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Executive Orders: An Introduction

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SUMMARY

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Executive Orders: An Introduction

Executive orders are written instruments through which a President can issue directives to shape policy. Although the U.S. Constitution does not address executive orders and no statute grants the President the general power to issue them, authority to issue such orders is accepted as an inherent aspect of presidential power, though their legal effect depends on various considerations. This report discusses the following:

- **Issuance of Executive Orders.** The typical process for issuing an executive order is set forth in an executive order issued by President John F. Kennedy. That process is coordinated by the Office of Management and Budget (OMB), which receives comments and language from impacted and interested agencies. Once OMB and stakeholder agencies have reviewed the draft language, the draft order is sent to the Attorney General and Director of the Office of the Federal Register for review, and then on to the President for signing. After signing, executive orders are generally published in the *Federal Register*. Not all executive orders go through this process.
- **Authority for Executive Orders.** Executive orders typically convey presidential directives intended to have the force and effect of law. To have legal effect, those directives must be issued pursuant to one of the President's sources of power: either Article II of the Constitution or a delegation of power from Congress. One way that Congress can delegate power to the President is by enacting a statute before the order issues. Congress can also ratify an already-issued executive order by enacting a statute, or can in rare circumstances impliedly ratify an executive order through inaction.
- **Judicial Review of Executive Orders.** Courts sometimes review the legality of executive orders. For example, a court may determine whether the President may act at all. In those circumstances, the court will employ a three-part analysis articulated by Justice Robert Jackson in his concurring opinion to the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*. In other cases, a reviewing court may determine the scope of Congress's delegation of power to the President. To perform that analysis, courts will generally use traditional tools of statutory interpretation. Courts may also be required to determine the scope of the President's action in the executive order. Courts will begin with the text of the executive order, and may defer to agency interpretations of that order (depending on the circumstances of the particular case). Separately, courts may also review other constitutional issues raised by the executive order (for example, whether the order violates the First Amendment to the U.S. Constitution).
- **Modification and Revocation of Executive Orders.** A President may amend, rescind, or revoke a prior executive order issued by his or an earlier Administration. Although executive orders can be flexible and powerful, they can also be impermanent because a later President can, generally, revoke or modify any previously issued executive order with which he disagrees. Similarly, Congress may nullify the legal effect of an executive order issued pursuant to power that it delegated to the President.

Not all presidential directives take the form of an executive order. For example, some directives take the form of presidential proclamations and executive memoranda. Although a House of Representatives committee report observed that executive orders tend to be directed toward government officials and proclamations tend to be directed at private parties, there is no clear substantive distinction between these forms of executive action (other than the way they are titled). Regardless of the form of directive, each must be issued pursuant to one of the President's powers to have legal effect. Although the form of the directive may dictate whether it is published in the *Federal Register*, there is no general legal requirement that the President use a particular type of directive to do a particular thing (although a statute giving power to the President may require that the President exercise that power using a particular directive).

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The U.S. Constitution vests the President with the executive power of the United States.[1] In exercising these powers, the President may convey directives through various written instruments, including executive orders, presidential proclamations, and executive memoranda.[2] In addition to conveying policy goals or directives, an executive order or other written instrument issued by the President may have the force of law as long as it is issued pursuant to one of his granted powers.[3] To have legal effect, an executive order must have as its source of authority either the President's powers in Article II of the Constitution or an express or implied delegation of power from Congress to the President.[4]

Although executive orders are a common form of presidential action, neither the Constitution nor any statute provides an overarching definition of an "executive order," and no statute grants the President the general authority to issue executive orders.[5] Nevertheless, it is widely accepted that the President has that power.[6] For example, President George Washington issued what is now regarded as one of the first executive orders, asking the heads of executive departments "to submit 'a clear account' of affairs connected with their [d]epartments."[7] Over the years, Presidents have used executive orders to institute measures of various levels of consequence and controversy. For example, executive orders were used to establish internment camps that housed Japanese Americans during World War II;[8] suspend the writ of habeas corpus during the Civil War;[9] and bar discrimination based on race, color, religion, or national origin in the armed

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[1] U.S. CONST. art. II, § 1.

[2] *See, e.g.*, Christian Termyn, *No Take Backs: Presidential Authority and Public Land Withdrawals*, 19 SUSTAINABLE DEV. L. & POL'Y 4, 7 (2019) ("Presidents utilize various written instruments to direct the Executive branch and implement policy. These include executive orders, proclamations, presidential memoranda, administrative directives, findings, and others. Most of the time, the President is free to choose the instrument she wishes to use to carry out the executive function."). Although styled differently, there are no overarching legal requirements that the President use a particular type of directive to accomplish a particular objective, although some statutes granting power to the President do require a particular type of directive to trigger their powers. *See infra* "Other Presidential Directives."

[3] Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 884 (2020); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 548 (2005) ("The Constitution does not mention the president's authority to issue orders, though the president's power to do so is by now beyond dispute."). *See also* John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 338 (2010); PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 8–10 (2002); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 5 (2002); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 34–36 (2001).

[4] Stack, *supra* note 3, at 551–52.

[5] *Id.* at 546 ("American law provides no definition of executive orders."). The only statute that comes close defines an "executive order," for the purposes of the National Crime Prevention and Privacy Compact, somewhat circularly as "an order of the President of the United States or the chief executive officer of a State that has the force of law and that is promulgated in accordance with applicable law." 34 U.S.C. § 40316(11). As discussed *infra*, however, other forms of presidential action are subject to different (albeit unofficial and likely unenforceable) issuance procedures and publication requirements. *See infra* "Other Presidential Directives."

[6] Stack, *supra* note 3, at 551.

[7] *See* N.J. HIST. REC. SURV. WORKS PROGRESS ADMIN., LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS 1 (Clifford L. Lord, ed., 1943).

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

[9] *See, e.g.*, Exec. Order from President Lincoln to Major-General H. W. Halleck, Commanding in the Department of Missouri (Dec. 1861), *reprinted in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, vol. VI, at 99 (James D. Richardson, ed., 1902) ("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).

forces.[10] Presidents have also used executive orders for more mundane governing tasks such as directing federal agencies to evaluate their ability to streamline customer service delivery[11] and establishing advisory committees.[12]

Executive orders can be a powerful tool for a President to shape policy and direct his Administration.[13] Yet they are also impermanent, absent action by Congress. An executive order issued by one President may be revoked or modified by that President or by a later Administration. Congress may also alter the legal effect of an executive order issued pursuant to a power that it delegated to the President.[14]

This report begins by discussing the procedures for issuing an executive order; sources of authority that the President may draw upon in issuing an executive order; and how courts review executive orders. The report next discusses how executive orders may be amended, abrogated, or otherwise altered both by the executive and legislative branches. Finally, the report briefly compares and contrasts executive orders and other written instruments issued by the President.

How Executive Orders Issue

Few enforceable guidelines for the issuance of executive orders exist. Neither the Constitution nor any statute sets forth general procedural (or other) prerequisites for an executive order to issue.[15] Moreover, although the Administrative Procedure Act (APA) delineates particular procedures that an executive agency must take before acting, and for judicial review if those procedures are not followed,[16] the Supreme Court has held that the President's actions are not directly reviewable under the APA.[17] Thus, challenges to the lawfulness of executive orders typically turn not on the process of their issuance, but on whether their implementation is consistent with statutory or constitutional requirements.[18]

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[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] Exec. Order No. 13,571, 76 Fed. Reg. 24,339 (May 2, 2011).

