



Executive Orders: Issuance, Modification, and Revocation

Vanessa K. Burrows
Legislative Attorney

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Summary

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

This report also discusses an issue that has arisen recently—whether a President would be able to waive parts of the health care reform law through an executive order or other administrative actions. Whether a particular executive order addressing a mandatory or discretionary action in the Patient Protection and Affordable Care Act (PPACA) would be upheld as a valid presidential action would depend on the content of the order itself, as well as constitutional considerations and the content of the specific congressional delegation of authority.

The 112th Congress has introduced several bills and resolutions that would require presidential action under existing executive orders. For example, H.R. 3537 and S. 1932 would require the President, acting through the Secretary of State, to grant a permit under Executive Order 13337 for the Keystone XL pipeline project application, but this requirement would be subject to several exceptions. Similarly, H.R. 1938 and H.R. 3400 would require the President to issue a final order granting or denying the presidential permit for the Keystone XL pipeline within 30 days of the issuance of the final environmental impact statement.

Other bills, such as H.R. 2987 and S. 1116, would require the President to issue executive orders on particular topics. Legislative proposals also would require the President to initiate an investigation into the imposition of sanctions under specified existing executive orders upon the receipt of a particular report (H.R. 740, H.R. 1905, S. 366, and S. 1048). In other cases, such as H.R. 142, bills would make particular actions contingent upon the President's issuance of an executive order. Other legislative proposals would add new conditions to, or are based upon, existing executive orders (H.R. 2175, H.R. 2954).

Additionally, the 112th Congress has introduced legislation that would supersede (H.R. 686, H.R. 3345), nullify (H.R. 1307), or otherwise affect the implementation of existing executive orders (H.R. 968, H.R. 2434, S. 1599). For example, in October 2011, the House passed H.R. 686, which would partially supersede Executive Order No. 1922 of April 24, 1914, as amended by the Camp W.G. Williams Land Exchange Act of 1989, “only insofar as it affects” certain lands identified for conveyance to the state of Utah. Other proposed bills and resolutions merely cite executive orders or are prescriptive: H.R. 740, H.Res. 99, H.Res. 134/S.Res. 80.

Finally, the 112th Congress has held and planned hearings and introduced legislation in response to a draft executive order that would require entities submitting offers for federal contracts to disclose certain political “contributions” and “expenditures.” For more on executive orders imposing conditions on federal contractors as terms of their contracts, and related legislation (H.R. 1906, H.R. 1540, H.R. 2017, and S. 1867), see CRS Report R41866, *Presidential Authority to Impose Requirements on Federal Contractors*, by Vanessa K. Burrows and Kate M. Manuel.

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Introduction

This report first discusses the definition of an executive order and provides an overview of the President's authority to issue an executive order. The report then discusses a framework for the analysis of executive orders. This report then examines the potential use of an executive order addressing a mandatory or discretionary action in the Patient Protection and Affordable Care Act (PPACA) and whether such an order would be upheld as a valid presidential action. The report concludes with a discussion of both congressional and presidential revocations and modifications of existing executive orders, including a brief review of legislative proposals in the 112th Congress.

Definition and Authority

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

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

In addition to executive orders and proclamations, Presidents often issue "presidential memoranda." The distinction of these instruments from executive orders and proclamations is likewise more a matter of form than of substance. Specifically, all three instruments can be employed to direct and govern the actions of government officials and agencies.² Further, if issued under a legitimate claim of authority and made public, all three may 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."³ Indeed, it would appear that the only technical difference between executive orders

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

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

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

and proclamations in relation to presidential memoranda is that the former must be published in the *Federal Register*, while the latter are published only when the President determines that they have “general applicability and legal effect.”⁴

Just as there is no definition of executive orders and proclamations in the Constitution, there is, likewise, no specific provision authorizing their issuance. As such, authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that “the executive power shall be vested in a President of the United States,” that “the President shall be Commander in Chief of the Army and Navy of the United States,” and that the President “shall take Care that the Laws be faithfully executed.”⁵ The President’s power to issue executive orders and proclamations may also derive from express or implied statutory authority.⁶ Irrespective of the implied nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic.⁷

Despite the amorphous nature of the authority to issue executive orders, Presidents have not hesitated to wield this power over a wide range of often controversial subjects, such as the suspension of the writ of *habeas corpus*;⁸ the establishment of internment camps during World War II;⁹ and equality of treatment in the armed services without regard to race, color, religion or national origin.¹⁰ President Obama issued an executive order pertaining to the abortion provisions in the new health care law, the Patient Protection and Affordable Care Act.¹¹ This broad usage of

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

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

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

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

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

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

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

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

executive orders to effectuate policy goals has led some commentators to suggest that many such orders constitute executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.¹² The controversial nature of many presidential directives thus raises questions regarding whether and how executive orders may be amended or revoked.

