held that the statute preempted the executive order, stripping it of any effect.²⁷

Congressional Revocation and Alteration of Executive Orders

Further, as long as it is not constitutionally based, Congress may repeal a presidential order, or terminate the underlying authority upon which the action is predicated. For example, in 2006, Congress revoked part of an executive order from November 12, 1838, which reserved certain public land for lighthouse purposes.²⁸ Congress has also explicitly revoked executive orders in their entirety, such as in the Energy Policy Act of 2005, which revoked a December 13, 1912, executive order that created Naval Petroleum Reserve Numbered 2.²⁹ Another example of the express nullification of an executive order by Congress involved the revocation of an executive

²¹ 343 U.S. at 637.

²² *Id.* at 637-38.

²³ *Id.* at 638-39.

²⁴ *Id.* at 640.

²⁵ *Id.* at 638, 640-45.

²⁶ *Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996).

²⁷ *Id.* at 1339.

²⁸ P.L. 109-241, § 504(a); 16 U.S.C. § 668dd note. "In use from the earliest days of the Republic, the Executive Order was at first employed mainly for the disposition of the public domain, for the withdrawal of lands for Indian, military, naval, and lighthouse reservations or other similar public purposes." W.P.A. HISTORICAL RECORDS SURVEY, PRESIDENTIAL EXECUTIVE ORDERS, VOL. I, LIST, at v (1944).

²⁹ P.L. 109-58, § 334; 10 U.S.C. § 7420 note.

order by President George H. W. Bush to the Secretary of the Department of Health and Human Services to establish a human fetal tissue bank for research purposes.³⁰ To effectuate this repeal, Congress simply directed that the “the provisions of Executive Order 12806 shall not have any legal effect.”³¹ There have been numerous similarly revoked executive orders and proposals to revoke particular executive orders.³²

Additionally, Congress has used its appropriations authority to limit the effect of executive orders, such as denying salaries and expenses for an office established in an executive order,³³ as well as denying funds to implement a particular section of a subsequently revoked executive order that would have enabled agency heads to designate a presidential appointee to serve as the agency’s regulatory policy officer.³⁴ Additionally, Congress has used appropriations acts to enable a program created by executive order to receive donations for publicity materials about the program.³⁵ Outside of appropriations bills, other legislative proposals have included those that would codify existing executive orders with modifications.³⁶

Select Laws Concerning Executive Orders Enacted During the 111th Congress

The 111th Congress has passed several laws with provisions relating to existing executive orders. For instance, P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA) transferred functions, personnel, assets, liabilities, and administrative actions that applied to the National Coordinator for Health Information Technology appointed under an executive order or the related office to the National Coordinator appointed under that law and the applicable office. Furthermore, appropriations acts, such as P.L. 111-8 and P.L. 111-117, contain several provisions on funding of various executive orders, including the provisions mentioned in the previous paragraph denying funding for sections of executive orders and enabling the receipt of donations related to executive orders. P.L. 111-8 also contains prohibitions on the use of funds to delay implementation of executive orders. Another appropriations act, P.L. 111-80, denies funding for the promulgation of proposed or final rules allowing importation of Chinese poultry products, if the rules were not issued according to the procedures for significant rules set forth in an executive order.

³⁰ Exec. Order No. 12806, 57 Fed. Reg. 21589 (May 21, 1992).

³¹ P.L. 103-43, 107 Stat. 133, § 121. Given the highly speculative basis of any asserted constitutional authority for the President to issue such an order, there appears to be little doubt as to the legitimacy of this congressional revocation. See *Youngstown*, 343 U.S. at 635-638.

³² See House Comm. on Rules, Subcomm. on Legislative and Budget Process, 106th Cong., 1st Sess., Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?, at 124-27 (Oct. 27, 1999); see also H.R. 5658, § 2857(b), 110th Cong (2008). This section of H.R. 5658 would have revoked Executive Order 1922 of April 24, 1914, as amended, as it affected certain lands identified for conveyance to Utah.

³³ P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

³⁴ Exec. Order 13422, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007) (revoked by Exec. Order 13497); P.L. 111-8, § 746; 123 Stat. 693.

³⁵ P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

³⁶ H.R. 3090, § 421, 111th Cong. (2009); S. 642, 110th Cong. (2008).

Legislative Proposals in the 111th Congress

In the 111th Congress, several bills have been introduced regarding the revocation and modification of executive orders. For example, H.R. 35, H.R. 500/S. 237, and H.R. 1228 would deem particular executive orders to be without force or effect; H.R. 603 would revoke part of an executive order on certain lands identified for conveyance; H.R. 3465 would supersede an executive order; and H.R. 4453 would require the President to revoke an executive order and amend a separate, older executive order to restore the words removed by the executive order to be revoked. S. 2929 would require notice of presidential revocations, modifications, waivers, or suspensions of executive orders, or authorization of such an action, to be published in the *Federal Register* within 30 days after such action is taken.

