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Executive Orders in Court

ABSTRACT. This Note presents a study of judicial decisions that have engaged with executive orders. The study was designed to elucidate the contexts in which courts have considered executive orders; to identify the questions that courts have posed about executive orders; and to synthesize the doctrine that courts have developed in response to those questions. This study reveals that, although the executive order is a powerful tool of the presidency, courts have not tended to acknowledge, in a particularly theorized way, the special challenges and demands of the executive order as a form of lawmaking. This Note argues that, in the absence of a thicker jurisprudential conception of the executive order, doctrinal asymmetries that heavily favor executive power have emerged. These asymmetries carry costs and therefore merit closer attention.

AUTHOR. Yale Law School, J.D. expected 2015. I owe an extraordinary debt of gratitude to Professor Abbe Gluck for opening my eyes to entirely new fields of study, planting the seeds of this work, encouraging me to develop this project, guiding its progression, and generously sharing reams of suggestions and advice along the way. This Note emerged from a group project on executive orders originated by Professor Gluck and joined by five fellow students: Tom Brown, Marguerite Colson, Daniella Rohr, Roberto Saldaña, and Andrew Sternlight. The students in the group were beyond generous in urging me to spin off my own contribution to the project as a Note and in encouraging me along the way. This project draws on the foundational work, brainstorming, and energy of that initial group project; indeed, it was Professor Gluck who originally proposed digging into judicial decisions on executive orders.

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INTRODUCTION

Edward Snowden's leaks about U.S. intelligence practices cast a harsh light on the USA PATRIOT Act and the medley of statutes that complement the 2001 law. In domestic and international news media, headlines immediately interrogated congressional intent and oversight of these statutes,[1] executive branch interpretation and implementation of these statutes,[2] and judicial acquiescence and intervention with respect to these statutes.[3]

Yet a different law—one that has long served as a linchpin of surveillance programs and that reportedly authorizes many of the NSA's most controversial activities[4]—has largely escaped public[5] and congressional[6] scrutiny. This law is not a statute but rather an executive order that dates back to 1981.[7]

1. *See, e.g.*, Dan Roberts & Spencer Ackerman, *US Lawmakers Call for Review of Patriot Act After NSA Surveillance Revelations*, GUARDIAN (London), June 10, 2013, http://www.theguardian.com/world/2013/jun/10/patriot-act-nsa-surveillance-review [http://perma.cc/E9YJ-5TMY]; Peter Wallsten, *Lawmakers Say Administration's Lack of Candor on Surveillance Weakens Oversight*, WASH. POST, July 10, 2013, http://www.washingtonpost.com/politics/lawmakers-say-administrations-lack-of-candor-on-surveillance-weakens-oversight/2013/07/10/8275d8c8-e97a-11e2-aa9f-c03a72e2d342_story.html [http://perma.cc/TK2-SCA8]; Peter Wallsten, *Lawmakers Say Obstacles Limited Oversight of NSA's Telephone Surveillance Program*, WASH. POST, Aug. 10, 2013, http://www.washingtonpost.com/politics/lawmakers-say-obstacles-limited-oversight-of-nsas-telephone-surveillance-program/2013/08/10/bee87394-004d-11e3-9a3e-916de805f65d_story.html [http://perma.cc/JXT2-T4BM].

2. *See, e.g.*, Ellen Nakashima & Robert Barnes, *Obama Administration Asserts Broad Surveillance Powers*, WASH. POST, Aug. 9, 2013, http://www.washingtonpost.com/politics/obama-administration-asserts-broad-surveillance-powers/2013/08/09/ff429504-0134-11e3-96a8-d3b921c0924a_story.html [http://perma.cc/LA8K-N5HT] (discussing the Obama Administration's white paper, which set out its interpretation of Section 215 of the USA PATRIOT Act).

3. *See, e.g.*, Spencer Ackerman, *NSA Illegally Collected Thousands of Emails Before Fisa Court Halted Program*, GUARDIAN (London), Aug. 21, 2013, http://www.theguardian.com/world/2013/aug/21/nsa-illegally-collected-thousands-emails-court [http://perma.cc/UR35-CMXL]; Ellen Nakashima, *FISA Court Releases Opinion Upholding NSA Phone Program*, WASH. POST, Sept. 17, 2013, http://www.washingtonpost.com/world/national-security/fisa-court-releases-opinion-upholding-nsa-phone-program/2013/09/17/66660718-1fd3-11e3-b7d1-7153ad47b549_story.html [http://perma.cc/XWK8-QYVJ].