Judicially Enforced Limitations

This section of the report examines one of the seminal separation of powers cases involving a conflict between the executive and legislative branches. While the principles discussed above establish the authority of the President to issue executive orders generally, the question of whether a particular order comports with constitutional and statutory provisions requires a more nuanced analysis.

Youngstown Sheet & Tube Co. v. Sawyer

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

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

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International Conference on Population (Second Session) Mexico, D.F., Aug. 6-13, 1984, at 4-5, http://www.populationaction.org/Publications/Reports/Global_Gag_Rule_Restrictions/MexicoCityPolicy1984.pdf; Memorandum of March 28, 2001, Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 29, 2001).

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

¹³ 343 U.S. 579 (1952).

¹⁴ *Id.* at 587.

¹⁵ *Id.* at 585.

¹⁶ *Id.* at 586-89.

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

Justice Jackson's Concurrence in *Youngstown*

Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.¹⁸ Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."¹⁹ Secondly, Justice Jackson maintained that, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."²⁰ In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only to the President's "own constitutional powers minus any constitutional powers of Congress over the matter."²¹ In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."²²

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

These standards remain applicable in the modern era. In 1996, the United States Court of Appeals for the District of Columbia invalidated an executive order issued by President Clinton on the grounds that it conflicted with the National Labor Relations Act (NLRA).²⁶ The order at issue prohibited federal agencies from contracting with employers that permanently replaced striking employees. Upon determining that the order conflicted with a provision of the NLRA

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concurring); *id.* at 635 (Jackson, J., concurring).

¹⁸ 343 U.S. at 635-38.

¹⁹ *Id.* at 635, 637.

²⁰ *Id.* at 637.

²¹ 343 U.S. at 637.

²² *Id.* at 637-38.

²³ *Id.* at 638-39.

²⁴ *Id.* at 640.

²⁵ *Id.* at 638, 640-45.

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

guaranteeing the right to hire permanent replacements during strikes, the court of appeals held that the statute preempted the executive order, stripping it of any effect.²⁷

Potential Use of Executive Orders Related to PPACA

The issue of a President's ability to waive parts of the health care reform legislation through the use of an executive order has arisen in recent presidential debates.²⁸ This section of the report discusses what general categories of provisions in the Patient Protection and Affordable Care Act (PPACA)²⁹ potentially could be impacted by a President through the use of an executive order or other administrative actions.³⁰ This section examines, within general categories of actions mandated by PPACA and discretionary actions contained in the act, the potential use of an executive order pertaining to those types of actions. Whether a particular executive order addressing a mandatory or discretionary action in PPACA would be upheld as a valid presidential action would depend on the content of the order itself, as well as constitutional considerations and the content of the specific congressional delegation of authority.

Discretionary Actions by the Health and Human Services Secretary

The ability of a President to direct department or agency heads to take particular actions "within the sphere of that official's delegated discretion" is the subject of much debate among constitutional and administrative law scholars.³¹ One view is that an executive order to the Secretary to take an action (such as issuing a proposed regulation) would appear to be "an exercise of the kind of policymaking authority Justice Black denied the President in *Youngstown*."³² This "conventional" administrative law view is that "Congress has exercised this

²⁷ *Id.* at 1339.

²⁸ Texas Governor Rick Perry has stated, "I will use an executive order to get rid of as much of Obamacare as I can on day one." Republican Presidential Candidates Participate in a CNN-Tea Party Express GOP Presidential Debate, CQ Transcriptions, LLC (Sept. 12, 2011). Later in the same debate, Rep. Michele Bachmann stated that "And waivers and executive orders won't cut it. If you could solve Obamacare with an executive order, any president could do it and any president could undo it. That's not—not how it can be done.... The only way to eradicate Obamacare is to pull it out by the root and branch to fully repeal it. It's the only way we're going to get rid of it." In a later debate, former Massachusetts Governor Mitt Romney stated, "And if I'm [P]resident of the United States, on my first day in office, I will issue an executive order which directs the [S]ecretary of [H]ealth and [H]uman [S]ervices to provide a waiver from Obamacare to all 50 states." Republican Presidential Candidates Participate in Fox News-Google GOP Presidential Debate, CQ Transcriptions, LLC (Sept. 22, 2011). See generally Republican Presidential Candidates Participate in Mike Huckabee Presidential Forum on Fox News, CQ Transcriptions, LLC (Dec. 3, 2011)(dialogue between Governor Rick Perry and Virginia Attorney General Ken Cuccinelli).

²⁹ P.L. 111-148 (2010). PPACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010)(HCERA). These acts will be collectively referred to as "PPACA."

