EDICTA PRAETORIS: EXECUTIVE ORDERS AND THE FORCE OF LAW

Who is the most powerful person in the world? Since 2009, Forbes has released nine rankings showing the most powerful people in the world.[1] The President of the United States always falls within the top three and has been ranked the most powerful person in the world three times.[2] But what exactly does that mean? What power does the President have, and how does he exercise that power? For that matter, what power does any executive have, whether state or federal, and when is it exceeded? In light of recent presidential administrations and the COVID-19 pandemic, the executive order has again taken center stage and has brought along with it old and new questions concerning an executive's power and authority.[3]

It all comes back to the trite and tricolonic expression we learned in grade school: the legislative branch of government makes the law, the executive branch enforces the law, and the judicial branch interprets the law. But if the executive branch does not make laws, then what are executive orders, which purport to have the force of law, and what is the legal basis to issue an executive order?

What is an Executive Order?

An executive order is "a written directive issued by a president, governor, or mayor to the employees of the executive and administrative branches or to the public, declaring an interpretation or an application of the law."[4] In other words, an executive order is a direction outlining how the law should be carried out by the executive branch of a government.

Take, for example, the following language: ". . . all persons held as slaves … are, and henceforward shall be free; and that the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons . . . ."[5] Though rarely recognized as such, the Emancipation Proclamation is actually one of the most famous presidential executive orders. By its terms, it outlines how the executive branch was to act when applying the law in the United States. Other famous and infamous executive orders throughout American history include the New Deal, the desegregation of the Armed Forces, and the Internment of Japanese Americans during World War II.[6] So, knowing what an executive order is, what is the legal basis for such orders and when are they best used?

Federal Executive Orders

When you are one of the most powerful people in the world, there is no telling what problems will cross your desk in search of a solution. During his presidency, Woodrow Wilson was faced with the challenge of managing hunting in Panama. Superficially, hunting does not sound like a presidential problem, except that it had become exceedingly popular to do so. At night. With torches. President Wilson addressed this problem with an executive order making it a misdemeanor to hunt in Panama with a lantern, torch, bonfire, or other artificial light.[7]

Though this particular problem seems a bit remote to most of us, executive orders have become a regular resource for presidents solving all kinds of problems.[8] According to Article II, Section I of the United States Constitution, the president must "take care that the laws are faithfully executed."[9] While this mandate is somewhat vague, the United States Supreme Court opinion in *J.W. Hampton Jr. & Co. v. United States* offers insight into the push-and-pull interplay between the president and Congress with respect to legislative power.[10]

In that case, President Coolidge issued a Proclamation raising the customs duty for imports two cents per pound above the statutory amount.[11] His order was based upon a federal statute whereby Congress granted power to the president to raise customs duties in certain cases.[12] When an importer challenged the increase, the Supreme Court held that Congress had the implied constitutional power to delegate legislative power to the president, as long as "Congress shall lay down by legislative act an intelligible principle to which" the president can conform.[13]

This rule was later tested and confirmed in the famous and dramatized case of *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Supreme Court held that President Truman's executive order seizing the country's steel mills was unconstitutional.[14] The Court's ruling understandably frustrated both Truman's purpose and his person.[15] (Rumor has it, however, that he patched up the slight with Justice Hugo Black over dinner and good bourbon.[16])

Justice Robert Jackson's concurrence in *Youngstown* provides the opinion's substantial analysis of executive orders by describing a three-tiered taxonomy of executive power.[17] Jackson's first and third tiers are straightforward: the president's authority is at a maximum when he acts with the express or implied authorization of Congress, and at its "lowest ebb" when he acts in direct conflict with congressional authority.[18] The second tier, however, where there is neither "a congressional grant or denial of authority," creates an uncertain "zone of twilight," wherein the president's acts may or may not be constitutional.[19]

Thus, to modify our grade school aphorism a bit, the president enforces the law enacted by Congress, but also mandates his own policies that have the force of law, so long as they conform to some principal implied within the laws passed by Congress, or at least do not run directly afoul of them.

