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Executive Order: Stroke of a Pen, Law of the Land?

By M. Patrick Moore and Kate R. Cook

Legal Analysis

Introduction

The President of the United States and the Governor of Massachusetts have the implied power to issue executive orders that, in certain contexts, will have the force of law. Focusing on the federal system and the Massachusetts state system, this article will address the concept of the executive order, how it has changed over time, and why executive orders are used to further wide-ranging policy goals. The article will also address the judicial scrutiny of executive orders, including, in particular, whether they are owed any deference or presumption of lawfulness.

Discussion

Throughout history, executive orders have addressed issues of profound national and local importance. Our system of classifying national security information, for example, is set by executive order. See Exec. Order No. 13526 (Dec. 29, 2009). So, too, is the process by which national security agencies determine who may have access to such information. See Exec. Order No. 13764 (Jan. 17, 2017); see also 50 U.S.C. § 3161 (instructing the President to issue such an order). Executive orders define the process by which nearly every federal and state agency may regulate. See generally Exec. Order No. 12291 (Feb. 17, 1981) (centralizing federal regulatory planning and review); Mass. Exec. Order No. 562 (Mar. 31, 2015) (synthesizing state regulatory review). And they provide the definition of an unfunded mandate, at least at the local level. Mass. Exec. Order No. 145 (Oct. 21, 1978). Executive orders have both advanced principles of equal protection and hindered them. See Exec. Order No. 9981 (July 26, 1948) (desegregating the armed forces); Exec. Order No. 10450 (Apr. 27, 1953) (excluding gay and lesbian officials from government service during all administrations from Eisenhower to Clinton); Exec. Order No. 12968 (Aug. 2, 1995) (establishing that the federal government no longer will "discriminate on the basis . . . [of] sexual orientation in granting access to classified information").

Despite the importance of executive orders, neither the United States nor the Massachusetts Constitutions expressly grants the power to issue them. Rather, the power is implied from the executive's core authority to administer the laws. See U.S. Const. art. II ("The executive Power shall be vested in a President . . . ."); id., art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."); Mass. Const. pt. II, ch. 2, § 1, art. I ("There shall be a supreme executive magistrate, who shall be styled, the Governor of the Commonwealth of Massachusetts . . . ."). The scope of that power has been, and continues to be, the focus of significant debate. In this article, we focus on the legal framework of that ongoing debate.

The Supreme Court tells us that history is an important guide to the scope of executive power. See, e.g., NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014). On that score, the record is clear. Dating back to President Washington, each President has interpreted his executive power to encompass the authority to issue executive orders. See Phillip J. Cooper, By Order of the President: Administration by Executive Order and Proclamation, 18 Admin. & Soc'y 233, 236 (1986) (describing Washington's use of executive orders and proclamations). Massachusetts

Governors likely have exercised the same power for just as long, though Governor Saltonstall (who served from 1939-1945) was the first to track the orders formally. See Mass. Legis. Research Council, Report Relative to Gubernatorial Executive Orders, submitted as 1981 House 6557, at 22 (1981) ("Mass. H. Rep.").

Historically, the number of presidential and gubernatorial executive orders peaked during periods of national emergency and war, most notably the Civil War, World War I, the Great Depression and World War II. See Cooper, supra, at 236-37. Governor Saltonstall, for example, began issuing a disproportionately high number of orders at the outset of World War II. See Mass. H. Rep. at 22, 80. No executive, however, used the authority with such regularity as President Franklin Roosevelt, who issued 567 orders in 1933 alone and a total of 3,727 orders before his death in 1945. See Cooper, supra, at 237. President Roosevelt averaged nearly 285 executive orders per year—a trend that increased steadily through the conclusion of World War II. See John Contrubis, Cong. Research Serv., Rep. No. 95-772, Executive Orders and Proclamations, at CRS-25 tbl.1 (1999). Since his administration, no President has averaged more than 78 per year. Id; Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern Day America, 28 J. Legis. 1, 27-29 (2002).

Perhaps as a result of the constitutional silence on the issue, there is no codified definition of an executive order. The most commonly referenced definition is set forth in a 1957 report from a committee of the U.S. House of Representatives. It reads, in pertinent part: "Executive orders . . . are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. . . . Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly." H. Comm. on Gov't Operations, 85th Cong., Executive Orders and Proclamations: A Study of a Use of Presidential Powers 1 (1957); see also Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation (2014); see generally Contrubis, supra. Massachusetts law similarly lacks a statutory definition of executive order, though the Supreme Judicial Court has recognized such orders as the "formal" exercise (or delegation) of powers granted to the Governor by the constitution or the legislature. See Opinion of the Justices, 368 Mass. 866, 874-75 (1975).

