

Executive Orders, “The Very Definition of Tyranny,” and the Congressional Solution, the Separation of Powers Restoration Act

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“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

The doctrine of separation of powers is fundamental to the American system. The Constitution vests legislative power in Congress,² judicial power in the courts,³ and executive power in the President.⁴ But what if the President were to usurp legislative powers? What if the common law made it almost impossible for citizens and state and local government officials to challenge the exercise of these powers? Executive orders are Presidential actions that often have legislative effects, but such orders are frequently shielded from review in the courts.

Since President Washington issued the first executive order in 1793,⁵ controversy has surrounded the issuance of executive orders.

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1. THE FEDERALIST NO. 47, at 300 (James Madison) (Henry Cabot Lodge ed., 1888).

2. U.S. CONST. art. I, § 1.

3. U.S. CONST. art. III, § 1.

4. U.S. CONST. art. II, § 1.

5. Bryan A. Liang, “A Zone of Twilight”: Executive Orders in the Modern Policy State 4, in 3 NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, BRIEFLY . . . PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION 3 (George C.

Historically, the executive order was used mainly for disposition of public property and designation of certain lands for military or Native American use.⁶ Today, there are three main types of presidential proclamations that may have legal force: those directed towards agents of the executive branch, those in connection with the President's role as Commander in Chief, and those pursuant to Congressional authorization.⁷ Presidents may use this power to regulate executive branch employees, to recognize or create a national holiday, or to transfer property between government offices.⁸ Although executive order power is not specifically granted in the Constitution, Presidents may point to their general power as head of the executive branch or their role as Commander in Chief as Constitutional sources for executive order power.⁹ Despite the seemingly innocuous historical role of executive orders, Presidents are frequently criticized for the scope of their executive orders.¹⁰ Partially realizing Madison's fear of tyranny, critics often suggest that broad executive orders border on Presidential "legislating."¹¹

Furthering the threat of tyranny, courts seldom rule against executive orders.¹² The United States Supreme Court has seldom addressed cases involving executive orders. In fact, the Court has only ruled against the expansive use of executive orders once.¹³

Landrith, III ed., Mar. 1999); Susan Page, *When a Law is Unlikely, Often an Order Will Do*, U.S.A. TODAY, Aug. 11, 1997, at 7A.

6. John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. REV. 99, 102 (2000) (citation omitted).

7. *Id.* at 100.

8. *Id.* at 101.

9. See *infra* notes 61-63 and accompanying text.

10. See, e.g., Liang, *supra* note 5, at 4-7 (discussing the broad scope of executive orders issued by Presidents Washington, John Adams, Jefferson, Madison, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Carter, Reagan, Bush, Clinton, and Ford).

11. See, e.g., *Clinton as Legislator*, INDIANAPOLIS STAR, Nov. 8, 1999, at A12 ("Let's stop Clinton before he legislates again."); Page, *supra* note 5 ("For a president, an executive order can be as powerful as a law—and considerably easier to achieve.").

12. See *infra* Part I.

13. See generally John A. Sterling, *Above the Law: Evolution of Executive Orders (Part Two)*, 31 UWLA L. REV. 123, 123 (2000). John Sterling wrote: "The Supreme Court had ruled only once against expansive use of the Executive Order prior to Bill Clinton's first term in the Oval Office." *Id.* He then states that the Supreme Court ruled twice against Clinton with regard to executive orders. *Id.* However, he later cites *Chamber of Commerce v. Reich* and *Clinton v. City of New York* as two cases against President Clinton and executive orders. *Id.* at 131-32. However, this author found the following: 1) Although the case does involve an executive order, *Chamber of Commerce v. Reich* is not

Lower federal courts regularly uphold executive orders.¹⁴ The seemingly limited review of executive orders coupled with criticism of the increasingly broad scope of orders suggests that an examination of executive order authority is important.

In this Note, I will review the breadth of executive order power by analyzing legal challenges to that power and suggested legislation intended to limit executive order power. Part I argues that executive orders are frequently upheld by federal courts and are difficult to challenge. This section examines past challenges to executive orders, both successful and unsuccessful, and develops suggestions for bringing a successful challenge to executive order power. Part II applies the suggestions in Part I to one of President Clinton's executive orders to illustrate how difficult it currently is to bring a challenge to an executive order. Part III examines the proposed Separation of Powers Restoration Act,¹⁵ and argues that the proposed act would facilitate challenges to executive orders.

I. Challenges to executive orders

There have been many challenges to executive orders throughout history.¹⁶ This section will examine common executive order challenges and consider similarities in these challenges. By drawing similarities, this section will develop a list of prerequisites for challenging an executive order by analyzing unsuccessful challenges to executive orders. This section will suggest four sets of circumstances under which federal courts will strike down executive orders by looking at four cases where orders were successfully challenged.

a Supreme Court case. See *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1995); 2) *Clinton v. City of New York* is a Supreme Court case; however, it involves a challenge to Presidential action pursuant to the Line Item Veto Act, which is distinguishable from the executive orders discussed here. 524 U.S. 417 (1998). Thus, eliminating John Sterling's two Clinton cases, the Supreme Court only ruled against the expansive use of executive orders once.

14. See *infra* Part I.

15. H.R. 864, 107th Cong. (2001).

16. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *Farkas v. Tex. Instrument, Inc.* 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3 (3d Cir. 1964).