State Executive Orders

The authority for executive orders in Tennessee similarly begins with the state constitution. In Tennessee, the courts and the Attorney General have stated that "the Office of Governor has no prerogative powers," but "only those powers that are conferred upon it by the State Constitution."[20] The Tennessee Constitution provides for an "executive department," which "shall be vested in a Governor," who possesses the "Supreme Executive power" in Tennessee.[21] In 1988, the attorney general stated that, while "Supreme Executive power" is not defined, it implies the power to "issue executive orders regarding, among other things, state administrative policies and the actions of executive branch officials, employees and agencies in carrying out their duties."[22]

As of 1997, the Tennessee Supreme Court had not articulated its own "intelligible principle test" to determine when the General Assembly could constitutionally delegate its legislative authority to the governor and his administrative agencies.[23] This changed in *Bean v. McWherter*, wherein the court held that "the test for determining whether a statute is an unlawful delegation is whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent."[24] The court also held that "[g]overning standards need not be expressed [by the General Assembly] provided such standards can be reasonably ascertained from the statutory scheme as a whole."[25] Using this test, the court held that, where the General Assembly had enacted Tenn. Code Ann. § 70–4–403(1), allowing the wildlife commission to change animal classifications, the delegation was constitutional because the statutory scheme was "clearly adequate" to allow both the courts and the Commission "to determine whether the legislature's intent is being furthered."[26] Not every situation is quite so clear, however.

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COVID-19

As COVID-19 reached Tennessee in March 2020, Governor Bill Lee began issuing a series of executive orders to deal with the pandemic.[27] In the four months between March 12, 2020, and July 31, 2020, Governor Lee issued more executive orders (thirty-two) than the total number he had previously issued in his governorship, mostly to combat COVID-19.[28] These executive orders cited Tenn. Code Ann. § 58–2–107 as their legal basis.[29] Section 107 is a broad delegation of power to the governor, granting the "authority to assume control over all aspects of the State's response to an emergency . . . ."[30] And this is exactly what Governor Lee did, issuing orders to suspend certain statutes, close certain businesses, and limit the gathering of individuals.[31] But in the ensuing months it became clear that the pandemic was here to stay, at least for a while. As Governor Lee issued further executive orders to either rescind or prolong his initial orders, some began to question Governor Lee's authority to issue these orders at all. This discussion will likely continue for years to come.[32]

Due to the nature and extent of Governor Lee's COVID-19 orders, it is possible that, in the future, courts will be forced to consider the constitutionality of these orders. For example, Executive Order No. 26 relaxed requirements for execution of wills.[33] It is easy to anticipate a disinherited child challenging the validity of a will executed over Zoom. Courts may well be asked whether a statute as broadly drafted and applied as Tenn. Code Ann. § 58–2–107 could possibly provide a specific intelligible principal or reasonably ascertained governing standards by which to judge the constitutionality of the ensuing executive orders.

Consider again, though, the Emancipation Proclamation. The constitutionality of that executive order remains in debate even today, however, the debate is merely academic thanks to the Thirteenth Amendment.[34] The United States Congress exercised its own constitutional power to ratify the Proclamation and cut off the debate.[35] Though the Tennessee General Assembly took no action regarding the Governor's executive orders during their two special sessions in 2020, they now seems eager to weigh in on the executive orders issued during the last year.[36] Perhaps the courts will turn to the actions and inactions of the legislature for perspective as they analyze COVID-19 executive orders.

As it stands, very little case law in Tennessee deals with the constitutionality of executive orders.[37] But, as President Truman stated to the American people in the events leading up to *Youngstown*: "These are not normal times. These are times of crisis."[38] The past year of crisis may again present courts with this generational question of executive power.