[12] Exec. Order No. 13,565, 76 Fed. Reg. 7681 (Feb. 11, 2011).

[13] *See infra* "How Executive Orders Issue."

[14] *See infra* "Modification and Revocation."

[15] As explained in more detail *infra*, there are specific publication requirements for issued executive orders.

[16] *See, e.g.*, 5 U.S.C. § 553.

[17] Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). In practice, however, agency action implementing an executive order may be challenged under the APA, and set aside if the action is inconsistent with governing statutes. *See, e.g.*, E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 770 (9th Cir. 2018); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 160 (D.C. Cir. 2003) (reviewing challenge to agency action taken pursuant to executive orders); Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("We think it is now well established that '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'" (quoting *Franklin*, 505 U.S. at 815 (Scalia, J., concurring in part and concurring in the judgment)). *See also* CRS Legal Sidebar LSB10172, *Can a President Amend Regulations by Executive Order?*, by Valerie C. Brannon.

[18] Review of executive orders is discussed in more detail *infra*. The Fifth Amendment's Due Process Clause (which guarantees, among other rights, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law") seemingly provides some restrictions, such as hearing requirements, on issuance of executive orders if the order implicates a person's interest in life, liberty, or property. *See* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976). In practice, however, procedural challenges to executive orders have not been successful. Stack, *supra* note 3, at 553. *See also, e.g.*, Chichakli v. Szubin, 546 F.3d 315, 317 (5th Cir. 2008); Wong v. Campbell, 626 F.2d 739, 745 (9th Cir.

The procedural requirements for issuing an executive order are themselves set forth in Executive Order No. 11,030, issued by President John F. Kennedy in 1962.[19] Under that order's procedure, draft executive orders are first submitted to the Director of the Office of Management and Budget (OMB), along with an explanation of "the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations."[20] If the Director of OMB approves the order, it is then transmitted to the Attorney General for "consideration as to both form and legality."[21] The Attorney General has delegated this responsibility to the Office of Legal Counsel (OLC) within the Department of Justice.[22] If the Attorney General approves of the order, it is transmitted to the Director of the Office of the Federal Register to ensure it is "free from typographical or clerical error[s]," and then back to the President.[23] If either the Director of OMB or the Attorney General does not approve of the order, "it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval."[24] The executive order does not provide any consequences for not following these procedures,[25] and significant executive orders have issued without following these procedures.[26]

There is evidence that consultative procedures regularly occur before an executive order issues.[27] One commentator, relying on interviews with former officials in recent presidential Administrations, has described the process as beginning in one of two ways: "top down," where the President asks an agency official to draft a directive; or "bottom up," where "an agency wants the executive branch to adopt a policy, but it lacks the authority to bind other agencies itself."[28] In either case, the process usually begins with an agency official or other executive officer writing an initial draft of the order.[29] Once OMB receives a draft executive order, it shares the draft with

1980); Jalil v. Campbell, 590 F.2d 1120, 1123 n.3 (D.C. Cir. 1978).

[19] Exec. Order No. 11,030, 27 Fed. Reg. 5847, 5847 (June 19, 1962). This Order has been periodically modified over the years to account for, e.g., changes in technology or the names of relevant agencies. Exec. Order No. 13,403, § 1(a), 71 Fed. Reg. 28,543, 28,543 (May 12, 2006) (replacing "typewritten" with "prepared"); Exec. Order No. 12,608, § 2, 52 Fed. Reg. 34,617, 34,617 (Sept. 9, 1987) (replacing "Bureau of the Budget" with "Office of Management and Budget").

[20] Exec. Order No. 11,030, § 2(a), 3 C.F.R. § 610 (1959–1963).

[21] *Id.* § 2(b).

[22] 28 C.F.R. § 0.25(b) (2000).

[23] Exec. Order No. 11,030, § 2(c)–(d), 3 C.F.R. § 610 (1959–1963).

[24] Exec. Order No. 11,030, § 2(e).

[25] *See generally id.*; Stack, *supra* note 3, at 553 n.55 (citing KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 61 (2001)) ("Important orders have been issued without complying with this procedure, and there is no legal consequence to noncompliance.").

[26] *Id.* One commentator has suggested that the executive branch may choose to deviate from established procedures when the subject matter is politically sensitive or when there are concerns about drafts leaking to the press. Grove, *supra* note 3, at 909–10. As another example, the *New York Times* reported that President Donald Trump's first executive order suspending foreign travelers from certain countries from entering the United States was signed "with little or no legal review." Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html.

[27] Matthew Chou, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 563 (2019) (describing the process as "a matter of nonbinding but codified custom").

[28] Grove, *supra* note 3, at 901.

[29] *Id.* at 902. As explained *supra*, the procedure (including the source of the initial draft) may vary depending on the circumstances. *See supra* note 26 and accompanying text.

other agencies that may be interested in the issue.[30] Those agencies provide comments on any policy and legal issues the draft raises.[31] Often there is debate on the "precise wording of the directive at issue," commonly resulting in at least three drafts and three rounds of comments.[32] Direct presidential involvement at this step is generally "the exception rather than the rule."[33] After the language is settled, the draft is sent to OLC for legal review and certification.[34] After OLC, the draft is sent to the White House Staff Secretary (Staff Secretary) to ensure that "'relevant constituencies' within the Executive Office of the President are on board."[35] Finally, the Staff Secretary sends the draft to the President, along with OLC's certification on legality and a memo outlining any points of disagreement.[36] The President then decides whether to sign the order.[37]

There is a statutory requirement that executive orders must be published in the *Federal Register* after they issue, with certain exceptions. Specifically, a presidential proclamation or executive order must be published in the *Federal Register* unless it does "not having general applicability and legal effect" or is "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof."[38] Although the statute states that "[f]or the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect," it does not otherwise define any of the potential language used which would indicate that an instrument is a proclamation or executive order, as opposed to another form of presidential action.[39] Thus, one commentator has argued that "a president may avoid this publication requirement simply by calling the directive something other than an executive order or proclamation."[40] Nevertheless, the decision to employ a directive that is not published in the *Federal Register* may involve some important tradeoffs. For example, some federal statutes condition their delegation of authority to the President on a particular directive's publication in the *Federal Register*.[41] Attempting to enforce a particular directive without providing adequate notice may implicate due process concerns.[42]

Authority for Executive Orders

Although the President has some discretion in the procedure for issuing an executive order, there are some limits on the substantive content of executive orders. Because an executive order is an exercise of presidential power, its legal effect depends upon its reliance on a valid source of

[30] *Id.*; *see also* Chou, *supra* note 27, at 563.

[31] Grove, *supra* note 3, at 902.

[32] *Id.*

[33] *Id.* at 903.

[34] *Id.*

[35] *Id.* at 904.

[36] *Id.*

[37] *Id.*

[38] 44 U.S.C. § 1505(a)(1).

[39] *Id.* § 1505.

[40] Stack, *supra* note 3, at 554–55.

[41] *See, e.g.*, 50 U.S.C. § 1621.