A. Order must have the force and effect of law

To be challengeable, an executive order must have the force and effect of law.¹⁷ Under the United States Code, federal court jurisdiction is limited to “federal question[s].”¹⁸ “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”¹⁹ For federal courts to have jurisdiction over a civil action challenging an executive order, the order must have the “force and effect of law.”²⁰

There are two different branches of analysis under this requirement. First, if the order is issued in accordance with Congressional statutory mandate or delegation, the order has the force and effect of law.²¹ However, if the order is not based on an express Congressional grant of authority, federal courts may either look for an implied Congressional basis for the order or find that no statutory basis exists so that the order does not have the force and effect of law.

1. Express Statutory Authority

Federal courts have repeatedly held or noted in dicta that executive orders issued pursuant to statutory mandate have the “force and effect of law.”²²

Congress may delegate lawmaking powers to the executive branch, including its administrative agencies, through statute When a President issues an executive order on the basis of a grant of statutory authority, the President theoretically exercises legislative authority delegated to Congress. As such, federal courts have treated such executive orders as the equivalent of federal statutes, having the force and

17. Liang, *supra* note 5, at 10.

18. 28 U.S.C. § 1331 (1994).

19. *Id.* (emphasis added).

20. *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964); *Chen v. INS*, 95 F.3d 801, 805-06 (9th Cir. 1996) (superceded by statute on other grounds as stated in *Chen v. INS*, 195 F.3d 198, 201 (4th Cir. 1999)).

21. Liang, *supra* note 5, at 10.

22. *See, e.g.*, *Chen v. INS*, 95 F.3d 801, 805-06 (9th Cir. 1996) (superceded by statute on other grounds as stated in *Chen v. INS*, 195 F.3d 198, 201 (4th Cir. 1999)); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967).

effect of law.²³

Since statutes issued by Congress are federal laws for jurisdiction purposes, it follows that executive orders based on statutory mandate have the force and effect of law. The analysis becomes more complicated when the executive order is not issued pursuant to clear Congressional mandate.

2. *No Express Statutory Authority*

If an executive order is not based on statutory authority, challenging that order is more difficult. In this case, courts may only allow the challenge if the order is based on an implied Congressional grant of authority. For example, in *Contractors Ass'n v. Secretary of Labor*, the plaintiffs were challenging the validity of the Philadelphia Plan, which was developed by the Department of Labor pursuant to Executive Order No. 11,246.²⁴ The court found that the President had implied authority from Congress to implement an appropriation program and that, in the absence of a contrary Congressional enactment, the Philadelphia Plan was within the implied authority granted.²⁵ Since the court in *Contractors Ass'n* found there was implied Congressional authority for the Order,²⁶ the Order should have had the force and effect of law so that it could be challenged. However, once the court found that the Order was authorized by Congress, the court also found that the Executive Order was valid because it was within the authority granted.²⁷ Further, the court found that the Philadelphia Plan was valid because the Executive Order granted broad authority to the Labor Department.²⁸ Thus, although the plaintiffs in this case succeeded in proving that the Executive Order had the force and effect of law, the plaintiffs lost because the authority, which gave the Order the force and effect of law, also gave the President sufficient discretion to issue the Order.

Federal courts may find that an order may not be challenged if the order does not have a statutory basis of authority.²⁹ For example,

23. Liang, *supra* note 5, at 8 (internal citations omitted).

24. *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 162 (3d Cir. 1971), *cert. denied sub nom. Contractors Ass'n v. Hodgson*, 404 U.S. 854 (1971).

25. *Id.* at 171.

26. *Id.*

27. *Id.* at 171, 175-77.

28. *Id.* at 175.

29. In *Youngstown Sheet & Tube Co. v. Sawyer*, an executive order was struck down by the Supreme Court because it had no basis of authority either in statute or in the

in *Chrysler Corp. v. Brown*, the Supreme Court held that disclosure regulations under Executive Order 11,246 did not have the force and effect of law and thus did not alter the disclosures prohibited by the Trade Secrets Act, 18 U.S.C. § 1905.³⁰ The Court noted, “[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’”³¹ However, “in order for such regulations to have the ‘force and effect of law,’ it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress.”³² In *Chrysler Corp.*, this alleged nexus was “so strained that it would do violence to established principles of separation of powers to denominate these particular regulations ‘legislative’ and credit them with the ‘binding effect of law.’”³³ Although this case did not involve a direct challenge to an executive order,³⁴ this logic suggests that executive orders without any statutory basis will not have the force and effect of law. As noted above, orders that do not have the force and effect of law may not be challenged in federal court because the federal courts only have jurisdiction over claims arising under the *laws* of the United States.³⁵

B. Allowance for a private right of action

Even if an executive order has the force and effect of law, plaintiffs still need to demonstrate that a private right of action exists to challenge the order.³⁶ For example, in *Independent Meat Packers Ass’n v. Butz*, the court heard an appeal from an order of the district court enjoining implementation of United States Department of Agriculture (USDA) regulations.³⁷ The district court had partially

Constitution. 343 U.S. 579 (1952) [“the Steel Seizure Case”]. However, this decision has been read by courts to hold that the Presidential orders will only have the force and effect of law if there is a delegation from Congress because the *Steel Seizure Case* suggested that there is no inherent authority for Presidential legislation in the Constitution. See, e.g., *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 234-35 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

30. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

31. *Id.* at 295.

32. *Id.* at 304.

33. *Id.* at 307-08.