Other bills on executive orders proposed in the 111th Congress are prescriptive, and do not necessarily require presidential modification or revocation of executive orders. For example, H.R. 21 would establish a committee in the Executive Office of the President that would succeed a committee established by executive order. H.R. 292 would require the Secretary of Veterans Affairs to ensure that that department is complying with a particular executive order. H.R. 669 would redesignate an office established by an executive order. H.R. 1082 would prohibit importation of foreign-made American flags, regardless of whether their proportions complied with an executive order. H.R. 1367 would expand the applicability of several executive orders to parent companies of foreign entities that commit acts outside the United States that would violate such executive orders if the acts were committed in the United States. H.R. 3293 would prohibit the appropriation or availability of funds for the procurement of goods made by child labor in certain industries and countries, in accordance with an executive order. S. 237 would provide for the continued existence of a council despite termination of an applicable section of an executive order.

Presidential Revocation and Alteration of Executive Orders

Illustrating the fact that executive orders are used to further an administration's policy goals, there are frequent examples of situations in which a sitting President has revoked or amended orders issued by his predecessor.³⁷ This practice is particularly apparent where Presidents have used these instruments to assert control over and influence the agency rulemaking process. President Ford, for instance, issued Executive Order 11821, requiring agencies to issue inflation impact statements for proposed regulations.³⁸ President Carter altered this practice with Executive Order

³⁷ For example, on February 17, 2001, in Executive Orders 13201-04, President Bush revoked a series of executive orders issued by President Clinton regarding union dues and labor contracts, significantly altering several requirements pertaining to government contracts. 66 Fed. Reg. 11221, 11225, 11227-28 (2001); *see* Exec. Order No. 12871, 58 Fed. Reg. 52201 (1993); Exec. Order 12933, 59 Fed. Reg. 53559 (1994). President Obama revoked Executive Order 13201 in Executive Order 13496. 74 Fed. Reg. 6107 (Feb. 4, 2009). He revoked Executive Order 13202 in Executive Order 13502. 74 Fed. Reg. 6985 (Feb. 11, 2009). President Obama also revoked Executive Order 13204 in Executive Order 13495. 74 Fed. Reg. 6103 (Feb. 4, 2009).

³⁸ 3 C.F.R. 926 (1971-75).

12044, requiring agencies to consider the potential economic impact of certain rules and identify potential alternatives.³⁹

Shortly after taking office, President Reagan revoked President Carter's order, implementing a scheme asserting much more extensive control over the rulemaking process. Executive Order 12291 directed agencies to implement rules only if "the potential benefits to society for the regulation outweigh the potential costs to society," requiring agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.⁴⁰ This order was criticized by some as a violation of the separation of powers doctrine, on the grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress.⁴¹ Despite these concerns, there were no court rulings assessing the validity of President Reagan's order. In turn, President Clinton issued Executive Order 12866, modifying the system established during the Reagan Administration.⁴² While retaining many of the basic features of President Reagan's order, E.O. 12866 eased cost-benefit analysis requirements, and recognized the primary duty of agencies to fulfill the duties committed to them by Congress. President George W. Bush issued two executive orders amending E.O. 12866, E.O. 13258, and E.O. 13422, both of which were revoked by President Obama in E.O. 13497.⁴³ President Bush's E.O. 13258 concerned regulatory planning and review, and it removed references in E.O. 12866 to the role of the Vice President, replacing several of them with a reference to the Director of the Office of Management and Budget (OMB) or the Chief of Staff to the President.⁴⁴ E.O. 13422 defined guidance documents and significant guidance documents and applied several parts of E.O. 12866 to guidance documents, as well as required each agency head to designate a presidential appointee to the newly created position of regulatory policy officer.⁴⁵ E.O. 13422 also made changes to the Office of Information and Regulatory Affairs' (OIRA's) duties and authorities, including a requirement that OIRA be given advance notice of significant guidance documents.⁴⁶ President Obama's executive order revoking E.O. 13258 and E.O. 13422 also directed the Director of OMB and the heads of executive departments and agencies to rescind orders, rules, guidelines, and policies that implemented those executive orders.⁴⁷

³⁹ 3 C.F.R. 152 (1978).

⁴⁰ 3 C.F.R. 127, 128 (1981).

⁴¹ See, e.g., Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291*, 80 MICH. L. REV. 193 (1981); Erik D. Olsen, *The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1 (1984).

⁴² 58 Fed. Reg. 51735 (1993).

⁴³ 74 Fed. Reg. 6113 (Feb. 4, 2009)(revoking Executive Orders 13528 and 13422).

⁴⁴ 67 Fed. Reg. 9385 (Feb. 28, 2002)(amending Executive Order 12866).

⁴⁵ 72 Fed. Reg. 2763 (Jan. 23, 2007)(amending Executive Order 12866). For more information on how the now-revoked order had impacted Executive Order 12866, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.

⁴⁶ 72 Fed. Reg. 2763 (Jan. 23, 2007)(amending Executive Order 12866).

⁴⁷ *Id.*

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Acknowledgments

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