Regarding the substance and reviewability of executive orders, policymakers and courts alike are guided by the three categories set forth in Justice Robert Jackson's seminal concurrence in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). That case famously involved President Truman's attempt to seize most of the nation's steel mills to quell labor unrest during the Korean War, which Truman attempted to accomplish via executive order directing the Secretary of Commerce to take possession of and operate the mills. Id. at 583. In analyzing Truman's order, Justice Jackson set forth three "practical situations in which a President may doubt, or others may challenge, his powers." Id. at 635.

Though Justice Jackson described the "three practical situations" as "over-simplified," they continue to be the benchmarks against which the exercise of executive power is measured. Id. at 635-38. First, when acting with express or implied legislative authorization, the executive exercises both the power vested in the executive and the authority of the legislature, and the

executive's actions are presumed valid. Second, when the executive acts in the "zone of twilight" defined by legislative silence or inaction on the issue, executive authority will be addressed on a case-by-case basis. Third, when the executive contravenes legislative action, the executive's action is presumptively impermissible. Id. at 637-38.

The most common executive orders fall into the first category, i.e., action where the executive is expressly authorized to act. Such orders are generally directed to, and govern actions by, government officials and agencies. The reason is simple. Executive orders are not self-executing; most exist against the backdrop that an executive official who fails to comply with the order will be removed. See generally Myers v. United States, 272 U.S. 52 (1926). The majority of executive orders pertain to internal matters of government administration, the creation of task forces, and the commissioning of reports. Typically, the order will set forth clearly the basis of its authority. Cf. 1 C.F.R. § 19.1(b) (2017) ("The order or proclamation shall contain a citation of the authority under which it is issued.").

Though the legal framework is routine, the subject matter of such orders is often rich and significant. On the state level, for example, the Governor is expressly afforded the constitutional authority to nominate and appoint judges. See Mass. Const. pt. II, ch. 2, § 1, art. 9. In 1975, Governor Dukakis established the Judicial Nominating Commission (JNC) by executive order, on the theory that the "high quality of judicial officer appointments can be best assured by the use of a non-partisan judicial nominating commission composed of outstanding laymen and lawyers." Mass. Exec. Order No. 114 (Jan. 3, 1975). The Supreme Judicial Court upheld the Governor's authority to create the JNC by executive order, which established "formally and publicly" the "enlist[ment] [of] such aid as he deems necessary to investigate the availability of qualified candidates for judicial office." Opinion of the Justices, 368 Mass. 866, 874-75 (1975). Though each successive Governor has slightly revised the JNC, the tradition of a formalized nominating process continues.

Even where the executive has acted pursuant to an express grant of authority, however, there are checks. For example, when President Trump established his most recent travel ban, see Exec. Order No. 13780 (March 6, 2017), he purported to act under his express statutory authority to bar the immigration of certain individuals he "finds . . . would be detrimental to the interests of the United States." See 8 U.S.C. § 1182(f). Subsequent litigation has focused on whether President Trump actually made such a finding and, if he did so, whether it was improperly infected with religious considerations (in violation of the First Amendment) or was otherwise arbitrary (in violation of the Fifth or Fourteenth Amendments). See, e.g., Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017). The Supreme Court will hear these cases during the first session of October Term 2017. See Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (granting the Government's petitions for certiorari, staying in part the lower courts' injunctions, and holding that the Executive Order cannot be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States).

Executive orders in Justice Jackson's second category, where the scope of executive authority is not well-defined, are evaluated on a case-by-case basis. A reviewing court will scour the Constitution and consider "all the circumstances which might shed light on the views of the

Legislative Branch towards such action, including congressional inertia, indifference, or quiescence." Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981) (internal quotation omitted). In Dames & Moore, the Supreme Court analyzed a series of executive orders that extinguished American liens against Iranian property and barred claims against Iranian property in American courts. There, the Court recognized that a "'long-continued [executive] practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of [legislative] consent.'" Id. at 686 (second and third alterations in original) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)). In other words, the absence of legislative disapproval following executive action on uncertain terrain will be a relevant consideration. Id. at 686-88.