34. The case involved a challenge to regulations based upon an executive order.

35. See, e.g., *Chen v. INS*, 95 F.3d 801, 805-06 (9th Cir. 1996) (superceded by statute on other grounds as stated in *Chen v. INS*, 195 F.3d 198, 201 (4th Cir. 1999)).

36. Liang, *supra* note 5, at 17-20. See also *Indep. Meat Packers Ass’n*, 526 F.2d at 236.

37. *Indep. Meat Packers Ass’n*, 526 F.2d at 231.

based its decision on the fact that the regulations conflicted with Executive Order 11,821.³⁸ First, the appellate court determined that the Executive Order did not have the force and effect of law because the Order did not state a statutory basis for authority, and the President merely intended the Order as a “managerial tool.”³⁹ The court noted, “[e]ven if appellees [original plaintiffs] could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action.”⁴⁰ Because the Order did not *expressly grant* a right of action, the court held that no private right of action existed.⁴¹ If the existence of a private right of action turns on whether the Order expressly grants a right of action, this will make executive orders almost impossible to challenge. Presidents are not likely to include provisions for private rights of action to challenge their orders.

C. Exhausting Administrative Remedies

Even if an order has the “force and effect of law,” potential plaintiffs may have alternatives to federal court. If an executive order provides for any type of remedy other than suit in federal court, a court may require that potential plaintiffs exhaust these remedies before filing suit.⁴² For example, in *Farmer v. Philadelphia Electric Co.*, a former lineman of Philadelphia Electric Company [“Electric Company”] was injured in the course of work.⁴³ The Electric Company allowed him to change jobs for a short time, but then required him to return to work as a lineman.⁴⁴ When the employee refused, saying he was not physically able, the Electric Company fired him.⁴⁵ The former employee brought suit as a third party beneficiary of contracts between the United States and the Electric Company alleging violation of the nondiscrimination clause required by executive order in government contracts.⁴⁶ The court noted that there

38. *See id.* at 234.

39. *Id.* at 235-36.

40. *Id.* at 236.

41. *Id.*

42. Liang, *supra* note 5, at 10.

43. *Farmer*, 329 F.2d at 5.

44. *Id.*

45. *Id.*

46. *Id.*

was not a private right of action available.⁴⁷ However, the holding, affirming a motion to dismiss the complaint, was based on “the doctrine of ‘exhaustion of administrative remedies.’”⁴⁸ Specifically, the court concluded that the plaintiff should “be required to file a complaint with an appropriate contracting agency or with the President’s Committee before being permitted to seek the aid of a Federal district court.”⁴⁹

Once exhaustion through an executive agency is required, it becomes unlikely that orders will be invalidated. The executive branch is likely to rule in favor of maximum authority for the executive agent, their employer. If a federal court accords deference to that ruling, the plaintiff may not have the benefit of a non-biased determining body. As a further obstacle to challenging executive orders, *Farmer* itself suggests that the presence of alternative remedies may be persuasive evidence that there is no allowance for a private right of action.⁵⁰

D. Summary of Requirements for Executive Order Challenge

In conclusion, there are three main requirements for challenging executive orders. First, the order must have the force and effect of law in order for the federal court to have jurisdiction over the claim. If the order has an express statutory basis, the order will have the force and effect of law. If the order does not have an express statutory basis, federal courts will determine whether there is any implied Congressional authority. If there is not, the order will not have the force and effect of law and thus will not be challengeable. Second, there must be an allowance for a private right of action to challenge the order. Federal courts may find that no private right of action exists if the order does not expressly provide for such a right. Finally, plaintiffs may need to exhaust administrative remedies. Additionally, if the order provides for alternate remedies, the order may be held not to allow for a private right of action in federal court.

47. *Id.* at 8-10. This may be partly due to the unusual nature of the case. *See id.* at 4 (noting this case appears to be the first time federal courts have addressed a case like this).

48. *Id.* at 10.

49. *Farmer*, 329 F.2d at 10. *But see* *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184, 1201-03 (11th Cir. 2002) (finding jurisdiction even though relevant executive orders provided an alternative conflict resolution process).

50. *Farmer*, 329 F.2d at 8-10.

E. Successful Challenges

Despite the inherent difficulties in challenging executive orders, there have been some successful challenges. This next section looks at four successful challenges to executive orders. These successful challenges suggest at least four sets of circumstances under which executive orders are limited. First, *Youngstown Sheet & Tube Co. v. Sawyer* suggests that inherent Constitutional authority to issue executive orders is limited.⁵¹ Second, *Liberty Mutual Insurance Co. v. Friedman* suggests that executive authority based on a Congressional grant is limited to the scope of that grant of authority.⁵² Third, *Ozonoff v. Berzak* indicates that executive orders cannot violate the Constitution.⁵³ Finally, *Chamber of Commerce v. Reich* suggests that executive orders are limited where the orders are pre-empted by statute.⁵⁴

I. *Youngstown Sheet & Tube Co. v. Sawyer* – Order Based on Claimed Inherent Authority

The only Supreme Court case regarding executive orders involved President Truman's Executive Order 10,340.⁵⁵ In late 1951, steel companies and employees began arguing over terms and conditions of employment.⁵⁶ After several federal attempts to encourage settlement, the United Steelworkers of America, C.I.O., gave notice for a strike on April 4, 1952.⁵⁷ President Truman, concerned about the national supply of steel for war materials, issued Executive Order 10,340, which authorized the Secretary of Commerce to take possession of most of the steel mills to ensure that the mills continued to function.⁵⁸ The mill owners argued that this

51. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Liang, *supra* note 5, at 25.