³⁰ Presidents have several methods of affecting administrative decisions, including presidential memoranda, which may be used to direct and govern the actions of government officials and agencies. Presidents may also use presidential directives, "issued from the office of the Chief Executive," which have the "same substantive legal effect as an executive order." Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, Memorandum for the Counsel to the President from Acting Assistant Attorney General Randolph D. Moss (Jan. 29, 2000), <http://www.justice.gov/olc/predirective.htm>. Additionally, "[a]gency officials may accede to [the President's] preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2298 (2001).

³¹ See Kagan, *supra* note 30, at 2323. See generally *id.* at 2319-31.

³² *Id.* at 2321, 2323; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952)("The President's order does (continued...)

[administrative policymaking] power by delegating the relevant discretion to a specified agency official, rather than to the President.”³³ Another view, the unitary executive view, asserts that the “Constitution establishes a President with plenary control over all heads of agencies involved in executing, implementing, or administering federal law.”³⁴ Supreme Court Justice Elena Kagan has argued for a third view that would turn on the issue of statutory interpretation:

If Congress, in a particular statute, has stated its intent with respect to presidential involvement [to direct discretionary action], then that is the end of the matter. But if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on the President’s role in the delegation, then an interpretive question arises [as to whether the delegation is to the stated agency official only, absent “evidence to the contrary,” or to the agency official “subject to the ultimate control of the President,” absent contrary congressional intent].³⁵

On the one hand, if a President were to issue an executive order concerning discretionary actions by the Secretary, such an executive order—depending on its content—may be within the President’s generally recognized powers to provide for the direction of the executive branch.³⁶ PPACA contains many grants of discretionary authority to the Secretary of Health and Human Services (HHS) to implement the act. For example, §2713(c) provides that “The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.”³⁷ An executive order or presidential memorandum that directed the Secretary to develop such guidelines and provide guidance on compliance with the guidelines would appear to be within the President’s authority.³⁸ Past Presidents have asserted similar or more expansive authority through executive

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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. The preamble of the order itself, like that of many statutes ... authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question.... The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.”)

³³ Kagan, *supra* note 30, at 2325.

³⁴ *Id.*

³⁵ Kagan, *supra* note 30, at 2326-27; *see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602 (1952)(Frankfurter, J. concurring)(“It cannot be contended that the President would have had the power to issue this order had Congress explicitly negated such authority in formal legislation.”).

³⁶ *See* U.S. CONST. art. II, §3.

³⁷ PPACA & HCERA, Consolidated Print, §2713(c).

³⁸ *See, e.g.*, Exec. Order No. 13141, 64 Fed. Reg. 63169 (Nov. 18, 1999)(stating, with regard to environmental review of trade agreements, that the United States Trade Representative and the Chair of the Council on Environmental Quality “shall oversee the implementation of this order, in consultation with appropriate foreign policy, environmental, and economic agencies”); Office of the United States Trade Representative, Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements, 65 Fed. Reg. 79442 (Dec. 19, 2000); *see also* Memorandum on Guidelines to States for Implementing the Family Violence Provisions of Welfare Reform Legislation, 2 Pub. Papers 1751 (Oct. 3, 1996)(“I direct the Secretary of [HHS] and the Attorney General to develop guidance for States to assist and facilitate the implementation of the Family Violence provisions.”); Memorandum on the Food Safety Initiative, 2 Pub. Papers 1285, 1286 (Oct. 2, 1997)(“I direct the Secretary of [HHS], in partnership with the Secretary of Agriculture and in close cooperation with the agricultural community, to issue within 1 year from the date of this memorandum, guidance on good agricultural practices and good manufacturing practices for fruits and vegetables.”); Memorandum on New Tools to Help Parents Balance Work and Family, 1 Pub. Papers 841 (May 24, 1999)(“I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child. (continued...)

orders, in particular with regard to centralization of control over agencies.³⁹ Similarly, instructions to the Secretary in an executive order on implementing the law through the potential issuance of policy statements would arguably be within the President's general authority to provide instructions to executive branch officials.⁴⁰ On the other hand, an executive order on discretionary actions by the Secretary—depending on its content—may be viewed as beyond the President's authority under *Youngstown*, as Congress chose to delegate discretionary authority to the HHS Secretary, not the President.⁴¹ Under Justice Kagan's theory, the question would turn on the precise statute at issue.