[42] Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

presidential authority. Thus, it is "black letter law" that for an executive order to have legal effect, its authority "must stem either from an act of Congress or from the Constitution itself."[43]

U.S. Constitution

The Constitution vests the President with the "executive Power,"[44] and assigns him a range of powers and functions, some addressed in general terms and others specific. The President is conferred responsibility to "take Care that the Laws be faithfully executed"[45] and required by oath to "faithfully execute the Office of President of the United States," and, to the best of his "Ability, preserve, protect and defend the Constitution of the United States."[46] The President is the "Commander in Chief of the Army and Navy of the United States."[47] Although not explicitly made plain by the Constitution, by nature of his role, including his power to "make Treaties,"[48] "appoint Ambassadors,"[49] and receive foreign "Ambassadors and other Public Ministers,"[50] he is also understood to be primarily responsible for carrying out the country's foreign affairs.[51]

Executive orders premised at least in part upon the President's constitutional authority often involve foreign relations or military matters.[52] For example, when issuing an executive order to desegregate the armed forces,[53] President Harry S. Truman identified its legal basis as deriving not only from the general authority vested in the President "by the Constitution and the statutes of the United States," but also his specific constitutional authority "as Commander in Chief of the armed services."[54]

Occasionally, courts may also examine whether a nonstatutory basis for a presidential directive is sufficient to give it legal effect. For example, in *Medellin v. Texas* the Supreme Court addressed the legal impact of a presidential memorandum that sought to give effect to an order of the International Court of Justice.[55] The Supreme Court held that the memorandum was not directly

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[43] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188 (1999) (citation omitted).

[44] U.S. CONST., Art, II, §1, cl. 1.

[45] *Id.*, §3.

[46] *Id.*, §1, cl. 8.

[47] *Id.*, §2, cl. 1.

[48] *Id.*, §2, cl. 2.

[49] *Id.*

[50] *Id.*, §3.

[51] *See e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations,'" quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring). *See also* Zivotofsky v. Kerry, 576 U.S. 1, 11–16 (2015) (discussing bases for understanding the President to have exclusive constitutional authority over the recognition of foreign sovereigns).

[52] *See, e.g.*, Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955) (prescribing code of conduct for the armed forces).

[53] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

[54] *Id.* Although the order claims authority from the "statutes of the United States," it does not identify any particular statute. *Id.* The Civil Rights Act of 1964, which barred various forms of racial discrimination, was not enacted until more than 15 years later. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352 (1964).

[55] Medellin v. Texas, 552 U.S. 491, 503, 507-508 (2008) (holding that Article 94 of the U.N. Charter, which states that each member of United Nations "undertakes to comply" with the decisions of the International Court of Justice (ICJ), was not self-executing under U.S. law and Congress had not passed legislation giving the ICJ's orders domestic effect).

enforceable under U.S. law.[56] The Court held that, notwithstanding the President's power to act in foreign affairs, the memorandum was of no legal effect because it did not derive from a power either in the Constitution or delegated by Congress.[57]

Congressional Delegation

Few executive orders, particularly those involving domestic matters, are premised solely on a presidential or constitutional power. Frequently, directives contained in executive orders derive their authority from some form of congressional authorization for the President to act.[58] Generally, Congress may either actively delegate such power before the President issues the order, or may ratify the order after it issues either by codifying the order or providing authorization for it.

Before Issuance

The President may issue executive orders to carry out a delegation of authority given by Congress.[59] The Defense Production Act (DPA)[60] provides one example of a statutory delegation of power to the President. The DPA states that "[t]he President is hereby authorized" to require prioritization of contracts relating to the national defense and "to allocate materials, services, and facilities" in a manner necessary to promote the national defense.[61] The DPA further indicates that its powers "shall not be used to control the general distribution of any material in the civilian market unless the President finds" both that the material "is a scarce and critical material essential to the national defense," and that national defense requirements cannot otherwise be met.[62]

In response to the Coronavirus Disease 2019 (COVID-19) pandemic, President Donald Trump invoked the DPA's powers to protect food supply chain resources via executive order in April 2020.[63] In the order, the President found that "meat and poultry in the food supply chain meet the criteria" set forth in the DPA, and he directed the Secretary of Agriculture to "take all appropriate

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[56] *Id.*

[57] *Id.* at 525–32.

[58] *See, e.g.*, Exec. Order No. 14,014, 86 Fed. Reg. 9429 (Feb. 10, 2021) (citing as authority "the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code"); Exec. Order No. 13,963, 85 Fed. Reg. 81,331 (Dec. 10, 2020) (citing as authority "the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq.*"); Exec. Order 13,751, 81 Fed. Reg. 88,609 (Dec. 5, 2016) (citing as authority "the Constitution and to ensure the faithful execution of the laws of the United States of America, including the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4701 et seq.), the Plant Protection Act (7 U.S.C. 7701 et seq.), the Lacey Act, as amended (18 U.S.C. 42, 16 U.S.C. 3371-3378 et seq.), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), the Noxious Weed Control and Eradication Act of 2004 (7 U.S.C. 7781 et seq.), and other pertinent statutes").

[59] *See, e.g.*, 8 U.S.C. § 1182(f) ("Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.").

[60] 50 U.S.C. §§ 4501 *et seq*.

[61] *Id.* § 4511(a).

[62] *Id.* § 4511(b).

[63] Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020). *See also* CRS Legal Sidebar LSB10456, *Executive Order on the Food Supply Chain and the Defense Production Act: FAQs*, by Nina M. Hart.

action under that section to ensure that meat and poultry processors continue operations."[64] President Trump also delegated his powers to prioritize and require performance of contracts relating to "food supply chain resources, including meat and poultry," to the Secretary of Agriculture.[65] Due to the statutory source of power underlying the order, if these executive actions were later challenged in court, the President or Secretary might contend they were acting pursuant to a power granted to Congress.

After Issuance

In addition to delegating power to the President before an executive order issues, Congress may also ratify an already-issued executive order. For example, Congress may opt to provide unambiguous statutory authorization for the President's actions after an order has issued. The Supreme Court has also held that Congress ratified an executive order indirectly when it referred to the executive order in later legislation or made appropriations recognizing the executive order's impact.[66] In 1923, President Warren G. Harding issued an executive order creating the National Petroleum Reserve in the then-territory of Alaska.[67] In later litigation, the Supreme Court held in *United States v. Alaska* that the Reserve included submerged lands within its boundaries, and that the Alaska Statehood Act passed by Congress indicated that title to the Reserve remained with the United States.[68] Nevertheless, Alaska argued President Harding lacked the authority to include submerged lands in his executive order creating the Reserve; therefore, Alaska, and not the federal government, owned the submerged lands.[69]

The Supreme Court disagreed, reasoning that Congress ratified President Harding's executive order when it enacted the Alaska Statehood Act.[70] Notably, the Court held that Congress had ratified the executive order even though it was unclear whether the Pickett Act, which was enacted before the order was issued, gave the President the authority to include submerged lands.[71] Even so, the Court held the order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands in the Reserve to secure a source of oil for the Navy."[72] Thereafter, the Court reasoned, "Congress acknowledged the United States' ownership of and

[64] Exec. Order No. 13,917, 85 Fed. Reg. at 26,313.

[65] *Id.* at 26,314.

[66] Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147–48 (1937) ("Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation Acts of April 7, 1934, March 22, 1935, and May 15, 1936, all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the Shipping Act as amended and refer to the executive order. The appellant insists that these references were casual and are not to be taken as ratifying the President's action. We need not shop to consider the argument since, by the Merchant Marine Act of 1936, the functions of the former Shipping Board are referred to as 'now vested in the Department of Commerce pursuant to section 12 of the President's Executive order (No. 6166.).'"); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 119 (1947) (reasoning that recognition of reorganization by executive order in appropriations act "was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809.").

[67] United States v. Alaska, 521 U.S. 1, 36 (1997).

[68] *Id.* at 40–42.

[69] *Id.* at 43.

[70] *Id.* at 44 ("We conclude that Congress ratified the terms of the 1923 Executive Order in § 11(b) of the Statehood Act.").

