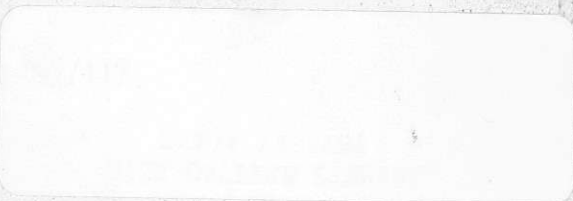


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EXECUTIVE ORDERS

(A Brief History of Their Use
and the President's Power to Issue Them), 1963.

[NOTE: While this report contains much information
on the history of Executive Orders, due to the
limited time allowed for its preparation it does
not purport to be an exhaustive study on the subject]

Under the Constitution of the United States, the President is vested with the executive power of the Government (Article II, Section 1, Clause 1), the power to preserve, protect and defend the Constitution (Article II, Section 1, Clause 8), and the power to see that the laws are faithfully executed (Article II, Section 3). From these powers is implied the authority to issue Executive Orders.

In subject matter executive Orders have covered a wide scope, ranging from the appointment of a charwoman in a local post office (No. 6420, November 9, 1933) to prescribing rules and regulations under the Trading-with-the-Enemy Act (No. 2796, January 26, 1918). Most Orders relate to the conduct of government business but many have a wider significance. An Executive Order has never been defined by Congress.

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In use from the earliest days of the Republic, the Executive Order was at first employed mainly for the disposition of the public domain, the withdrawal of lands from federal reservations, and for other such similar purposes. It was also used to create forest reserves, to establish land offices, to promulgate rules for civil service, to blanket in additional positions, and to make individual exceptions and exemptions from these rules.

During World I the use of the Executive Order was widened, as executive authority and power increased. Agencies such as the Food Administration, the Grain Corporation, and the War Trade Board were set up by Executive Order (namely, E. O. 2679-A; E. O. 2681; and E. O. 2729-A); and during World War II such agencies as the Office of Censorship, the War Shipping Administration, the National Housing Agency, and the War Manpower Commission, were established by Executive Order (E. O. 8985, December 19, 1941; E. O. 9054, February 1, 1942; E. O. 9070, February 24, 1942; and E. O. 9139, April 18, 1942).

In the early years Orders were not numbered and, inasmuch as there was no uniform system for recording them the total of the unnumbered Orders is unknown. According to the Historical Records Survey in their List and Index of Presidential Executive Orders, Unnumbered Series, the "numbering was begun

by the Department of State in 1907, at which time all of the relatively few Orders then on file in that Department were arranged chronologically and given a number."

Of the numbered series the following figures show the number of Orders issued during each Presidential term beginning with William McKinley in 1901:

March 4, 1901 -- March 3, 1905 (McKinley and Theo. Roosevelt)	299
March 4, 1905 -- March 3, 1909 (Theo. Roosevelt)	864
March 4, 1909 -- March 3, 1913 (William Howard Taft)	789
March 4, 1913 -- March 3, 1917 (Woodrow Wilson)	855
March 4, 1917 -- March 3, 1921 (Woodrow Wilson)	1001
March 4, 1921 -- March 3, 1925 (Harding and Coolidge)	782
March 4, 1925 -- March 3, 1929 (Calvin Coolidge)	957
March 4, 1929 -- March 3, 1933 (Herbert Hoover)	1000
March 4, 1933 -- January 20, 1937 (F. D. Roosevelt)	1699
January 20, 1937 -- January 20, 1941 (F. D. Roosevelt)	1113
January 20, 1941 -- January 20, 1945 (F. D. Roosevelt)	874
January 20, 1945 -- January 20, 1949 (Roosevelt and Truman)	514
January 20, 1949 -- January 20, 1953 (H. S. Truman)	903
January 20, 1953 -- January 20, 1957 (Eisenhower)	264
January 20, 1957 -- January 20, 1961 (Eisenhower)	218

The validity of Executive Orders has been questioned many times, but a ruling as to the extent or limit to which they may be used has never been determined by the Courts or by Congress.