Additionally, if an executive order interpreting PPACA did not accurately reflect the law's text, or was interpreted to implement the law in a manner that is not compelled by PPACA's underlying legal provisions, the legal basis for the order may be less clear under the tripartite scheme in *Youngstown*.⁴² Under the second *Youngstown* category, in which Congress has neither granted nor denied authority to the President, the President acts in reliance "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁴³ In these instances, the validity of the presidential action "hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'"⁴⁴ A reviewing court may look to the statute upon which the executive order is based, as Congress arguably has not ceded its authority with regard to domestic policy matters addressed in PPACA, and may be less likely to view the President as having independent constitutional authority in this area (as opposed to matters of foreign affairs and national security). Such an executive order also could be seen as within the third *Youngstown* category—contrary to Congress's express will that the discretionary authority within PPACA be carried out by the HHS Secretary.⁴⁵

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In addition, I direct the Secretary to develop model State legislation that States could use in following these regulations."); Memorandum on Reducing the Risk of *Listeria Monocytogenes*, 1 Pub. Papers 854, 855 (May 5, 2000) ("I direct the Secretary of Agriculture to complete proposed regulations that include any appropriate microbiological testing and other industry measures...."); Message to Congress Reporting on the Executive Order on Blocking Property of Certain Persons Contributing to the Conflict in Cote d'Ivoire, 1 Pub. Papers 215, 216 (Feb. 8, 2006) ("I delegated to the Secretary of the Treasury, after consultation with the Secretary of State, the authority to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by the IIEPA and the United Nations Participation Act, as may be necessary to carry out the purposes of this order.").

³⁹ See, e.g., Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (President Reagan's executive order on proposed major rules, regulatory impact analysis, and cost-benefit analysis); Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (President Clinton's order on regulatory planning and review).

⁴⁰ See U.S. CONST. art. II, §3; Kagan, *supra* note 30, at 2285, 2290-99 (discussing the "use of formal directives (generally styled as memoranda to the heads of departments) instructing one or more agencies to propose a rule or perform some other administrative action within a set period of time").

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952); see Kagan, *supra* note 30, at 2325.

⁴² See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[I]t 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.").

⁴³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

⁴⁴ *Dames & Moore*, 453 U.S. at 668-69 (quoting *Youngstown*, 343 U.S. at 637).

⁴⁵ *Youngstown*, 343 U.S. at 637.

Requirements for Federal Regulations Implementing PPACA

PPACA contains numerous requirements that the Secretary must issue rules to implement particular provisions of the act. For example, §1104(c) requires the Secretary to issue several final rules establishing a unique health plan identifier, a standard for electronic funds transfers, and a transaction standard and a single set of associated operating rules for health claims attachments. These three statutory requirements for the issuance of rules also state that the Secretary may issue such rules as interim final rules, so that such rules and standards are effective no later than particular dates in 2012, 2014, and 2016.

A President would not appear to be able to issue an executive order halting an agency from promulgating a rule that is statutorily required by PPACA, as such an action would conflict with an explicit congressional mandate. Under the third *Youngstown* category, an executive order preventing issuance of a congressionally mandated PPACA rule could be viewed as “incompatible with the express or implied will of Congress.”⁴⁶ As mentioned earlier, such a presidential action must rest upon an exclusive power, and the courts can uphold the measure “only by disabling the Congress from acting upon the subject.”⁴⁷

For example, in 1996, in *Chamber of Commerce of the United States v. Reich*, the U.S. Court of Appeals for the District of Columbia Circuit found that Executive Order 12954 was invalid in part because it conflicted with the National Labor Relations Act (NLRA).⁴⁸ Executive Order 12954 directed the Secretary of Labor to promulgate regulations providing for the debarment of contractors who hired permanent replacements for striking workers,⁴⁹ and was issued after Congress debated, but failed to pass, amendments to the NLRA that would have prohibited employers from hiring permanent replacements.⁵⁰ The court discussed the ability of the courts, in cases where Congress has not precluded non-statutory judicial review, to review the legality of the President’s order and the actions of subordinate executive officials acting pursuant to a presidential directive.⁵¹ The court stated that it was “untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to the Federal Property and Administrative Services Act [FPASA]⁵² in pursuit of governmental savings.”⁵³

⁴⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

⁴⁷ *Id.* at 637-38.

⁴⁸ 74 F.3d 1322, 1339 (D.C. Cir. 1996). The court did not mention *Youngstown*.

⁴⁹ 60 Fed. Reg. 13023 (Mar. 10, 1995).

⁵⁰ 74 F. 3d at 1325; *see, e.g.*, H.R. 5, 103d Cong.; S. 55, 103d Cong.; Ronald Turner, *Banning the Permanent Replacement of Strikers by Executive Order: The Conflict between Executive Order 12945 and the NLRA*, 12 J.L. & POL’Y 1 (1996).

⁵¹ 74 F.3d at 1328 (“That the ‘executive’s’ action here is essentially that of the President does not insulate the entire executive branch from judicial review.... Even if the Secretary were acting at the behest of the President this ‘does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.”)(quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12)(D.C. Cir. 1971)); *see also Reich*, 74 F.3d at 1331 n.4.

⁵² P.L. 81-152, 63 Stat. 377 (June 30, 1949)(codified in scattered sections of Titles 40 and 41 of the *United States Code*).

⁵³ 74 F.3d at 1332 (emphasis in original).

