The Impact of Executive Orders on the Legislative Process: Executive Lawmaking

TESTIMONY of William J. Olson

to the Committee on Rules, Subcommittee on Legislative and Budget Process
October 27, 1999

Mr. Chairman and members of the Subcommittee, I want to thank you for this opportunity to testify before you regarding the impact of Executive Orders on the legislative process and the very real problem of presidential lawmaking by fiat.

From the standpoint of my participation, the timing of your hearing is providential, in that many months ago I was asked to undertake a study of this very subject by Roger Pilon, director of the Cato Institute's Center for Constitutional Studies. The paper which I co-authored with Alan Woll, an associate in our law firm, was finalized just last week. It is now back from the printer and today receiving its first public release. The Cato paper has a title somewhat more flamboyant than that of this hearing — "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power." I greatly appreciate the opportunity to testify about the matters discussed at length there, and I understand that copies of this paper have been made available to the Subcommittee, and otherwise are available on Cato's website at www.cato.org.

On January 30, 1788, in Federalist 47, James Madison observed that Montesquieu's warning — "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" — did not apply to our constitution because "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law...." Despite Madison's predictions, our government quickly strayed from its principles and our chief magistrate has, in fact, again and again, legislated by fiat. In fact, in our research on presidential directives (such as executive orders and proclamations), I learned that from its beginning, American political history has been marked by efforts of many presidents to define the extent of their power and authority in ways violative of the U.S. Constitution.

As early as 1792, according to Thomas Jefferson: "I said to [President Washington] that if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved, if the Legislature could be kept independent, I should never fear the result of such a government; but that I could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch."

Congress and the courts have taken action from time to time to examine and, at times, challenge presidential exercises of authority perceived to be unconstitutional: from President Washington's declaration of neutrality to the Louisiana Purchase, Jefferson's embargo, Jackson's removal of federal funds from the Second Bank of the United States, Polk's sending of Gen. Zachary Taylor's troops into contested territory before the declaration of war with Mexico, Lincoln's conduct of the Civil War without calling Congress into session, Lincoln's amnesty and reconstruction plans, the Tenure of Office Act and Andrew Johnson's impeachment ... and the list goes on and on.

But the Constitution anticipated that the Congress and the Court would jealously guard their prerogatives, and, setting power against power, unconstitutional excursions by the executive would be met with fierce resistance. Sadly, neither the Congress nor the Court have acted boldly in defense of the Constitution, particularly in the recent past.

My first personal experience with an unconstitutional exercise by the executive of a legislative power arose in the mid-1980's, shortly after I completed serving three part-time positions in the Reagan Administration, when I filed suit against the Reagan Administration for usurping the Senate's power to ratify treaties before they became effective. The case was *The Conservative Caucus* v. *Reagan*, litigated in the U.S. District Court for the District of Columbia. Our client had sought to prevent Secretary of Defense Casper Weinberger from ordering the Pentagon to unilaterally implement the SALT II treaty — which the Senate had thus far refused to ratify. President Reagan had announced his determination to implement the treaty, notwithstanding the Senate's constitutional role. Unfortunately, we were unable to obtain a review on the merits, as the suit was dismissed, as so many similar suits have been, on the theory that our client lacked standing to bring suit.

The simple truth is that the courts cannot be counted upon to check Presidential power — our research has been able to identify only two cases in the history of the country in which the courts have struck down completely an executive order. The first of these was in 1952, when the U.S. Supreme Court negated the seizure of the steel mills ordered by President Truman, observing that:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States ...." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [*Youngstown Sheet & Tube* v. *Sawyer*.]

Notwithstanding this U.S. Supreme Court decision, presidents of both parties continued to implement controversial initiatives using presidential directives — often in the face of Congressional opposition. The other time the court struck down completely an executive order was President Clinton's executive order relating to the hiring of permanent striker replacements by

federal contractors, and the decision of the U.S. Court of Appeals for the D.C. Circuit was not appealed to the U.S. Supreme Court. *Chamber of Commerce of the U.S.* v. *Reich*.