52. *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981); Liang, *supra* note 5, at 29-30.

53. *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984); Liang, *supra* note 5, at 27-28.

54. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); Liang, *supra* note 5, at 33. *See also* *Building & Constr. Trades Dep't v. Allbaugh*, 395 F.3d 28 (D.C. Cir. 2002) (concluding that enforcement of Executive Order 13202 should not have been enjoined because it was not preempted by the National Labor Relations Act).

55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) ("the Steel Seizure Case").

56. *Id.* at 582.

57. *Id.* at 583.

58. *Id.* at 582-83.

action was legislative and beyond Presidential authority.⁵⁹ The Court agreed with the mill owners and upheld the district court ruling, striking down the Order.

Justice Black, writing for the majority, first established that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”⁶⁰ Although there was neither an express Constitutional nor a Congressional grant of this authority, President Truman cited an implied grant of this power pursuant to a combination of three Constitutional provisions: (1) “[t]he executive Power shall be vested in a President of the United States of America;”⁶¹ (2) the President “shall take Care that the Laws be faithfully executed;”⁶² and (3) the President’s power as Commander in Chief of the Army and Navy.⁶³ The Court dealt with the Commander in Chief argument first. Without clearly stating a test for the proper limit of Presidential power as Commander in Chief, the Court said that this power would not support “tak[ing] possession of private property in order to keep labor disputes from stopping production.”⁶⁴ The Court then rejected President Truman’s other arguments based on both the framework and language of the Constitution. The Court concluded that the President’s role as law executor was contrary to the idea that the President could also be a lawmaker.⁶⁵ Justice Black wrote of the President, “[t]he Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”⁶⁶ The Court noted that Article I expressly gave all lawmaking power to Congress.⁶⁷

It was clear from the *Steel Seizure Case* that there were limits on executive order power where there was no statutory basis and the Order went beyond the scope of the inherent powers of the President under the Constitution.⁶⁸ The Supreme Court did not state a clear

59. *Id.* at 582.

60. *Id.* at 585.

61. U.S. CONST. art. II, § 1, cl. 1.

62. U.S. CONST. art. II, § 3.

63. U.S. CONST. art. II, § 2, cl. 1.

64. *Youngstown*, 343 U.S. at 587.

65. *Id.*

66. *Id.*

67. *Id.* at 587-88. See U.S. CONST. art. I.

68. *Youngstown*, 343 U.S. at 588-89.

standard to determine whether an executive order was beyond the scope of inherent powers. However, the *Steel Seizure Case* stands for the proposition that executive order power may be limited when the order is not based on statute and not supported by inherent Presidential Constitutional authority.⁶⁹

2. *Liberty Mutual Insurance Co. v. Friedman – Order Beyond the Scope of Granting Authority*

In *Liberty Mutual Insurance Co. v. Friedman*, insurance companies challenged a determination by Weldon J. Rougeau, the Director of the Office of Federal Contract Compliance Programs, that insurance companies were subcontractors within the meaning of Executive Order No. 11,246.⁷⁰ First, the court affirmed that the insurance companies were subcontractors within the meaning of the regulations.⁷¹ However, the court held that the “application of the Executive Order to plaintiffs is not reasonably within the contemplation of any statutory grant of authority.”⁷² The court concluded, “the question is ‘whether or to what extent Congress did grant . . . such authority’ to the executive branch of the government.”⁷³ In analyzing the extent of authority granted by Congress, the court assumed that the Order was based on the Procurement Act.⁷⁴ However, the court found that the government agents had “acted outside any grant of legislative authority when they sought to impose the requirements of Executive Order 11,246 upon plaintiffs.”⁷⁵

In *Liberty Mutual Insurance Co.*, the court applied *Chrysler Corp.*⁷⁶ to find that even if statutory authority was assumed, the Congressional grant of authority would need to “reasonably contemplate” the regulations issued.⁷⁷ Thus, after an executive order is traced back to the basis of authority, the order (or regulations based on that order) cannot exceed the scope of that grant of

69. *See id.*

70. *Friedman*, 639 F.2d at 165.

71. *Id.* at 166-67.

72. *Id.* at 168.

73. *Id.* (quoting *NAACP v. Federal Power Comm’n*, 425 U.S. 662, 665 (1976)).

74. *Id.* at 170.

75. *Id.* at 172.

76. *See supra* notes 31-35 and accompanying text.

77. *Friedman*, 639 F.2d at 169.

authority.

3. *Ozonoff v. Berzak – Order that Violates the Constitution*

In *Ozonoff v. Berzak*, the plaintiff challenged Executive Order No. 10,422, which required citizens to pass a loyalty check before they entered employment for an international organization.⁷⁸ The court found the Order unconstitutionally broad under the First Amendment, or at least unlawful as applied to a World Health Organization (WHO) applicant.⁷⁹

Ozonoff made it clear that the First Amendment could limit broad executive action. Since an executive order must have the force and effect of law to be challengeable, it is not surprising that these “laws” are limited by the Constitution. Thus, although *Ozonoff* only dealt with the First Amendment, it is clear that executive order power is limited by the Constitution.