[71] *Id.* at 45.

[72] *Id.*

jurisdiction over the Reserve in . . . the [Alaska] Statehood Act."[73] "Congress ratified the inclusion of submerged lands within the Reserve, whether or not it had intended the President's reservation authority under the Pickett Act to extend to such lands."[74] Accordingly, even if the executive order was originally issued without statutory authority, later action by Congress retroactively conferred that authority.

Judicial Review of Executive Orders

In some cases, there may be a question whether an executive order is valid; that is, a question whether the executive order was issued pursuant to a delegation of power by Congress or pursuant to the President's constitutional powers.[75] In such circumstances the executive order may be challenged in court, assuming that the other requirements for bringing suit (for example, standing) are met.[76] Thus, courts have been called on to determine whether a particular executive order is valid.[77] In some cases, the President contends that his action is allowed by an independent constitutional basis beyond that which has been conferred to him by Congress. In other cases, the question turns on whether the President's action falls within the scope of a power granted to him by Congress.

Determining Whether the President May Act

In some cases, there may be a question whether the President has the power to act at all. The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* established the framework for analyzing whether the President has the power to act in a particular case when the allocation of constitutional authority between the President and Congress is ambiguous or disputed. Although Justice Hugo Black authored the majority opinion, the framework explained in Justice Robert H. Jackson's concurring opinion has become more influential, and has since been employed by the courts to analyze the validity of presidential actions.

Youngstown addressed President Truman's executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills to ensure continued production, in an effort to avert the effects of a workers' strike during the Korean War.[78] The steel companies challenged the Order, and the Supreme Court held it unconstitutional.[79] The majority, through Justice Black, wrote that "the President's power to see that laws are faithfully executed refuted the idea that he is to be a lawmaker."[80] Thus, the Court reasoned that presidential authority to issue such an executive order, "if any, must stem either from an act of Congress or from the Constitution itself."[81] Because no statute or constitutional provision authorized President Truman's Order, the Court concluded it was effectively a legislative act.[82] The Court further noted that Congress

[73] *Id.*

[74] *Id.*

[75] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2403–04 (2018).

[76] *See id.*

[77] *See, e.g.*, *id.*

[78] *Id.* at 582; Exec. Order No. 10,340, 71 Fed. Reg. 3139 (Apr. 10, 1952).

[79] *Youngstown*, 343 U.S. at 582–84, 588–89.

[80] *Id.* at 587.

[81] *Id.* at 585.

[82] *Id.* at 587 ("The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Nor can the seizure order be sustained because of the several constitutional provisions

rejected seizure as a means of settling labor disputes during consideration of the Taft-Hartley Act of 1947, and instead adopted other processes.[83] Thus, the Court ruled that the Order violated the separation-of-powers doctrine, explaining that "the Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[84]

Although Justice Black's opinion was joined by a majority of the Court, five justices wrote concurring opinions.[85] Justice Jackson's concurrence has proven to be the most influential.[86] In that opinion, Justice Jackson established a tripartite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.[87] Justice Jackson articulated three categories of executive action:

1. "When the President acts pursuant to an express or implied authorization of Congress."[88]

Justice Jackson opined that the President's authority to act is at a maximum when he acts within this first category because this includes all of the power that the President "possesses in his own right plus all that Congress can delegate."[89] In other words, the President is acting pursuant to the branches' combined authorities. Such action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation."[90]

2. "When the President acts in absence of either a congressional grant or denial of authority."[91]

In this second category, where Congress has neither granted nor denied authority to the President, Justice Jackson maintained that the President could still act upon his own independent powers. In that case, there is a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."[92] Under these circumstances, Justice Jackson observed that congressional acquiescence or silence "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility," yet "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[93]

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that grant executive power to the President. . . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.").

[83] *Id*. at 586 (citing 93 Cong. Rec. 3637–3645, where Congress rejected an amendment that would have authorized governmental seizures in cases of emergency); *see also* Taft-Hartley Act of 1947, Pub. L. No. 80-101 (1947).

[84] *Youngstown*, 343 U.S. at 586–89.

[85] *Id.* at 580 (listing concurring justices).

[86] Zivotofsky v. Kerry, 576 U.S. 1 (2015) (stating that "[i]n considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework"); Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 394 (2015) ("Functionalism, in contrast, is at the heart of Justice Jackson's influential concurrence in *Youngstown*, now often read as the central opinion in that case."); Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351, 354 (2016) ("Among the best known [concurrences] is Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* delineating a three-part framework for analyzing the constitutional validity of unilateral executive actions." (footnote omitted)).

[87] *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

[88] *Id.* at 635.

[89] *Id.* at 635–37.

[90] *Id.* at 637.

[91] *Id.* at 637.

[92] *Id*.

[93] *Id*.

For example, in *United States v. Midwest Oil Co.*, the Supreme Court affirmed the President's power to create reservations, notwithstanding that no specific statute conferred that power.[94] The Court reasoned that after the President created reservations, "Congress did not repudiate the power claimed or the . . . orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory, purposes."[95] Although *Midwest Oil* was decided early in the 20th century, the Court has reaffirmed the principle that "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent."[96]

3. "When the President takes measures incompatible with the expressed or implied will of Congress."[97]

In this third category, where the President acts in a manner "incompatible with the expressed or implied will of Congress," the President's power is at its "lowest ebb . . . for he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter."[98] Justice Jackson observed that courts generally "sustain exclusive presidential control . . . only by disabling the Congress from acting upon the subject."[99] He cautioned that examination of presidential action under this third category deserved more scrutiny because for the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[100]

Although Justice Jackson recognized that because "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," the three categories he established were a "somewhat over-simplified grouping."[101] Nevertheless, he maintained that the categories assisted in identifying "practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity."[102]

After outlining his framework, Justice Jackson applied it to President Truman's action. Justice Jackson determined that analysis under the first category was inappropriate, because Congress had not explicitly or implicitly authorized seizure of the steel mills.[103] Justice Jackson also determined that President Truman's action did not fall under the second category because Congress had addressed the issue of seizure by creating statutory methods of seizure that

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[94] United States v. Midwest Oil Co., 236 U.S. 459, 470–71 (1915).

[95] *Id.* at 471.

[96] Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting *Midwest Oil*, 236 U.S. at 474 (alterations in original)). Regarding *Midwest Oil*, however, Congress later enacted a statutory framework governing land withdrawal, and so the President can no longer exercise that broad authority. Nat'l Mining Ass'n v. Zinke, 877 F.3d 845, 856 (9th Cir. 2017) (describing the statutory scheme and stating that it "eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority.").

[97] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[98] *Id*.

[99] *Id*. at 637–38.

[100] *Id.* at 638.

[101] *Id.* at 635.

[102] *Id*. at 635. The Supreme Court later agreed that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

[103] *Youngstown*, 343 U.S. at 638.