Congress has done little more than the courts in restricting presidential lawmaking. Nevertheless, Congress did make one bold step to check executive powers in the related arenas of executive orders, states of emergency and emergency powers. The Congressional concern led to the creation of a Special Senate Committee on the Termination of the National Emergency, co-chaired by Sens. Frank Church (D-ID) and Charles Mathias, Jr. (R-MD), more than 25 years ago. The diligent efforts of this committee resulted in the successful codification of efforts to restore the Constitutional separation of powers, through a check on the presidential exercise of "emergency powers," by means of the National Emergencies Act. Other contemporaneous statutory efforts to check presidents' unconstitutional exercise of power include the War Powers Resolution, the International Emergency Economic Powers Act, and the amendment of the Trading with the Enemy Act of 1917.

Unfortunately, these 1970s efforts to impose restraints on unconstitutional exercises of power by presidents have been ineffective — witness the inability of Representatives and Senators to obtain judicial review of President Clinton's war upon the Federal Republic of Yugoslavia pursuant to the terms of the War Powers Resolution. Likewise, notwithstanding the National Emergencies Act and the International Emergency Economic Powers Act, the number of presidentially-declared national emergencies has exploded. Since then, although individual members of Congress have spoken out, the Congress has failed to act.

I commend the efforts of this Subcommittee to take a new look at the issue of executive lawmaking, urge you to expand the scope of your investigation to focus on emergency powers, and in both cases to begin your investigation where Senators Church and Mathias left off, and to act boldly to curtail Presidential lawmaking.

Two proposals are currently before the House which would address this concern. First there is Rep. Metcalf's H. Con. Res. 30, which would express:

the sense of the Congress that any Executive order issued by the President before, on, or after the date of the approval of this resolution that infringes on the powers and duties of the Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the Executive order, is advisory only and has no force or effect unless enacted as law.

This proposal has been useful in focusing attention on the problem, but the solution it proposes would be cosmetic only. First, as a concurrent resolution, even upon passage, it will not enjoy the force of law. If a resolution passed into law by both Houses of Congress over a presidential veto, such as the War Powers Resolution, cannot be enforced in the courts, then passage of a resolution with no legal effect is essentially a symbolic gesture. Second, it is unclear what constitutes an infringement of the powers and duties of Congress, or a specific appropriation for the purpose of the executive order. And third, even if it were an effective limitation on executive orders, it could be evaded easily by entitling the directive as a proclamation (or some other directive). Rather than truly solve the problem, I fear passage of this proposal would be counterproductive in that it would give Members of Congress and the public the false impression that the problem had been solved.

By contrast, H.R. 2655, Rep. Paul's and Rep. Metcalf's approach holds great hope to solve this recurrent problem. This bill, which, as a proposed statute, would become legally binding, would:

- establish the first statutory definition of "presidential directive" (it uses the term "presidential order");
- expand access to the courts to challenge the legality of presidential orders;
- define the constitutional powers which the president may exercise by presidential order; would require any statutory authority for the presidential order to be express for the order to be valid;
- terminate the powers and authorities possessed by the president, executive agencies, or federal officers and employees, that are derived from the currently existing states of national emergency;
- vest the authority to declare future national emergencies in Congress alone; and
- repeal the ineffective War Powers Resolution.

Lastly, I would say that concerns about presidential lawmaking must not be written off as attacks on the policies underlying the executive orders. This is not partisan politics masquerading as separation of powers issues. It is true that it finds fault with President Clinton, but it is also finds fault with Presidents Reagan, Bush, and others. As a review of the above-mentioned CRS report will demonstrate, presidential directives were used to legislate to accomplish political objectives which could be viewed as "liberal" and political objectives which could be viewed as "conservative." No constitutional power should be misused, irrespective of the benefit perceived for a political objective. If constitutional processes are violated, in the end, we all lose.

In his concurring opinion in *Youngstown Sheet and Tube*, Justice Frankfurter observed:

The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. **The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement.** Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. **Such a step would most assuredly alter the pattern of the Constitution.** [Emphasis added.]

The problem before you is extremely serious, but solvable. The U.S. Constitution charges you with the duty to protect it from assault, and the American people look to you to do just that. Thank you.