4. *Chamber of Commerce v. Reich - Order Based on Statute That Violates Another Statute*

In *Chamber of Commerce v. Reich*, the Court of Appeals for the District of Columbia struck down President Clinton’s Executive Order No. 12,964 because the Order was pre-empted by the National Labor Relations Act (NLRA).⁸⁰ Clinton’s Executive Order declared that “contracting agencies shall not contract with employers that permanently replace lawfully striking employees.”⁸¹ The Secretary of Labor, Reich, issued regulations that implemented the Order.⁸² The Chamber of Commerce and other concerned entities sought declaratory and injunctive relief against enforcement of the regulations.⁸³ The plaintiffs alleged that the Order did not comply with the Procurement Act on which it was based and that it violated an employer’s statutory right under the NLRA.⁸⁴

First, the court noted that it could review the legality of the President’s action through a suit seeking to enjoin a President’s agent

78. *Ozonoff*, 744 F.2d at 225-26.

79. *Id.* at 230-34.

80. *Reich*, 74 F.3d at 1324, 1339.

81. *Id.* at 1324 (quoting Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995)).

82. *Reich*, 74 F.3d at 1324.

83. *Id.* at 1325.

84. *Id.*

from enforcing the action.⁸⁵ Next, the court found that the plaintiffs had a cause of action and that sovereign immunity was waived under the Administrative Procurement Act,⁸⁶ even though the plaintiffs did not explicitly bring suit under the APA.⁸⁷ The court concluded that the Executive Order conflicted with and was preempted by the NLRA.⁸⁸

Chamber of Commerce suggests that executive order authority may not be exercised in cases where the order is based on a statute and is preempted by another statute. However, the holding may be limited to orders that conflict with the NLRA because the court engaged in a discussion of federal pre-emption under the NLRA.⁸⁹ If the holding is not construed narrowly to apply only to cases of conflict with the NLRA, then the case suggests, at least, that it must be clear that the contrary statute pre-empts the executive order before the order will be invalidated.

5. Conclusion

Case law suggests that executive orders may be successfully challenged if they are beyond the scope of Constitutional and Congressional grants of authority. Orders may also be successfully challenged if they violate the Constitution or are preempted by statute. Even if there are grounds to challenge an executive order, the prerequisites discussed earlier will still need to be met.

II. Clinton's Executive Example

In order to understand fully the difficulty in challenging executive orders, this Note will next consider an executive order from President Clinton using the framework for challenging executive orders discussed in Part I. This Note will first consider the text and effect of the executive order, Executive Order No. 13,083,⁹⁰ to provide an example of why one might want to challenge an executive order. Next, this Note will demonstrate the difficulties in challenging the Order based upon the criteria established in Part I.

On May 14, 1998, President Clinton issued Executive Order

85. *Id.* at 1328.

86. 5 U.S.C. § 702 (1994).

87. *Reich*, 74 F.3d at 1328-30.

88. *Id.* at 1338-39.

89. *Id.* at 1333-39.

90. Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 14, 1998).

13,083 setting out “federalism” guidelines, which federal agencies were to consider before drafting regulations.⁹¹ The goal of this Order sounds harmless enough until one examines the language of the Order itself. The Order noted that it is important for agencies “to recognize the distinction between matters of national or multi-state scope (which may justify Federal action) and matters that are merely common to the States.”⁹² Then the Order listed some matters which would require federal action including, but not limited to: “[w]hen there is a need for uniform national standards,” “[w]hen decentralization increases the costs of government thus imposing additional burdens on the taxpayer,” and “[w]hen States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States.”⁹³

This language represented a broad expansion of federal oversight. For example, the language “need for uniform national standards” is not further defined.⁹⁴ Uniform national standards in the area of criminal law would certainly facilitate crime prevention by providing citizens with notice of which activities are prohibited and aiding in the prosecution of cross-jurisdictional crimes. However, except for federal crimes, criminal law is an area that is generally left up to state control. Similarly, the language “[w]hen States would be reluctant to impose necessary regulations because of fears that regulated business activity will relocate to other States” is not further defined.⁹⁵ Since any business regulation might make businesses move to another state, this concern is potentially involved in every state regulation decision. However, regulations of businesses that do not fall under Congressional authority to regulate interstate commerce are left to state discretion by the Constitution.⁹⁶ This Executive Order could provide a basis for federal intrusion into traditional state arenas, contrary to legislative decisions and the Constitution.

Even if this Order is not an unconstitutional extension of federal power,⁹⁷ the Order reflects a policy decision that will influence

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. U.S. CONST. amend. X.

97. The order does note that “[t]here should be strict adherence to constitutional principles.” Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 14, 1998).

regulations. Those regulations could adversely affect state and local autonomy. This policy decision might be best as a product of the debate and compromise that occurs in Congress.

Assuming that one wanted to challenge Executive Order 13,083, the pertinent question for this Note is not *why* one would want to challenge the Order, but whether one *could* challenge the Order. First, as discussed above, for jurisdictional reasons, this Order would need to have the force and effect of law.⁹⁸ However, this Order does not cite a specific statutory or Constitutional basis for the Order.⁹⁹ The Order states that it is issued “[b]y the authority vested in me [Clinton] as President by the Constitution and the laws of the United States of America.”¹⁰⁰ Since no specific statutory authority is cited, a federal court might apply a *Chrysler Corp.*¹⁰¹ type of analysis and find that the Order did not have the force and effect of law. If the Order does not have the force and effect of law, it could not be challenged at all.¹⁰² It is also possible that a court might find an implied Congressional grant of authority for the Order. If the federal court found an implied grant of authority, it is possible that the court would find that the Order was within that grant of authority and thus valid.¹⁰³ Assuming a federal court found an implied statutory basis for the Order, a potential plaintiff would next need to prove that there was a private right of action available.