President Truman had not used.[104] The Justice therefore concluded that the President's action could be sustained, if at all, only if it passed muster under the third category; that is, the Order could be approved only if "seizure of such strike-bound industries is within his domain and beyond the control of Congress."[105] As seizure of steel mills was within the scope of congressional power, the exercise of presidential power under these circumstances was "most vulnerable to attack and [left the President] in the least favorable of possible constitutional postures."[106]

San Francisco v. Trump provides another example of a court analyzing whether the President had the power to act in a particular manner.[107] That case involved a challenge to President Trump's executive order deeming so-called "sanctuary" jurisdictions ineligible for federal grants, and directing federal agencies "to withhold funds appropriated by Congress in order to further the Administration's policy objective of punishing cities and counties that adopt so-called 'sanctuary' policies."[108] Applying Justice Jackson's *Youngstown* framework, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reasoned that "because Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants" on nonsanctuary statuses, and because the Constitution has not allocated the President any spending powers, the President's power was "at its lowest ebb."[109] Because the President does not have spending powers under the Constitution, the court reasoned it was unavailable as a source of authority for the Order.[110] And because Congress had not delegated to the President the ability to add conditions to federal grants, the court reasoned there was similarly no statutory authority for the Order.[111] As the President could not rely on constitutional powers or on powers delegated by Congress, the court concluded there was "no reasonable argument that the President ha[d] not exceeded his authority."[112] Accordingly, the Ninth Circuit held that the Order was unconstitutional.[113]

The *Youngstown* framework is relevant to assessing the allocation of constitutional powers between Congress and the President. There are additional limitations on the actions that the President may take, outside of the *Youngstown* framework. For example, the President may not take an unconstitutional action, even if Congress has authorized such action. *Clinton v. New York* illustrates the point.[114] That case involved a challenge to the Line Item Veto Act, which allowed the President to veto particular provisions in a bill that Congress passed, rather than vetoing the bill in its entirety.[115] The Line Item Veto Act passed both houses of Congress and was signed by

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[104] *Id.* at 638–39 ("None of the [three methods of seizure created by Congress] were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.").

[105] *Id.* at 640.

[106] *Id.*

[107] 897 F.3d 1225 (9th Cir. 2018).

[108] *Id.* at 1233 (citing Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017)).

[109] *Id.* at 1233–34.

[110] *See id.*

[111] *Id.*

[112] *Id.* at 1234–35.

[113] *Id.* at 1235. Other cities challenged the Attorney General's implementation of the executive order. *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 600 (E.D. Pa. 2017). This litigation strategy (i.e., challenging agency implementation of the executive order) allowed those cities to use the APA as a basis for their claims. *See id.*

[114] 524 U.S. 417, 436 (1998).

[115] *Id.*

the President, and President Clinton attempted to use the powers that Congress granted by cancelling particular provisions in a piece of legislation.[116] Notwithstanding that Congress specifically gave the President that power, the Supreme Court held that the power violated the Presentment Clause of the U.S. Constitution and therefore could not be exercised.[117]

Determining the Scope of Congress's Delegation

In other cases, it may be clear that Congress has granted *some* power to the President; then, the question may become whether the President's action falls within the scope of the power he has been granted. When presidential action is challenged, a court would analyze whether the action taken falls within the President's delegated power, and whether the action otherwise violates the Constitution.[118]

Generally, courts will begin with the text of the statute delegating power to the President to determine the scope of Congress's delegation of power.[119] Courts will also consider the amount of power typically afforded to the President in the particular subject area at issue.[120] In limited circumstances, courts may also consider whether Congress has failed to act after a consistent and long-standing pattern of executive action taken under the statute.[121] If so, then a court may view Congress as having acquiesced to the President's power to act under the statute.[122]

Trump v. Hawaii—the Supreme Court case analyzing President Trump's proclamation suspending entry of foreign nationals from certain countries—provides one example of this analysis.[123] There, President Trump argued that Congress delegated to him the power to suspend immigration, in certain circumstances, under the Immigration and Nationality Act (INA), and that the proclamation's entry suspension fell within that grant of power.[124]

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[116] *Id.*

[117] *Id.* at 421.

[118] Action by an administrative agency, as opposed to the President himself, is reviewed differently under the APA, and is outside of the scope of this report. For further information on review of agency action, *see* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole; *see also* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that the President is not an "agency" under the APA). Parties sometimes challenge administrative action implementing an executive order, rather than the order itself, due to the different review afforded under the APA. *See supra* note 17 and accompanying text.

[119] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (beginning analysis with the "plain language" of the Immigration and Nationality Act); Hamdan v. Rumsfeld, 548 U.S. 557, 593 (2006) (determining whether presidential order was authorized by two statutes).

[120] *Hawaii*, 138 S. Ct. at 2409 ("[P]laintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.").

[121] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 11 (1965) ("Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress.").

[122] *See id.* Courts tend to find that such a pattern exists relatively infrequently. *See* Medellin v. Texas, 552 U.S. 491, 530 (2008) (rejecting a claim of congressional acquiesence).

[123] Trump v. Hawaii, 138 S. Ct. 2392, 2403–04 (2018). President Trump's first two written instruments limiting immigration were executive orders, but the third instrument (which the Supreme Court reviewed) was a presidential proclamation. *Id.* Although styled differently, proclamations are not treated differently for the purposes of this analysis, and signal a difference in form rather than substance. *See infra* "Other Presidential Directives."

[124] *Hawaii*, 138 S. Ct. at 2407–10.

The Supreme Court determined that "[b]y its plain language, [the INA] grants the President broad discretion to suspend the entry of aliens into the United States."[125] The Court then held that "[t]he President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest."[126] The Court began by looking at the INA's relevant language, concluding that Congress's language "exudes deference to the President in every clause."[127] Specifically, the INA allows the President to determine

- "whether and when to suspend entry ('[w]henever [he] finds that the entry' of aliens 'would be detrimental' to the national interest);
- whose entry to suspend ('all aliens or any class of aliens');
- for how long ('for such period as he shall deem necessary'); and
- on what conditions ('any restrictions he may deem to be appropriate')."[128]

The Court next examined whether President Trump's actions fell within the powers granted by the INA.[129] Considering Congress's broad grant of authority, the Court determined that the proclamation fell "well within this comprehensive delegation."[130] The Court noted that the President "ordered [the Department of Homeland Security] and other agencies to conduct a comprehensive evaluation" of compliance with different metrics, and set forth in the proclamation findings detailing how each restricted country was deficient.[131] Although the challengers argued this was insufficient support, the Court determined that the request for a "searching inquiry" was inconsistent with the "broad statutory text and the deference traditionally accorded the President in this sphere."[132] The Court further determined that the statutory structure and legislative purpose did not "justif[y] departing from the clear text of the statute."[133] As the proclamation was "expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices," the Court also rejected a challenge under the First Amendment.[134] Accordingly, *Trump v. Hawaii* illustrates how courts analyze the legality of particular executive action: analyzing the scope of the granted power (here, the INA) and whether the particular action (here, the proclamation) falls within that grant of power.[135]

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[125] *Id.* at 2408.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 2408–09.

[130] *Id.* at 2408.

[131] *Id.* at 2408–09.

[132] *Id.* at 2409.

[133] *Id.* at 2410–15.

[134] *Id.* at 2415–23.

[135] Notably, *Trump v. Hawaii* involves questions relating to national security and foreign affairs—two spheres where the President generally has greater leeway. *Id.* at 2409–10. If an executive order touched on purely domestic issues, there may be less deference. *See, e.g.*, Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1325 (D.C. Cir. 1996) (invalidating executive order which barred "the federal government from contracting with employers who hire permanent replacements during a lawful strike.").

Determining the Scope of the Executive Order

The validity of an executive order may involve construing not only the statute delegating power to the President (to determine the scope of the delegation of power) and but also construing an executive order (to determine whether the executive action set forth in the order falls within Congress's delegation). In those circumstances, courts may be called on to interpret the underlying executive order to determine its scope and impact.