However, Presidents have issued executive orders on regulatory review that have increased the President's involvement in agency rulemaking generally.⁵⁴ (See "Presidential Revocation and Modification of Executive Orders" below). Additionally, White House chiefs of staff under the incoming Administrations of Presidents George W. Bush and Barack Obama have issued memoranda to the heads of executive branch departments and agencies requesting that certain steps be taken with regard to various proposed and final regulations from the outgoing Administration.⁵⁵

Mandatory PPACA Programs and Appropriations

Similar to the above discussion on statutorily required rulemakings, a President would not appear to be able to issue an executive order halting statutorily required programs or mandatory appropriations for a new grant or other program in PPACA,⁵⁶ and there are a variety of different types of these programs. Such an executive order would likely conflict with an explicit congressional mandate and be viewed "incompatible with the express ... will of Congress" under the third *Youngstown* category.⁵⁷ However, there may be instances where PPACA leaves discretion to the Secretary to take actions to implement a mandatory program, and, as discussed above, an executive order directing the Secretary to take particular actions may be analyzed as within or beyond the President's powers to provide for the direction of the executive branch.

Congressional Revocation and Modification of Executive Orders

As long as it is not constitutionally based, Congress may repeal a presidential order, or terminate the underlying authority upon which the action is predicated. For example, in 2006, Congress revoked part of an executive order from November 12, 1838, which reserved certain public land for lighthouse purposes.⁵⁸ Congress has also explicitly revoked executive orders in their entirety,

⁵⁴ See, e.g., Exec. Order No. 11821, 39 Fed. Reg. 41,501 (Nov. 29, 1974)(President Ford); Exec. Order No. 12044, 43 Fed. Reg. 12,661 (March 24, 1978)(President Carter); Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981)(President Reagan); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993)(President Clinton); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011)(President Obama).

⁵⁵ Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001); Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 20, 2009); see also Memorandum from Peter R. Orszag, Director, Office of Management and Budget (Jan. 21, 2009)(providing guidance on implementing the Emanuel memorandum).

⁵⁶ CRS Report R41301, *Appropriations and Fund Transfers in the Patient Protection and Affordable Care Act (PPACA)*, by C. Stephen Redhead, summarizes all the mandatory appropriations in PPACA, most of which are for new programs. See Table 1 in the report. Each row entry in the table includes the following information: (i) the PPACA section; (ii) whether or not the program is new, or simply an amendment to an existing program; (iii) a description of the program; and (iv) details of the appropriation. As summarized in R41301, many of the provisions provide annual appropriations for one or more specified fiscal years; a few provisions are multiple-year appropriations. Often the provision includes additional language stating that the funds are to remain available "until expended" or "without fiscal year limitation." A couple of provisions appropriate an indefinite amount.

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

⁵⁸ P.L. 109-241, §504(a); 16 U.S.C. §668dd note. "In use from the earliest days of the Republic, the Executive Order was at first employed mainly for the disposition of the public domain, for the withdrawal of lands for Indian, military, naval, and lighthouse reservations or other similar public purposes." W.P.A. HISTORICAL RECORDS SURVEY, (continued...)

such as in the Energy Policy Act of 2005, which revoked a December 13, 1912, executive order that created Naval Petroleum Reserve Numbered 2.⁵⁹ Another example of the express nullification of an executive order by Congress involved the revocation of an executive order by President George H. W. Bush to the Secretary of the Department of Health and Human Services to establish a human fetal tissue bank for research purposes.⁶⁰ To effectuate this repeal, Congress simply directed that the “the provisions of Executive Order 12806 shall not have any legal effect.”⁶¹ There have been numerous similarly revoked executive orders and proposals to revoke particular executive orders.⁶²

Congress also may retroactively repeal the statutory authority in which the President based his executive order. This would render any executive order, issued after the date established by Congress, invalid. Congress may also affect executive orders based on statutory authority, or where there is concurrent authority, by amending the language to include a sunset provision and then later extend the effective period or let the provision lapse. If Congress let the sunset provision lapse, the President would no longer have the authority with regard to that statute to act. For example, the National Council on Indian Opportunity (NCIO) was established by Executive Order 11399⁶³ and amended by Executive Order 11688.⁶⁴ In 1969, Congress appropriated funds to continue the NCIO for five years at which time it would terminate unless reauthorized by Congress.⁶⁵ The NCIO is no longer in existence.

Additionally, Congress has used its appropriations authority to limit the effect of executive orders, such as denying salaries and expenses for an office established in an executive order,⁶⁶ as well as denying funds to implement a particular section of a subsequently revoked executive order that would have enabled agency heads to designate a presidential appointee to serve as the agency’s regulatory policy officer.⁶⁷ Congress has used appropriations acts to enable a program created by executive order to receive donations for publicity materials about the program.⁶⁸ Outside of appropriations bills, other legislative proposals have included those that would codify existing executive orders with modifications.⁶⁹

(...continued)

PRESIDENTIAL EXECUTIVE ORDERS, VOL. I, LIST, at v (1944).