The Order of the President (E.O. 10340, April 8, 1952) seizing the steel industry, was held by the Supreme Court in Youngstown Co. v. Sawyer, 343 U.S. 579, 589 (1952), to be without Constitutional or Congressional authority and therefore could not stand. The power sought to be exercised under it was a law-making power which the Constitution vests in the Congress alone. "Nor," said the Court (p. 587), "can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the Presidents' power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Justice Frankfurter, in his concurring opinion (p. 613) quoted a statement made by Justice Brandeis in Myers v. United States, 272 U.S. 240, 293 (1926), that "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

Most of the Supreme Court cases in which Executive Orders are involved are concerned with the question of actions

taken under an Order and not the constitutionality of the Order itself. However, references to the President's power have been made, by way of dicta, in a few cases which are quoted below.

Peters v. Hobby, 349 U.S. 331, 349 (1955), involved the Loyalty Review Board's action under Executive Order 9835. The Court stated that the constitutionality of the Order did not come into issue, but Mr. Justice Black, in his concurring opinion, made the following pertinent statement (p. 319):

. . . I agree that it is generally better for this Court not to decide constitutional questions in cases which can be adequately disposed of on non-constitutional grounds. . . . [but here] I think it would be better judicial practice to reach and decide the constitutional issues, although I agree with the Court that the Presidential Order can justifiably be construed as denying the Loyalty Review Board the power exercised in this case. . . . But I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any Act of Congress. That order and others associated with it embody a broad far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here. And of course the Constitution does not confer lawmaking power on the President.

. . . .

I have thought it necessary to add these statements to the Court's opinion in order that the President's power to issue the order might not be considered as having been decided sub silentio.

In Greene v. McElroy, 360 U. S. 474, 508 (1959), the question dealt with action taken under Executive Orders 10290 and 10501 dealing with the safeguarding of official information. In the opinion of the Court, Chief Justice Warren declared we do not "decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. . . ."

Congress has, on a number of occasions repealed Executive Orders. For example, E. O. 27-A of September 4, 1890, which created the United States Board on Geographical Names was repealed by the Act of July 25, 1947 (61 Stat. 477 § 6);

E. O. 597½ of March 22, 1907, which promulgated the Code of Civil Procedure of the Canal Zone was repealed by Act of February 27, 1933 (47 Stat. 1123 §1240);

E. O. 1141 of November 23, 1909, which made the enticing of laborers from the Canal Zone a misdemeanor was repealed by Act of February 16, 1933 (47 Stat. 810).

Certain paragraphs in E. O. 6098 and 6568 of March 31, 1933 and January 19, 1934, relating to veterans' pensions were canceled by Act of August 25, 1937 (50 Stat. 798);

E. O. 9250 of October 3, 1942, limiting salaries to \$25,000 after payment of taxes, was rescinded by Act of April 11, 1943 (57 Stat. 63 §4(b)).

Whereas Congress has exercised the power of repealing Executive Orders, it must be noted that this power has limitations, for as the Supreme Court declared in Ex parte Milligan, 4 Wall. 2, 139 (1866):

The power to make the necessary laws is in Congress; the power to execute is in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law.

As a tool by which the President carries out certain functions of his office, the executive order has never been questioned. Records show that George Washington issued an Order on June 8, 1789, asking the heads of the Executive Department to submit "a clear account" of affairs connected with their Departments. It has been estimated that the total number of the "unnumbered series" amounted to fifteen thousand; another estimate fixed the figure at as high as fifty thousand. Orders have been recognized as part of the Federal system of "statutory law" according to Notz, R. L.: Legal Bibliography and Legal Research, 3rd ed., Chicago, 1952, §17, in the following order: (1) the United States Constitution, (2) acts of Congress and treaties, (3) Presidential executive orders. Congress has frequently enacted legislation directing or requesting the

President to issue executive orders in certain fields; and the Federal Register Act of 1935 (44 U.S.C. §305) specifically requires Executive Orders to be published in the Federal Register.

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February 2, 1961
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