In the past, courts have at times determined the scope of executive orders using the same interpretive tools traditionally used to interpret congressional statutes.[136] In recent years, some courts and commenters have questioned whether the rationales underlying the various approaches to statutory interpretation apply to the interpretation of executive orders.[137] Regardless of any differences in rationales, however, there appears to be general agreement that the analysis begins with the text of the directive.[138]

Other parts of the executive branch may also clarify or interpret an executive order after the order issues.[139] In those situations, courts may accord deference to the agency's interpretation of the order.[140] In determining whether to defer to an agency's interpretation of an executive order, a court may consider whether the interpretation is consistent with the order; whether the executive order appears to delegate interpretative authority to the agency; whether it binds other agencies; and the timing of the interpretation (for example, whether the interpretation was a post-hoc response to litigation).[141]

For example, following President Trump's executive order on so-called "sanctuary" jurisdictions, the Attorney General issued a memorandum interpreting the President's Order and arguably narrowing its scope and applicability.[142] The government argued that the Ninth Circuit should defer to the interpretation articulated in the Attorney General's memorandum, and thus uphold the underlying executive order.[143] The court refused to do so.[144] In particular, the court noted that the

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[136] *See, e.g.*, Ex parte Endo, 323 U.S. 283, 298 (1944) ("We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field."). For a description of the approaches to statutory interpretation, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[137] San Francisco v. Trump, 897 F.3d 1225, 1238 (9th Cir. 2018) ("Executive orders are unlike both statutes and other agency actions. In contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders."); Grove, *supra* note 3, at 884–90 ("To the extent one believes that constitutional theory and institutional considerations should inform interpretive method (as many scholars do), presidential directives should be treated as distinct instruments. In short, presidential directives are not statutes.").

[138] *San Francisco*, 897 F.3d at 1238 ("[O]ne interpretive principle is clear, and its application is dispositive. As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text, which must be construed consistently with the Order's object and policy.") (internal quotation marks and citation omitted); Bassidji v. Goe, 413 F.3d 928, 934 (9th Cir. 2005) ("As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text."); Grove, *supra* note 3, at 910–24 (arguing that executive orders should be interpreted using textualism).

[139] *San Francisco*, 897 F.3d at 1240.

[140] Udall v. Tallman, 380 U.S. 1, 4 (1965) (holding that courts must respect "quite clearly a reasonable interpretation" of an executive order by an agency); Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981) ("In light of an agency's presumed expertise in interpreting executive orders charged to its administration, we review such agency interpretations with great deference."). Although *Tallman* seems to mandate deference to an agency's interpretation of an executive order, its continued vitality may be in question considering the Supreme Court's recent approach to interpretive deference. Chou, *supra* note 27, at 567–71 (chronicling cases).

[141] *San Francisco*, 897 F.3d at 1242.

[142] *Id.*

[143] *Id.*

[144] *Id.*

interpretation in the memorandum was inconsistent with the text of the order; the memorandum did not appear to delegate interpretive power to the Attorney General; the memorandum did not bind other agencies; and the memorandum appeared to have been issued in response to litigation over the Order.[145]

In addition to agency interpretations of the order, courts may also consider the object and policy of the order.[146] In some cases, that may include public statements made by or on behalf of the Administration regarding the subject matter of the order.[147] In the case addressing President Trump's order on so-called "sanctuary" jurisdictions, the court analyzed statements by President Trump's Administration and by President Trump himself in interpreting the Order.[148]

Modification and Revocation of Executive Orders

Once issued, a valid executive order has the force and effect of law. Executive orders do not, by default, expire when the issuing President leaves office. Instead, an issued executive order remains in effect until it is either struck down in court, modified, or revoked. This section provides more detail on how executive orders may be modified or revoked.

Modification or Revocation by the President

Executive orders are a powerful and flexible tool for Presidents to create policy and issue directives during their Administrations. However, executive orders are less persistent than other acts that have the force and effect of law, such as federal statutes that can be altered only through later-in-time enactments, because a sitting President can revoke or modify his or a prior President's executive order by issuing a new executive order.[149] In other words, if the current President disagrees with an existing executive order for any reason, he normally may revoke or modify that order without delay and without consulting with the other branches of government (unless Congress has codified the prior order in statute).[150] Presidents may also revoke or modify executive orders issued earlier in their Administrations; more frequently, however, new Presidents revoke or modify executive orders issued by one of their predecessors.

Revocation by Present Administration

Sometimes a President will revoke or modify an executive order issued earlier in his own Administration. For example, in 2015, President Barack Obama revoked one of his prior executive orders, Executive Order 13,514,[151] which aimed to reduce energy use by the federal

[145] *Id.*

[146] *Bassidji*, 413 F.3d at 934.

[147] *San Francisco*, 897 F.3d at 1242–43.

[148] *Id.*

[149] Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 994–95 (2003) ("Executive orders are also freely revocable and revisable by a subsequent President. All an incoming President needs to do to revoke or revise an executive order issued by his predecessor is issue a new executive order.").

[150] *Id.*

[151] Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009), *revoked by* Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 9, 2015).

government, and replaced that Order with a broader Order aimed at reducing the federal government's contribution to climate change.[152]

Revocation by Later Administrations

More commonly, Presidents will revoke or modify executive orders issued by one of their predecessors. For example, in April 1992, President George H. W. Bush issued an executive order requiring that most federal contracts include a provision requiring the contractor to post a notice that employees could not be required to join or maintain membership in a labor union.[153] President Clinton revoked that Order in February 1993.[154] President George W. Bush revoked President Clinton's revocation in February 2001.[155] President Obama revoked President Bush's revocation of President Clinton's revocation in January 2009.[156]

The evolution of executive orders used to control and influence the agency rulemaking process illustrates how executive orders can modify or revoke orders used by a previous Administration, particularly when the executive order was issued by a President of a different political party. The following timeline demonstrates how succeeding Presidents have gradually modified the rulemaking process used by administrative agencies[157] with a uniform set of standards regarding cost-benefit considerations:

- President Gerald Ford issued Executive Order 11,821, which required agencies to issue inflation impact statements for proposed regulations.[158]
- President Jimmy Carter altered this practice with Executive Order 12,044, which required agencies to consider the potential economic impact of certain rules and identify alternatives.[159]
- President Ronald Reagan revoked President Carter's Order and issued Executive Order 12,291, which directed agencies to implement rules only if the "potential benefits to society for the regulation outweigh the potential costs to society."[160] This required agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.[161]

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[152] Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 9, 2015).

[153] Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (Apr. 13, 1992).

[154] Exec. Order No. 12,836, 58 Fed. Reg. 7045 (Feb. 1, 1993).

[155] Exec. Order No. 13,201, 66 Fed. Reg. 11,221 (Feb. 17, 2001).

[156] Exec. Order No. 13,496, 74 Fed. Reg. 6107 (Jan. 30, 2009). As of this writing, President Obama's Order has not been revoked.

[157] 5 U.S.C. §§ 551 *et seq*. For further description of the rulemaking process and its requirements, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey; and CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[158] Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 27, 1974).

[159] Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

[160] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[161] Executive Order 12,291 was criticized by some as a violation of the separation-of-powers doctrine, on grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress. *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). Despite these concerns, there were no court rulings that assessed the validity of President Reagan's Order.