⁵⁹ P.L. 109-58, §334; 10 U.S.C. §7420 note.

⁶⁰ Exec. Order No. 12806, 57 Fed. Reg. 21589 (May 21, 1992).

⁶¹ P.L. 103-43, 107 Stat. 133, §121. Given the highly speculative basis of any asserted constitutional authority for the President to issue such an order, there appears to be little doubt as to the legitimacy of this congressional revocation. See *Youngstown*, 343 U.S. at 635-638.

⁶² See House Comm. on Rules, Subcomm. on Legislative and Budget Process, 106th Cong., 1st Sess., Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?, at 124-27 (Oct. 27, 1999); see also H.R. 5658, §2857(b), 110th Cong. (2008). This section of H.R. 5658 would have revoked Executive Order 1922 of April 24, 1914, as amended, as it affected certain lands identified for conveyance to Utah.

⁶³ 33 Fed. Reg. 4245, as amended by Exec. Order No. 11551, 35 Fed. Reg. 12885; Exec. Order No. 11688, 37 Fed. Reg. 25815.

⁶⁴ 37 Fed. Reg. 25815 (Dec. 1, 1972).

⁶⁵ P.L. 91-125, 83 Stat. 220, 25 U.S.C. §1 note.

⁶⁶ P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

⁶⁷ Exec. Order 13422, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007)(revoked by Exec. Order 13497); P.L. 111-8, §746; 123 Stat. 693.

⁶⁸ P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

⁶⁹ H.R. 3090, §421, 111th Cong. (2009); S. 642, 110th Cong. (2008).

Select Laws Concerning Executive Orders Enacted During the 111th Congress

The 111th Congress passed several laws with provisions relating to existing executive orders. For instance, P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA) transferred functions, personnel, assets, liabilities, and administrative actions from a national coordinator appointed under an executive order to a national coordinator appointed under a provision of ARRA. Furthermore, appropriations acts, such as P.L. 111-8 and P.L. 111-117, contained several provisions on funding of various executive orders, including the provisions mentioned in the previous paragraph denying funding for sections of executive orders and enabling the receipt of donations related to executive orders. P.L. 111-8 also contained prohibitions on the use of funds to delay implementation of executive orders. Another appropriations act, P.L. 111-80, denied funding for the promulgation of proposed or final rules allowing importation of Chinese poultry products, if the rules were not issued according to the procedures for significant rules set forth in an executive order. Several bills also were introduced in the 111th Congress regarding the revocation and modification of executive orders.⁷⁰

Legislative Activity in the 112th Congress

In the 112th Congress, several bills have been introduced that would supersede, nullify, or otherwise affect the implementation of existing or draft executive orders. For example, H.R. 3345 would supersede, in its entirety, Executive Order 12999, which addresses the transfer of federal technology for schools and nonprofits. In October 2011, the House passed H.R. 686, which would partially supersede Executive Order No. 1922 of April 24, 1914, as amended by the Camp W.G. Williams Land Exchange Act of 1989, “only insofar as it affects” certain lands identified for conveyance to the state of Utah. Another bill, H.R. 1307, would nullify Executive Order 13166, entitled “Improving Access to Services for Persons with Limited English Proficiency,” and prohibit appropriated funds from being used to issue or enforce an executive order that “creates an entitlement to services” in languages other than English. H.R. 968 would limit the President’s authority to implement a March 2011 executive order on the periodic review of Guantanamo detainees until the Secretary of Defense submits a national security protocol for each detainee to the appropriate congressional committees. Appropriations bills, such as H.R. 2434 and S. 1599, contain several provisions on funding related to various executive orders.

The 112th Congress also has introduced several bills and resolutions that would require presidential action under existing executive orders. For example, H.R. 3537 and S. 1932 would require the President, acting through the Secretary of State, to grant a permit under an existing executive order, Executive Order 13337, for the Keystone XL pipeline project application, but this requirement would be subject to several exceptions. Similarly, H.R. 1938 and H.R. 3400 would require the President to issue a final order granting or denying the presidential permit for the Keystone XL pipeline within 30 days of the issuance of the final environmental impact statement. The Obama Administration has issued a Statement of Administration Policy against H.R. 1938, stating that the bill “conflicts with long-standing Executive branch procedures regarding the authority of the President and the Secretary of State,” which appear in Executive

⁷⁰ See, e.g., H.R. 35, H.R. 500/S. 237, H.R. 603, H.R. 1228, H.R. 3465, H.R. 4453, and S. 2929.

Order 11423 and 13337.⁷¹ Other bills, such as H.R. 2987 and S. 1116, would require the President to issue executive orders on particular topics.