The plain text of the Order makes it clear that there is no private right of action created:

This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.¹⁰⁴

Since there is no private right of action created by this Order, an individual may not be able to challenge the Order in federal court.¹⁰⁵

98. See *supra* Part IA.

99. See Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (1998).

100. *Id.*

101. See *supra* note 31-36 and accompanying text.

102. See *supra* Part IA.

103. See, e.g., *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971), cert. denied sub nom. *Contractors Ass'n v. Hodgson*, 404 U.S. 854 (1971).

104. Exec. Order No. 13,083, 63 Fed. Reg. at 27,653 (May 14, 1998).

105. See *supra* Part IB.

Additionally, as noted above, the fact that no private right of action exists may be evidence that the Order does not have the force and effect of law. Under this analysis, even if a court were to follow the *Steel Seizure Case* and find that there was no Constitutional authority to issue the Order so that it should be invalid, potential plaintiffs could not bring the claim without a private right of action.¹⁰⁶

Potential plaintiffs may also have difficulty challenging this Order under the exhaustion of remedies doctrine.¹⁰⁷ The Order requires agencies to review the waiver process.¹⁰⁸ It further notes that agencies “shall, to the extent practicable and permitted by law, consider any application by a State or local government for a waiver of statutory or regulatory requirements”¹⁰⁹ This section of the Order suggests that there is a waiver process by which state and local governments could apply to waive any regulation issued under the Order. Thus, it is likely that a federal court would require a state or local government plaintiff to apply for a waiver and be denied before challenging the Order or its application in federal court.

In conclusion, under current laws, Executive Order No. 13,083 would be almost impossible to challenge. First, it is unlikely that a federal court would find that the Order has the force and effect of law so federal courts would not have jurisdiction to entertain a challenge. Second, even if the Order had the force and effect of law, it expressly disallows a private right of action. Finally, even if a private right of action existed under another legislative or Constitutional provision, a federal court would likely require, at minimum, that state and local government officials exhaust the remedies provided in the statute. Interestingly, this particular order was overruled in another way; there was such a public outcry over this action,¹¹⁰ that President Clinton suspended the Order three months later.¹¹¹

106. See *supra* note 36-41 and accompanying text.

107. See *supra* Part IC.

108. The waiver process is described below.

109. Exec. Order No. 13,083, 63 Fed. Reg. at 27,653 (1998).

110. John A. Sterling, *Above the Law: Evolution of Executive Orders (Part Two)*, 31 UWL L. REV. 123, 129 (2000) (quoting Catharine Edwards, *Executive Orders—Emergency Rule, Abuse of Power?*, INSIGHT ON THE NEWS MAGAZINE (Aug. 23, 1999), at <http://www.insightmag.com/main.cfm?include=detail&storyid=210404>).

111. See Executive Order 13095, 63 Fed. Reg. 42,565 (1998).

III. Separation of Powers Restoration Act

On March 6, 2001, Representative Ronald Paul introduced the Separation of Powers Restoration Act [the "Act"] to Congress.¹¹² The Act was referred to the House Committee on the Judiciary, where it currently waits for approval.¹¹³ The goal of the act is "[t]o restore the separation of powers between the Congress and the President."¹¹⁴ This section will analyze the Act and discuss how it would facilitate challenges to executive orders.¹¹⁵ First, this section will address the coverage of the Act. Then, this section will examine the Act's requirement of a Statement of Authority, the Act's limit on the effect of executive orders, and the Act's standing provisions.

A. Coverage of the Act

The Act sets limits on and requirements for "Presidential order[s]."¹¹⁶ The Act defines a "Presidential order" as "(1) any Executive order, Presidential proclamation, or Presidential directive; and (2) any other Presidential or Executive action by whatever name described purporting to have normative effect outside the executive branch which is issued under the authority of the President or any other officer or employee of the executive branch."¹¹⁷ According to the plain language, this definition includes both executive orders and regulations issued by other officials of the executive branch.

The broad definition, standing alone, is not a change from the common law. Many challenges to executive orders actually involve challenges to regulations issued pursuant to those orders.¹¹⁸ In these cases, federal courts have treated the regulations as derivative of the executive order which directed their issuance.¹¹⁹ "Regulations which are promulgated pursuant to the [Executive] Order likewise have the force and effect of law, provided that they are not inconsistent with

112. See H.R. 864, 107th Cong. (2001).

113. See *id.* (Bill Tracking Report available on LEXIS (2001)).

114. *Id.*

115. This Note will only deal with Sections 3, 4, 5 & 7 of the Act. Section 1 contains the title of the Act. H.R. 864, 107th Cong. § 1 (2001). Section 2 recites the Congressional findings on which the Act is based. H.R. 864, 107th Cong. § 2 (2001). Section 6 relates to National Emergency Power. H.R. 864, 107th Cong. § 6 (2001).

116. H.R. 864, 107th Cong. § 7 (2001).

117. *Id.*

118. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

119. See, e.g., *Chrysler Corp.*, 441 U.S. at 304; *Reich*, 74 F.3d at 1324, 1339.

the [Executive] Order or otherwise plainly unreasonable.”¹²⁰ Thus, in practice, the broad scope of the Act’s definition of “Presidential order” would not change the common law analysis of challenges to regulatory action pursuant to executive orders.