- President William J. Clinton issued Executive Order 12,866, which modified the system established during the Reagan Administration.[162] While retaining many of the basic features of President Reagan's Order, Executive Order 12,866 arguably eased the cost-benefit analysis requirements.
- President George W. Bush subsequently issued two executive orders—Executive Orders 13,258 and 13,422—which amended President Clinton's Order.[163] Executive Order 13,258 concerned regulatory planning and review, and removed references from President Clinton's Order regarding the Vice President's role, and instead referenced the Director of OMB or the President's Chief of Staff.[164] Executive Order 13,422 applied several parts of President Clinton's Order to agency guidance documents.[165] It also required each agency head to designate a presidential appointee to the newly created position of regulatory policy officer. Executive Order 13,422 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.
- President Obama revoked both of President Bush's Orders via Executive Order 13,497.[166] This Order also instructed the Director of OMB and the heads of executive departments and agencies to rescind orders, rules, guidelines, and policies that implemented President Bush's Orders identified above.[167]
- Although President Trump did not revoke President Obama's Executive Order 13,497, he did issue a number of executive orders regarding rulemaking and the regulatory process.[168]
- President Biden revoked a number of President Trump's Orders on these issues.[169]

Modification, Abrogation, or Codification by Congress

As explained previously, a President may issue an executive order using powers delegated to him by Congress.[170] Congress may modify or nullify the legal effect of an executive order issued pursuant to powers it delegated to the President.[171] (Congress could not, however, directly modify or revoke an executive order issued pursuant to powers granted exclusively to the President by

[162] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[163] Exec. Order No. 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

[164] Exec. Order No. 13,528, 67 Fed. Reg. 9385 (Feb. 28, 2002).

[165] Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

[166] Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009) (revoking Exec. Order Nos. 13,528 and 13,422).

[167] *Id.*

[168] *See, e.g.*, Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[169] Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

[170] *See supra* "Authority for Executive Orders."

[171] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952). Consistent with the *Youngstown* framework, Congress's authority to override an executive order relating to an area in which the President and Congress share power would likely depend on "the imperatives of events and contemporary imponderables." *See id.* at 637 ("[T]here is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

the Constitution.)[172] This section describes the process for congressional revocation or modification of a particular order, before discussing selected congressional proposals to limit the power of executive orders more broadly.

Modifying or Abrogating Specific Orders

To effectuate a repeal of a particular executive order, Congress sometimes enacts legislation directing that the order "shall not have legal effect" or "is revoked." For example, the Energy Policy Act of 2005 explicitly revoked a December 13, 1912, executive order that had created the Naval Petroleum Reserve Numbered 2.[173] In 1992, Congress similarly revoked an executive order issued by President George H. W. Bush that directed the Secretary of Health and Human Services to establish a human fetal tissue bank for research purposes. The repeal legislation stated: "[t]he provisions of Executive Order 12806 . . . shall not have any legal effect."[174]

Repeals occur through passage of legislation through ordinary means; thus, legislative repeals may be relatively rare due to the threat of a presidential veto.[175] In other words, if the President agrees that an order should be revoked, the President can revoke it by his own order; if the President disagrees, then Congress would presumably need sufficient votes to overcome a veto.

Additionally, Congress may inhibit the implementation of an executive order by preventing funds from being used to put the order into practice. For example, Congress has used its appropriations authority to limit the effect of executive orders by denying salaries and expenses for an office established in an executive order,[176] or by directly denying funds to implement a particular section of an order.[177]

Although outside of the executive order context, the case of *Zivotofsky v. Kerry*[178] illustrates that it is unconstitutional for Congress to legislate in an area granted exclusively to the President by the Constitution, and, by extension, that Congress could not revoke or modify an executive order that relied on the President's exclusive constitutional powers. In *Zivotofsky*, Congress enacted a

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[172] *See id.*

[173] Pub. L. No. 109-58, § 334 (2005) ("Effective on the date of the enactment of this Act, the Executive Order of December 13, 1912, which created Naval Petroleum Reserve Numbered 2, is revoked in its entirety.").

[174] Pub. L. No. 103-43, § 121 (1993). *See also* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, H.R. 5658, § 2587, 110th Cong. (2008) (would have revoked Executive Order 1922 of April 24, 1914, as amended, as it affected certain lands identified for conveyance to Utah).

[175] For example, a 1999 study found that, at that time, Congress had modified or repealed 239 executive orders. William J. Olson & Alan Woll, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, 358 POLICY ANALYSIS 1, 10, App'x 3 (Oct. 28, 1999), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa358.pdf. Another study suggests that less than 4% of executive orders have been modified by Congress. *See* ADAM L. WARBER, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY 118–20 (2006).

[176] Congress has repeatedly enacted appropriations laws that prohibit funds from being used to establish a Legal Examining Unit within the Office of Personnel Management (OPM) pursuant to Executive Order 9358, 8 Fed. Reg. 9175 (July 6, 1943), issued by President Franklin D. Roosevelt. President Roosevelt had discretionary authority pursuant to statute to issue regulations, via executive order, to organize the civil service and direct the Civil Service Commission, the precursor to OPM. *See* Pub. L. No. 76-880, § 1 (1940); Exec. Order No. 8743, 6 Fed. Reg. 2117 (Apr. 25, 1941). Appropriations laws that contain this prohibition include Pub. L. No. 105-61 (1997); Pub. L. No. 105-277 (1998); Pub. L. No. 106-58 (1999); Pub. L. No. 106-554 (2000); Pub. L. No. 107-67 (2001); Pub. L. No. 108-7 (2003); Pub. L. No. 108-199 (2004); Pub. L. No. 108-447 (2004); Pub. L. No. 109-115 (2005); Pub. L. No. 110-161 (2007); Pub. L. No. 111-8 (2009); Pub. L. No. 111-117 (2009).

[177] *See, e.g.*, Pub. L. No. 111-8 (2009) (preventing funds from being used "to implement, administer, or enforce" Executive Order 13422 § 5(b), which was subsequently revoked by Executive Order 13497).

[178] 576 U.S. 1 (2015).

statute that allowed U.S. citizens born in Jerusalem to list their place of birth on their passport as "Israel"—suggesting that Jerusalem was under Israeli sovereignty.[179] The statute attempted to override the State Department's manual, which indicated that such citizens should list their birthplace as "Jerusalem," because the United States does not recognize any sovereign as controlling Jerusalem.[180] Zivotofsky requested that Israel be listed as his birthplace on his passport, but the American Embassy in Tel Aviv refused.[181] Invoking the statute, Zivotofsky sued; the executive branch argued that under the Constitution, the President has the sole power to recognize sovereigns.[182] Drawing upon Justice Jackson's analysis from *Youngstown*, the Supreme Court reasoned that, because Congress had legislated on this particular issue, the President's power was "at its lowest ebb."[183] Nevertheless, the Court analyzed the Constitution's text and structure, along with precedent and history, and held that the power to recognize foreign sovereigns fell to the President alone.[184] Because the statute required the executive branch to contradict the President's recognition determination in an official document, the Court held it was unconstitutional.[185] Accordingly, any congressional attempt to revoke or modify an executive order issued based on the President's exclusive constitutional authority would likely be similarly unconstitutional.[186]

Codifying Specific Orders

Congress may also enact legislation that specifically references and codifies the terms of a previously issued executive order.[187] By codifying the sanctions in statute, Congress may ensure that the issuing Administration (or a later Administration) does not revoke them.[188] For example, 22 U.S.C. § 9522 codifies sanctions against the Russian Federation set forth in a series of executive orders, and provides the manner in which the President may terminate the sanctions. Because Congress codified the terms of the Order in a statute, the President may no longer revoke the Order using a new executive order; instead, the procedure set out in the statute must be followed and any preconditions must be met. Thus, Congress's codification of a particular order renders the terms of the order more permanent.