Along these lines, other bills would add new conditions to, or are based upon, existing executive orders. H.R. 1905 would codify United States sanctions on Iran imposed under certain executive orders, which would “remain in effect until the President certifies to the appropriate congressional committees, at least 90 days before the removal of such sanctions, that the Government of Iran” has taken actions such as “verifiably dismantl[ing]” its nuclear, biological, and chemical weapons programs. H.R. 1905 also contains the same provisions as H.R. 740, S. 366, and S. 1048, which would require the President, upon the receipt of a particular report by the Securities and Exchange Commission related to sanctionable activities, to initiate an investigation into the imposition of sanctions under specified existing executive orders. S. 1048 also would modify existing executive orders. On a different note, H.R. 2175 would require particular agencies to submit certain cost-benefit analyses described in Executive Order 12866 to Congress. H.R. 2954 would codify Executive Order 12898 on federal actions to address environmental justice in minority populations and low-income populations, with modifications including the elimination of the order’s prohibition on judicial review of compliance with the order.

Other bills and resolutions on executive orders proposed in the 112th Congress are prescriptive. For example, H.R. 474 would prohibit importation of foreign-made American flags, regardless of whether their proportions complied with an executive order. H.R. 142 would make the sale of gasoline from a newly created Strategic Gasoline Reserve contingent, in part, on the President’s issuance of an executive order. H.Res. 99 would recognize the 65th anniversary of the signing of Executive Order 9066 by President Franklin D. Roosevelt, which established the internment camps during World War II. H.Res. 134/S.Res. 80 would urge the President and the Secretary of State to take actions under an existing executive order to sanction Iranian government officials and others in Iran.

Draft Executive Order on Disclosure of Political Spending by Government Contractors

The 112th Congress also has expressed concerns with a draft executive order on disclosure requirements for federal contractors that the Obama Administration is reportedly considering.⁷² Some Members of Congress have written letters to the White House, and the House of Representatives has held a hearing on the draft executive order, which would require entities submitting offers for federal contracts to disclose certain campaign-related donations.⁷³

⁷¹ Executive Office of the President, Statement of Administration Policy: H.R. 1938—North American-Made Energy Security Act (July 25, 2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1938r_20110725.pdf. For more on these executive orders and related litigation, see the Appendix, Presidential Permitting Authority, in CRS Report R41668, *Keystone XL Pipeline Project: Key Issues*, by Paul W. Parfomak et al.

⁷² For background on the authorities under which Presidents have historically issued executive orders pertaining to federal contractors and the legal issues potentially raised by the exercise of these authorities; key cases challenging executive orders pertaining to federal contractors; and potential limitations on and congressional responses to presidential exercises of authority regarding federal contractors, see CRS Report R41866, *Presidential Authority to Impose Requirements on Federal Contractors*, by Vanessa K. Burrows and Kate M. Manuel.

⁷³ Amanda Becker and David M. Drucker, *Members Weigh In on Draft Disclosure Order*, Roll Call (May 24, 2011); *Politicizing Procurement: Would President Obama’s Proposal Curb Free Speech and Hurt Small Business?*, Joint Hearing before the H. Comm. on Oversight and Government Reform and the H. Comm. on Small Business, 112th Congress (May 12, 2011).

Specifically, the draft executive order reportedly would require the disclosure of (1) “contributions or expenditures to or on behalf of federal candidates, parties, or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control” and (2) “contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures and electioneering communications.”⁷⁴ Disclosure would be required if the aggregate amount of the contributions and expenditures to a given recipient exceeds \$5,000 during the year. The disclosures would be made publicly available.

In May 2011, the House passed an amendment, H.Amdt. 310, to the National Defense Authorization Act, H.R. 1540, in response to the draft order. Although the amendment does not specifically mention the draft executive order, H.Amdt. 310 would prohibit an executive agency from requiring an entity submitting an offer for a federal contract or participating in acquisition of property or services by the federal government to disclose certain political contributions, expenditures, and disbursements of funds as a condition of submitting the offer or participation. H.Amdt. 310 contains the same language as H.R. 1906, the Fairness in Federal Contracting Act of 2011. The Senate version of the National Defense Authorization Act for FY2012, S. 1867, contains identical language. The House has also passed an amendment to the Department of Homeland Security Appropriations Act, 2012 (H.R. 2017), that would prohibit the use of funds appropriated under the act “to implement any rule, regulation, or executive order regarding the disclosure of political contributions that takes effect on or after the date of enactment of this Act.”

Presidential Revocation and Modification of Executive Orders

Illustrating the fact that executive orders are used to further an administration’s policy goals, there are frequent examples of situations in which a sitting President has revoked or amended orders issued by his predecessor.⁷⁵ This practice is particularly apparent where Presidents have used these instruments to assert control over and influence the agency rulemaking process. President Ford, for instance, issued Executive Order 11821, requiring agencies to issue inflation impact statements for proposed regulations.⁷⁶ President Carter altered this practice with Executive Order 12044, requiring agencies to consider the potential economic impact of certain rules and identify potential alternatives.⁷⁷

Shortly after taking office, President Reagan revoked President Carter’s order, implementing a scheme asserting much more extensive control over the rulemaking process. Executive Order

⁷⁴ A copy of a document that is reportedly the draft executive order is available on Politico’s website, http://www.politico.com/static/PPM187_disclosure.html.