B. “Statement of Authority”

The Act requires a “statement of authority” for any “Presidential order.”¹²¹ This Section of the Act requires that the President “provide for each Presidential order a statement of the specific statutory or Constitutional provision which in fact grants the President the authority claimed for such action.”¹²² The Act declares invalid any Presidential order which does not include the statement of authority if the basis of authority is Congressional enactment.¹²³

Although this provision seems to limit executive order authority, there is unlikely to be any practical effect. Most executive orders already cite either a statutory or Constitutional basis. If this Act were passed, Presidents would be even more likely to cite some basis for their action. Even if an order did not include the statement of authority, it would still be valid under the Act if it were based on Constitutional authority because the invalidity provision only applies to executive orders issued pursuant to Congressional mandate. Thus, as a practical matter, this section of the Act only facilitates challenges to executive orders by ensuring that federal courts will not need to search for the basis of authority for the executive order.

C. Limiting the Effect of Presidential Orders

The Act would also limit the effect of Presidential orders.¹²⁴ Section 3 of the Act begins with a broad limit on Presidential orders declaring, “[a] Presidential order neither constitutes nor has the force of law and is limited in its application and effect to the executive branch.”¹²⁵ Standing alone, this clause would end challenges to executive orders. If executive orders lack the force and effect of law,

120. *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 368 (D.D.C. 1979) (upholding an executive order regarding discovery procedures and the regulations implementing those procedures pursuant to executive order).

121. H.R. 864, 107th Cong. § 4 (2001).

122. *Id.*

123. *Id.*

124. H.R. 864, 107th Cong. § 3 (2001).

125. *Id.* at § 3(a).

then the orders are not laws of the United States and federal courts would not have jurisdiction over suits based on the orders.¹²⁶ However, the Act limits this broad statement with exceptions.¹²⁷ Thus, the provision of the Act declaring that executive orders do not have the force of law does not apply to: reprieves or pardons (except in cases of impeachment), orders to military personnel related to actions as Commander in Chief, or orders pursuant to Congressional enactment that meet further criteria.¹²⁸ To meet the Congressional enactment exception, the order must cite the specific Congressional enactment, be pursuant to that enactment, be within the limits of the plain language of that enactment, and not be pursuant to treaty or bilateral or multilateral agreement which delegates power to a foreign entity not authorized under the Constitution or violates the Ninth or Tenth Amendments to the Constitution.¹²⁹

For Presidential orders relying on statutory authority, this section would not change the common law. Due to the statement of authority section of the Act, the President will already need to state the basis for his action, so citing the Congressional enactment is at most a procedural change.¹³⁰ In addition, lower courts have already required that Presidential action based on statute be within the limits of the authority granted by the statute.¹³¹ Thus, this section of the Act does not limit challenges to executive orders based on statutory authority.

However, if the Act is interpreted based on the plain language, the Act limits challenges to executive orders not based on statutory authority. As discussed above,¹³² there are executive orders based on implied Congressional authority and orders based on inherent Constitutional authority. Under section 3 of the Act, such orders no longer have the force and effect of law and are limited in scope to the executive branch. This means that citizens, entities, and governments harmed by regulations promulgated under orders pursuant to implied Congressional authority or inherent Constitutional authority could not challenge the underlying executive order in federal court. For

126. *See supra* Part IA.

127. HR. 864, 107th Cong. § 3(b) (2001).

128. *Id.*

129. *Id.*

130. *See supra* notes 121-23 and accompanying text.

131. *See, e.g.,* Liberty Mutual Ins. Co. v. Friedman, 639 F.2d 164, 172 (4th Cir. 1981).

132. *See supra* Part I.

example, in the *Steel Seizure Case*, the plaintiffs would have had no standing to sue because the order was based on inherent Constitutional authority,¹³³ and under this Act, that order would not have the force and effect of law. Thus, although this section of the Act does not change the common law with respect to orders based on statutory authority, the Act might make it impossible to challenge an executive order based on implied Congressional authority or Constitutional authority.

D. Standing for Challenging Executive Orders

The Act grants standing to several individuals and entities to challenge executive orders.¹³⁴ First, the Act declares that the standing granted is limited to challenges of “the validity of any Presidential order which exceeds the power granted to the President by the relevant authorizing statute or the Constitution.”¹³⁵ The Act grants standing to bring these challenges against executive orders to:

(1) Congress and its members if the order infringes on Congressional power, exceeds power granted by Congressional enactment or does not include a statement of authority when the authority is statutory; (2) to state and local governments officials if the order infringes on state or local power granted under Congressional enactment or treaty; and (3) to persons “aggrieved in a liberty or property interest adversely affected directly by the challenged order.”¹³⁶ This section of the Act facilitates challenging executive orders. With this language, Congress eliminated the need to prove a private right of action and possibly the need to prove that the order has the force and effect of law.¹³⁷

There is no need to prove a private right of action because the Act declares that “[t]he following persons may bring an action in an appropriate United States court.”¹³⁸ This language establishes a private right of action for Congress and its members when the order is based on statutory authority or interferes with Congressional authority.¹³⁹ Under the Act, Congress could challenge an order based

133. See *supra* notes 55-69 and accompanying text.

134. H.R. 864, 107th Cong. § 5 (2001).

135. *Id.*

136. *Id.*

137. See discussion *infra*.

138. *Id.*

139. *Id.* at § 5(1). This language may be a reaction to *Raines v. Byrd* where the

either on statute (expressly or impliedly) or inherent Constitutional authority provided that the order adversely affected Congressional authority. Arguably, it would only be advantageous for a member of Congress to attack an order if it adversely affected Congressional power; so, the Act effectively confers a private right of action on members of Congress for any needed circumstance.