Imposing Broader Limitations on Executive Orders

In addition to legislating regarding specific executive orders, Congress has also, at times, attempted to curtail the President's power to issue executive orders more broadly through

[179] *Id.* at 8.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 9.

[183] *Id.* at 10.

[184] *Id.* at 28.

[185] *Id.* at 30–31.

[186] Nevertheless, as explained previously, Congress may indirectly circumscribe the effect of an executive order by, for example, refusing to provide funding to implement the order. *See supra* notes 176–177 and accompanying text. In *Zivotofsky* the Court noted that the President could not, for example, build an embassy absent appropriations from Congress, *id.* at 15, and that Congress may circumscribe the impact of Presidential recognition by "enact[ing] an embargo, declin[ing] to confirm an ambassador, or even declar[ing] war," *id.* at 30.

[187] *See, e.g.*, 22 U.S.C. § 9522 (codifying sanctions against the Russian Federation set forth in a series of executive orders).

[188] *See infra* "Modification and Revocation of Executive Orders."

legislation. For example, the National Emergencies Act[189] terminated, as of September 14, 1978, "[a]ll powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, . . . , as a result of the existence of any declaration of national emergency in effect" on the date of enactment,[190] and attempted to curtail the President's ability to declare and maintain new national emergencies.[191] Whether that attempt successfully curtailed presidential power may be subject to debate.[192] Since the NEA's enactment, legislative proposals have occasionally been introduced to increase legislative oversight of executive orders generally.[193]

Other Presidential Directives

While this report generally addresses the President's use of executive orders, presidential directives may take other forms, including proclamations and memoranda.[194] As with executive orders, the effect of these directives depends on their substance and source of legal authority. Often, the differences among the three instruments may be a matter of form rather than function and effect.[195] A report issued in 1957 by the House of Representatives Government Operations Committee may shed some light on perceived differences.[196] According to that report, "[e]xecutive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly."[197] Proclamations, by contrast, "in most instances affect primarily the activities of private individuals."[198] According to the report, because "the President has no power or authority over individual citizens and their rights

[189] Pub. L. No. 914-412 (1976) (codified at 50 U.S.C. §§ 1601 *et seq.*).

[190] 50 U.S.C. § 1601.

[191] *Id.* §§ 1621–22, 1631, 1641.

[192] In recent years the NEA has been used to arguably expand presidential power. For example, declaring a national emergency allows the President to invoke and take action pursuant to more than 100 statutes. CRS Report R46379, *Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act*, coordinated by Jennifer K. Elsea.

[193] For example, the Separation of Powers Restoration Act (SPRA), introduced in the 106th Congress with more than 40 sponsors, would have similarly terminated then-existing national emergencies, and allowed only Congress to declare new emergencies. H.R. 2655, 106th Cong. (1999). SPRA would have also required any presidential order to include "a statement of the specific statutory or constitutional provision which in fact grants the President the authority claimed for" the order, and that any order without that statement would be invalid if "issued under authority granted by a congressional enactment." *Id.* § 4. The SPRA would also have limited presidential orders to affecting the executive branch only, and would have given certain parties the power to challenge such orders. *Id.* §§ 5-6. The Presidential Order Limitation Act of 1999 (POLA) provides another example. H.R. 3131, 106th Cong. (1999). POLA aimed to allow for increased congressional review of presidential orders by requiring the President to transmit orders to certain congressional officers. *Id.* § 3. Neither proposal received a vote.

[194] *See, e.g.*, Termyn, supra note 2, at 7 ("Presidents utilize various written instruments to direct the Executive branch and implement policy. These include executive orders, proclamations, presidential memoranda, administrative directives, findings, and others. Most of the time, the President is free to choose the instrument she wishes to use to carry out the executive function.").

[195] For example, President Trump issued three written instruments suspending immigration of nationals of certain countries early in his term. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2403–04 (2018). The first two instruments were styled as executive orders; the third was styled as a proclamation. *Id.* In *Hawaii*, the Supreme Court did not comment on the change in form. *See id.*

[196] H. Comm. on Gov't Operations, 85th Cong., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* 1 (Comm. Print 1957).

[197] *Id.*

[198] *Id.*

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."[199] Nevertheless, certain statutes delegating power to the President may require that power to be exercised using a particular type of instrument. For example, the INA provides that the President may restrict or suspend entry of foreign nationals "by proclamation, and for such period as he shall deem necessary."[200]

Nevertheless, any distinction among these instruments—executive orders, presidential memoranda, and proclamations—is muddied by the fact that all three may be employed to direct and govern the actions of government officials and agencies.[201] The OLC has opined that "there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order," and that "it is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner."[202] Moreover, if issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, "of which all courts are bound to take notice, and to which all courts are bound to give effect."[203] The only technical difference is that executive orders and proclamations must be published in the *Federal Register* (unless they do not have "general applicability and legal effect" or are "effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof"), whereas presidential memoranda are published only when the President determines they have "general applicability and legal effect."[204]

By its terms, the order setting forth the issuance process for executive orders applies only to executive orders and proclamations.[205] Nevertheless, other presidential directives often go through extensive review before the President signs them.[206] The main difference is that, whereas OMB oversees the process for issuing executive orders and proclamations, OLC typically oversees the process for other presidential directives.[207]

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[199] *Id.*

[200] 8 U.S.C. § 1182(f).

[201] *See, e.g.*, Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014) (establishing a minimum wage for contractors); Exec. Order No. 13,588, 76 Fed. Reg. 68,295 (Nov. 3, 2011) (reducing prescription drug shortages); Memorandum for Heads of Executive Dep't and Agencies on Advancing Pay Equality in the Federal Government and Learning From Successful Practices (May 10, 2013); Memorandum to Secretary of State on Waiver of Restriction on Providing Funds to the Palestinian Authority (Feb. 8, 2013); Proclamation No. 9072, 78 Fed. Reg. 80,417 (Dec. 23, 2013) (ordering "Certain Action Under the African Growth and Opportunity Act and for Other Purposes"); Proclamation No. 8783, 77 Fed. Reg. 14,265 (Mar. 6, 2012) (implementing the United States-Korea Free Trade Agreement). *See also* Termyn, supra note 2, at 7 ("Though historical practice might suggest proclamations are more geared towards private individuals, while orders are more towards administration of government, more recent accounts suggest that the instruments defy these distinctions too often for any differences to be legally significant." (footnote omitted)).

[202] Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000).

[203] Armstrong v. United States, 80 U.S. 154, 155–56 (1871); *see also* Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 ADMIN. & SOC'Y 233, 240 (Aug. 1986) (citing Farkas v. Texas Instrument, Inc., 372 F.2d 629 (5th Cir. 1967); Farmer v. Phil. Elec. Co., 329 F.2d 3 (3d Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560–61 (1893)).

[204] 44 U.S.C. § 1505.

[205] Exec. Order No. 11,030, § 2(a), 3 C.F.R. § 610 (1959–1963).

[206] Grove, *supra* note 3, at 908.

[207] *Id.*

Conclusion

Executive orders are one method through which Presidents exercise their power. When issued pursuant to a valid grant of authority (i.e., one of the powers granted to the President under the Constitution or a power delegated to the President by Congress), executive orders have the force and effect of law. Although executive orders are flexible and potentially powerful tools to shape government policy, they are also impermanent. Later Administrations can modify or revoke a prior President's executive orders, and Congress can also modify or otherwise circumscribe the legal effect of executive orders that address matters where the President does not possess exclusive constitutional authority.

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