Sometimes, particularly regarding long-standing executive orders, legislative approval is express. President Reagan's Executive Order No. 12333, for example, established a framework for the collection of foreign intelligence. The order itself relied on executive authority granted "by the Constitution" and by the 1947 National Security Act which, most prominently, created the National Security Council but which contained no express delegation of authority to the President. The order remains in place and, reportedly, is the legal basis for much of the National Security Agency's data collection. See Erica Newland, Executive Orders in Court, 124 Yale L.J. 2026, 2030 (2015). The order is now expressly referenced many times in the United States Code. Indeed, Congress even requires the regular reporting of any violations of the order. See 50 U.S.C. § 3110.

Executive orders in the third category, where the executive has acted in contravention of legislation, generally are not permitted. For example, the Governor may not seize facilities of the Massachusetts Bay Transportation Authority where such action is barred by the General Laws. See Mass. Bay Transp. Auth. Advisory Bd. v. Mass. Bay Transp. Auth., 382 Mass. 569, 578-79 (1981). Nor may the President bar a federal contractor that has hired permanent replacements for striking workers where the contractor is expressly afforded by federal law the right to hire such replacements. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1338-39 (D.C. Cir. 1996).

Where executive orders are well-anchored in existing law, they can be attractive tools for policymakers, in part because of the minimal process associated with them. As a senior aide to President Clinton once quipped: "Stroke of the pen, law of the land. Kind of cool." Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. Legislation 1, 1 (2002). Accordingly, an executive order may be an expeditious and tangible step towards accomplishing a policy goal. See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2300 (2001) (describing President Clinton's use of "deliverables," like announcing the issuance of an executive order, to advance his political agenda). Little is required of the executive other than publishing the order in the respective federal or state register. See 44 U.S.C. § 1505; G.L. c. 30A, § 6.

But the same qualities that make orders attractive can make them perilous, particularly where the subject matter strays beyond routine administrative or ceremonial purposes. Other types of executive action, most prominently including administrative rulemaking, include formalized stakeholder input before the action is finalized. The notice-and-comment regulatory process, for example, requires the executive branch to hear—and, where appropriate, address—stakeholder

comments and concerns before a regulation is finalized. See 5 U.S.C. § 553; G.L. c. 30A, §§ 2-3. An executive order may be issued without such external input. Although robust internal legal and litigation risk analyses should be undertaken before an order is signed, that is a matter of practice rather than law. Compare 1 C.F.R. § 19.2 (setting forth typical process of Attorney General review), with Ryan Lizza, Why Sally Yates Stood Up to Trump, New Yorker (May 29, 2017) (noting that the Acting Attorney General first learned of Exec. Order No. 13768, President Trump's first travel ban, from media reports).

Where an executive order that substantively affects the rights or property interests of stakeholders is issued, litigation is likely to follow, particularly where its legal foundation is uncertain or untested. Recent experience is illustrative. See, e.g., Int'l Refugee Assistance Project, 137 S. Ct. at 2088 (granting certiorari review of Exec. Order No. 13780, commonly referred to as the "travel ban"); County of Santa Clara v. Trump, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017) (enjoining enforcement of Exec. Order No. 13768 regarding grant funding to so-called sanctuary cities on several constitutional grounds); cf. United States v. Texas, 136 S. Ct. 2271 (2016) (per curium) (equally divided court affirming Fifth Circuit decision invalidating Department of Homeland Security memoranda regarding deferred action on certain undocumented immigrants). As Justice Jackson teaches us, that is as it should be: "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution." Youngstown, 343 U.S. at 638 (Jackson, J., concurring).

Conclusion

Executive orders can function as a formalized statement to the public regarding how executives intend to solve an administrative problem or discharge their duties. To withstand judicial review, executive orders must be rooted in constitutional or statutory authority and comply with the relevant constitution. Moreover, because executive orders lack the procedural protections that accompany administrative rulemaking and the deliberative process that shapes legislation, executive orders outside the obvious bounds of executive power deserve particular scrutiny.

Kate R. Cook is co-chair of the Boston Bar Association's Civil Rights and Civil Liberties Section and Of Counsel at Sugarman Rogers. She previously served as Chief Legal Counsel to Governor Deval Patrick, where she assisted in drafting numerous Executive Orders.

M. Patrick Moore Jr. is co-chair of the Boston Bar Association's Government Lawyers Forum and Counsel at Hemenway and Barnes LLP. He previously served as Associate Counsel and Advisor for Presidential Personnel in the White House of President Barack Obama, and as Deputy Legal Counsel to Governors Deval Patrick and Charlie Baker. In those roles, he assisted in drafting, analysis and review of executive orders.

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Hemenway & Barnes LLP
75 State Street, 16th Floor
Boston, MA 02109
617-227-7940
www.hembar.com