⁷⁵ For example, on February 17, 2001, in Executive Orders 13201-04, President Bush revoked a series of executive orders issued by President Clinton regarding union dues and labor contracts, significantly altering several requirements pertaining to government contracts. 66 Fed. Reg. 11221, 11225, 11227-28 (2001); *see* Exec. Order No. 12871, 58 Fed. Reg. 52201 (1993); Exec. Order 12933, 59 Fed. Reg. 53559 (1994). President Obama revoked Executive Order 13201 in Executive Order 13496. 74 Fed. Reg. 6107 (Feb. 4, 2009). He revoked Executive Order 13202 in Executive Order 13502. 74 Fed. Reg. 6985 (Feb. 11, 2009). President Obama also revoked Executive Order 13204 in Executive Order 13495. 74 Fed. Reg. 6103 (Feb. 4, 2009).

⁷⁶ 3 C.F.R. 926 (1971-75).

⁷⁷ 3 C.F.R. 152 (1978).

12291 directed agencies to implement rules only if “the potential benefits to society for the regulation outweigh the potential costs to society,” requiring agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.⁷⁸ This order was criticized by some as a violation of the separation of powers doctrine, on the grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress.⁷⁹ Despite these concerns, there were no court rulings assessing the validity of President Reagan’s order.

In turn, President Clinton issued Executive Order 12866, modifying the system established during the Reagan Administration.⁸⁰ While retaining many of the basic features of President Reagan’s order, E.O. 12866 eased cost-benefit analysis requirements, and recognized the primary duty of agencies to fulfill the duties committed to them by Congress.

President George W. Bush issued two executive orders amending E.O. 12866, Executive Orders 13258 and 13422. President Obama revoked both of these orders in E.O. 13497 at the beginning of his presidency.⁸¹ President Bush’s E.O. 13258 concerned regulatory planning and review, and it removed references in E.O. 12866 to the role of the Vice President, replacing several of them with a reference to the Director of the Office of Management and Budget (OMB) or the Chief of Staff to the President.⁸² E.O. 13422 defined guidance documents and significant guidance documents and applied several parts of E.O. 12866 to guidance documents, as well as required each agency head to designate a presidential appointee to the newly created position of regulatory policy officer.⁸³ E.O. 13422 also made changes to the Office of Information and Regulatory Affairs’ (OIRA) duties and authorities, including a requirement that OIRA be given advance notice of significant guidance documents.⁸⁴ President Obama’s executive order revoking the Bush executive orders also instructed the Director of OMB and the heads of executive departments and agencies to rescind orders, rules, guidelines, and policies that implemented those executive orders.⁸⁵

President Obama has issued two other executive orders on the regulatory review process. The first, E.O. 13563, reaffirmed and supplemented the principles of regulatory review in E.O. 12866.⁸⁶ The order addressed public participation and agency coordination in simplifying and harmonizing regulations for industries with significant regulatory requirements.⁸⁷ The order also instructed agencies to consider flexible approaches to regulation, required agencies to ensure the

⁷⁸ 3 C.F.R. 127, 128 (1981).

⁷⁹ 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).

⁸⁰ 58 Fed. Reg. 51735 (1993).

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

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

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

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

⁸⁵ *Id.*

⁸⁶ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011); see also Cass R. Sunstein, Administrator, OIRA, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13563, “Improving Regulation and Regulatory Review” (Feb. 2, 2011), at 1.

⁸⁷ Exec. Order No. 13563, §§2-3.

objectivity of scientific and technical information and processes that support regulations, and mandated that agencies develop a preliminary plan to review existing significant regulations for potential modifications or repeal.⁸⁸ The second executive order, E.O. 13579, stated that independent regulatory agencies should also comply with the goals and requirements of E.O. 13563, “to the extent permitted by law.”⁸⁹ E.O. 13579 also indicated that independent regulatory agencies should comply with the regulatory review provisions for existing significant regulations in E.O. 13563.⁹⁰

Author Contact Information

Vanessa K. Burrows
Legislative Attorney
vburrows@crs.loc.gov, 7-0831

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This report was originally written by T. J. Halstead, Deputy Assistant Director, American Law Division.

⁸⁸ Exec. Order No. 13563, §§4-6.

⁸⁹ Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 14, 2011).

⁹⁰ Generally speaking, executive orders on regulatory review have exempted independent regulatory agencies from their requirements by referencing a statutory definition of an independent regulatory agency that contains a list of such agencies. 44 U.S.C. §3502.