1 The World's Most Powerful People, https://www.forbes.com/powerful-people/list/#tab:overall (last visited Apr. 8, 2021).
2 *See Id.*
3 Tamara Keith, With 28 Executive Orders Signed, President Biden is Off to a Record Start, NPR (Feb. 3, 2021), https://www.npr.org/2021/02/03/963380189/with-28-executive-orders-signed-president-biden-is-off-to-a-record-start.
4 Executive Order, Bouvier Law Dictionary (2012).
5 The Emancipation Proclamation, Nat'l Archives, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation.
6 Chris Desbarres, Executive Orders: The Famous, The Infamous & The Ridiculous, Mental Floss (Jan. 5, 2009), https://www.mentalfloss.com/article/20519/executive-orders-famous-infamous-ridiculous.
7 *Id.*
8 The American Presidency Project, https://www.presidency.ucsb.edu/statistics/data/executive-orders (last visited Apr. 8, 2021).
9 U.S. Const. art. II, § 3, cl. 4.
10 *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).
11 *See id.* at 349.
12 *See id.* at 402.
13 *Id.* at 409.
14 *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).
15 Chris Desbarres, Executive Orders: The Famous, The Infamous & The Ridiculous, Mental Floss (Jan. 5, 2009), https://www.mentalfloss.com/article/20519/executive-orders-famous-infamous-ridiculous.
16 *Id.*
17 Joshua Waimberg, *Youngstown Steel:* The Supreme Court stands up to the President, Constitution Daily Blog (Nov. 16, 2015), https://constitutioncenter.org/blog/youngstown-steel-the-supreme-court-stands-up-to-the-president.
18 *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37.
19 *Id.* at 637.
20 Tenn. Op. Atty. Gen. No. 90-72 (July 18, 1990) (quoting Richardson v. Young, 122 Tenn. 471, 496, 125 S.W. 664, 669 (1910)).
21 Tenn. Const. art. III, § 1.
22 Tenn. Op. Atty. Gen. No. 88-69 (Mar. 25, 1988).
23 *See Bean v. McWherter,* 953 S.W.2d 197, 199 (Tenn. 1997) (stating that the court "has not enunciated criteria for analyzing whether the legislature's guidelines or standards are adequate to prevent arbitrary action").
24 *Id.*
25 *Id.*
26 *Id.* at 200.
27 *See* Governor's Executive Orders Nos. 14–29, https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee (last visited Apr. 9, 2021).
28 *Id.*
29 *See generally* Governor's Executive Order No. 14, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf (last visited Apr. 9, 2021) (stating that "Section 58-2-107(e)(1), provides that during a state of emergency, the Governor is authorized to '[s]upend any law, order, rule or regulation . . . .").
30 *See* Tenn. Code Ann. § 58–2–107.
31 *See generally* Governor's Executive Orders Nos. 14, 17, 21, https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee (last visited Apr. 9, 2021).
32 *See* Tenn. Op. Atty. Gen. No. 20-07 (Apr. 27, 2020).
33 Governor's Executive Order No. 26, https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee26.pdf (last visited Apr. 8, 2021).
34 Henry L. Chambers, Lincoln, the Emancipation Proclamation and Executive Power, 73 Md. L. Rev. 100 (2013).
35 *Id.* at 100.
36 Senate Bill 474, 112th Tennessee General Assembly (2021). Senate Bill 1335, 112th Tennessee General Assembly (2021). Senate Bill 850, 112th Tennessee General Assembly (2021).
37 *See generally Bean v. McWherter*, 953 S.W.2d 197 (Tenn. 1997); *Boyce v. Tenn. Peace Offier Stds. & Training Comm'n*, 354 S.W.3d 737 (Tenn. Ct. App. 2011); *Nunn v. Tenn. Dep't of Corr.,* 547 S.W.3d 163 (Tenn. Ct. App. 2017).
38 Steve Hendrix, Truman declared an emergency when he felt thwarted. Trump should know: It didn't end well, Wash. Post, Jan. 11, 2019.