The Act also establishes a private right of action for state and local government officials when the order violates rights based on Congressional enactments or treaties.¹⁴⁰ Unlike the Congressional right of action, there may be circumstances that are not covered by this language. For example, if state or local government officials wanted to challenge an executive order that infringed on state power as granted by the Constitution, the language would not provide that right of action. Nevertheless, this language is still sufficiently broad to make some challenges brought by state and local government officials easier to support.

Finally, the language establishes a private right of action for any person whose liberty or property interest is directly and adversely affected by the order.¹⁴¹ This language is sufficiently broad to cover both executive orders based on statutory authority and orders based on Constitutional authority. Since only directly injured persons would be able to bring an action in federal court under standing requirements, this language effectively applies to all challenges of executive orders by individuals. Thus, by conferring a private right of action in many cases in which executive orders would be challenged, the Act facilitates challenges to executive orders.

It is possible that the standing provisions of the Act would also eliminate the need for federal courts to determine if the regulation has the force and effect of law.¹⁴² The requirement that an executive order have the “force and effect of law” is related to federal court jurisdiction.¹⁴³ By providing that “[t]he following persons may bring an action in an appropriate United States court to challenge the validity of any Presidential order,”¹⁴⁴ Congress may specifically be

9

Supreme Court held that members of Congress did not have standing to challenge Presidential vetoes based on the Line Item Veto Act. *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

140. H.R. 864, 107th Cong. § 5(2) (2001).

141. *Id.* at § 5(3).

142. *See id.* at § 5.

143. *See supra* Part IA.

144. H.R. 864, 107th Cong. § 5 (2001).

extending federal court jurisdiction to these cases. If Congress is automatically giving federal courts jurisdiction over actions challenging Presidential orders, then the section which limits the effect of Presidential orders¹⁴⁵ would have no effect on the ability to bring challenges to executive orders. This interpretation would allow challenges to any Presidential order, provided the individual met the requirements of the Act itself.¹⁴⁶ However, it is not clear what the language “appropriate United States court” means.¹⁴⁷ It is possible that this language merely means choosing the “appropriate” court based upon geographic and other personal jurisdictional criteria. However, it is also possible that, in the context of the Act as a whole, including the language limiting the effect of Presidential orders, the language “appropriate” still requires an evaluation of the jurisdictional requirement of whether a federal question exists. Under this interpretation, it is possible that no “appropriate” court would exist for challenges where the order does not have the force and effect of law. The impact of this section of the Act with respect to determinations of whether the order has the force and effect of law is uncertain.

E. Facilitating Challenges Under the Separation of Powers Act

The Act facilitates challenges to executive orders in several ways. First, the Act requires a statement of the basis of authority for any executive order.¹⁴⁸ This requirement will likely encourage Presidents to include the basis for their executive order, which will allow courts to determine clearly the basis of authority. Second, the Act eliminates the need to prove a private right of action provided a plaintiff meets certain criteria.¹⁴⁹ Finally, the Act may confer jurisdiction on federal courts over all executive orders, which would eliminate the need to determine if the order has the “force and effect of law.”¹⁵⁰

IV. Conclusion

The separation of powers among the legislative, judicial, and

145. *See supra* Part IIIC.

146. *See supra* note 135 and accompanying text.

147. H.R. 864, 107th Cong. § 5 (2001).

148. H.R. 864, 107th Cong. § 4 (2001).

149. H.R. 864, 107th Cong. § 5 (2001).

150. *Id.*

executive branches is a founding principle of the American system. Executive orders which are legislative in nature can upset the balance of the separation of powers by concentrating legislative power in the executive branch. Executive orders are protected from judicial review by common law requirements for challenging an executive order. To challenge an executive order in federal court, potential plaintiffs must prove that the order has the force and effect of law and that there is a private right of action. Even if plaintiffs prove both of those requirements, potential plaintiffs may need to exhaust administrative remedies and the existence of alternative remedies may be proof that no federal judicial remedy exists. This Note has demonstrated the difficulty in challenging an executive order by applying the current challenge requirements to an executive order from President Clinton.

Analysis of successful challenges to executive orders suggests four areas in which federal courts will overturn orders. First, federal courts may overturn executive orders based solely on inherent Constitutional authority. Second, federal courts may overturn executive orders based on Congressional grant of authority if the order exceeds the scope of that grant of authority. Third, federal courts may overturn executive orders that violate the Constitution. Finally, federal courts may overturn executive orders, which are preempted by other statutes.

The Separation of Powers Restoration Act would make executive orders easier to challenge in federal courts. The Act requires a statement of authority, eliminates the need to prove a private right of action, and may eliminate the need to prove that the challenged order has the force and effect of law. Because this Act facilitates challenges to executive orders, it will help protect the separation of powers by allowing Presidential legislative actions to be challenged in federal court, just as other legislative actions may be challenged. The Act will assist Congress, the judiciary, and the public in ensuring that the President is not legislating without supervision and will help protect our country from “the very definition of tyranny.”¹⁵¹

151. THE FEDERALIST NO. 47, at 300 (James Madison) (Henry Cabot Lodge ed., 1888).