4. *See* Ali Watkins, *Most of NSA's Data Collection Authorized by Order Ronald Reagan Issued*, MCCLATCHY DC, Nov. 21, 2013, http://www.mcclatchydc.com/2013/11/21/209167/most-of-nsas-data-collection-authorized.html [http://perma.cc/V493-XXZG].

5. *See id.* Occasional efforts have been made to bring attention to the importance of this executive order. *See, e.g.*, John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, WASH. POST, July 18, 2014, http://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html [http://perma.cc/QS9T-BRMV].

Known as E.O. 12,333 (twelve-triple-three), the surveillance executive order creates a framework for intelligence programs that target "the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents."[8] Its sweep is extensive, and its first principles are explicit: "All reasonable and lawful means must be used to ensure that the United States will receive the best intelligence available."[9]

The relative scarcity of attention to E.O. 12,333 is all the more surprising because the Order, according to some reports, is the authority behind "most of [the] NSA's data collection."[10] Despite text that imposes limitations on surveillance of U.S. persons,[11] press reports have suggested that significant numbers of U.S. persons are caught in the Order's web.[12] And compared to activities authorized by the Order's statutory counterparts, E.O. 12,333 programs are less likely to be briefed to the congressional intelligence committees.[13] These programs also fall outside the jurisdiction of the Foreign Intelligence Surveillance Court (FISC).[14]

While it has never been put to a congressional vote, E.O. 12,333 nonetheless has the force and effect of law: executive orders, which can derive their power

6. *See* Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST, Oct. 14, 2013, http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html [http://perma.cc/HTM3-N6DB]; Tony Romm, *Congress's NSA Dilemma: Oversee or Overlook Intel*, POLITICO, Nov. 4, 2013, http://www.politico.com/story/2013/11/congress-nsa-dilemma-intel-99274.html [http://perma.cc/8TEA-Q54L].

7. United States Intelligence Activities, Exec. Order No. 12,333, 3 C.F.R. 200 (1981) [hereinafter E.O. 12,333], *amended by* Exec. Order No. 13,284, 3 C.F.R. 161 (2003); Exec. Order No. 13,355, 3 C.F.R. 218 (2004); *and* Exec. Order No. 13,470, 3 C.F.R. 218 (2008).

8. *Id.*

9. *Id.*

10. Watkins, *supra* note 4.

11. *See* E.O. 12,333 §§2.3(b), 2.3(h), 2.4.

12. *See* Gellman & Soltani, *supra* note 6; Tye, *supra* note 5.

13. *See* sources cited *supra* note 6.

14. *See* Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801-1885 (2012) (creating the FISC and vesting it with jurisdiction over applications for searches under FISA); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1149 (2013) (explaining that in addition to surveillance authorized by FISA, "[t]he Government has numerous other methods of conducting surveillance . . . . [A]lthough we do not reach the question, the Government contends that it can conduct FISA-exempt human and technical surveillance programs that are governed by Executive Order 12333."); *see also* Alvaro Bedoya, *Executive Order 12333 and the Golden Number*, JUST SECURITY, (Oct. 9, 2014, 10:14 AM), http://justsecurity.org/16157/executive-order-12333-golden-number [http://perma.cc/JN8R-GPWU]. Some information about FISC decisions is also shared with members of the congressional intelligence committees. *See, e.g.*, 50 U.S.C. §§ 1871, 1881(f) (2012).

from congressional delegations of authority to the President (explicit, implicit, or anticipated),[15] from the President's independent authority under Article II of the Constitution,[16] or from some vague combination of the two,[17] are generally enforceable by courts against private citizens.[18] E.O. 12,333's authority purportedly derives from both constitutional and statutory sources. President Reagan captured this lineage in the opening lines of the Order, averring that it was issued "by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including the National Security Act of 1947 . . . and as President of the United States of America."[19]

Presidents may issue executive orders in order to plant a flag in a particular policy sphere, to reorganize the structure of the executive branch, or to provide policy leadership when Congress is stuck in the mud.[20] Executive orders, like E.O. 12,333, are formidable instruments of power[21] in large part because they

15. Some statutes authorize or instruct the president to fill gaps in statutory language. Presidents often fill these gaps via executive order. *See, e.g.*, 26 U.S.C. § 168 (2012) ("If the president determines that a foreign country [burdens United States commerce in particular ways] . . . the President may by Executive order provide for the application of paragraph (1)(D) to any article or class of articles manufactured or produced in such foreign country for such period as may be provided by such Executive order."); Procurement Act, 40 U.S.C. § 121 (2012) ("The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle."); International Emergency Economic Powers Act § 203(a)(1), 50 U.S.C. § 1702(a) (2012) ("At the times and to the extent specified in section 202 (50 U.S.C. § 1701), the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—investigate, regulate, or prohibit . . . .").

16. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). *Compare* Exec. Order 13,565, 3 C.F.R. 219 (2011) ("By the authority vested in me as President by the Constitution and the laws of the United States of America, including title III of the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Public Law 110-403) (15 U.S.C. 8111-8116) (the 'PRO IP Act') . . . ."), *with* Exec. Order 13, 293, 3 C.F.R. 218 (2003) ("By the authority vested in me as President of the United States and as Commander in Chief of the Armed Forces of the United States . . . .").

17. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); *Youngstown*, 343 U.S. 579; United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

18. *See* Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1871) (holding that an executive proclamation was "a public act . . . to which all courts are bound to give effect").

19. E.O. 12,333.

20. *See, e.g.*, Improving Critical Infrastructure Cybersecurity, Exec. Order No. 13,636, 3 C.F.R. 217 (2014).

21. *See generally* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 4-5 (2001); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2291-92 (2001) ("Presidents, of course, discovered long ago that they could use executive orders and similar vehicles (for example, proclamations) to take various unilateral ac-

are not immediately constrained by the "finely wrought and exhaustively considered" process of bicameralism and presentment,[22] nor are they subject to the hoops and constraints of the Administrative Procedure Act.[23] As Kevin Stack has written:

> In contrast to legislation or agency regulation, there are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive. That, no doubt, is central to their appeal to presidents. They rid the president of the need to assemble majorities in both houses of Congress, or to wait through administrative processes, such as notice-and-comment rulemaking, to initiate policy.[24]

While executive orders may bypass the procedural restraints imposed on other forms of lawmaking,[25] they implicate individual rights and the structure of the

tions, sometimes of considerable importance. . . . Most executive orders, significant and insignificant alike, involved (if foreign policy orders are placed to the side) the administration of public lands, the public workforce, or other public operations—although they also sometimes affected, and indeed were intended to affect, nongovernmental actors. The President in these cases, whether claiming authorization from a federal statute delegating him power or from the Constitution itself, asserted his right as head of the executive branch to determine how its internal processes and constituent units were to function.").

22. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983); *see* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 n.10 (1981) ("Executive orders are effective Presidential tools because they do not need the approval of Congress, therefore largely bypassing congressional and public scrutiny.").

23. Procedural hurdles like those created by the APA increase the likelihood that "different positions will be heard, that conflicting interests will be reconciled into coalitions, [and] that a consensus will be formed" before new law is made. Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 25 (1976); *see also* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (refusing to "subject the President to the provisions of the APA").

24. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552-53 (2005).

25. This absence of procedural restraints was satirized by *Saturday Night Live* in a 2014 sketch that imitated the classic Schoolhouse Rock segment, "I'm Just a Bill." *Saturday Night Live: Capitol Hill Cold Open* (NBC television broadcast Nov. 22, 2014), https://www.youtube.com/watch?v=JUDSeb2zHQ0 [https://perma.cc/X2H6-2BQJ] ("I'm an executive order, and I pretty much just happen."). However, the recent presidential action that the segment targeted was not actually an "executive order" but rather a series of "executive actions." *See* Zachary A. Goldfarb, *SNL Skit Suggests Obama's Immigration Executive Action Is Unconstitutional*, WASH. POST: WONKBLOG (Nov. 23, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/23/snl-skit-suggests-obamas-immigration-executive-action-is-unconstitutional [http://perma.cc/Y3H9-VUCQ].

federal government, thereby "affecting millions" of people.[26] Presidents have used executive orders to suspend habeas corpus,[27] desegregate the military,[28] implement affirmative action requirements for government contractors,[29] institute centralized review of proposed agency regulations,[30] stall stem cell research,[31] create the nation's first cybersecurity initiative,[32] and yes, authorize a surveillance dragnet.[33]

The literature has thoroughly documented the ways in which executive orders mediate among the President, Congress, and agencies.[34] Moreover, many of the Supreme Court's most memorable separation-of-powers cases have involved executive orders,[35] and judicial decisions about executive orders have been studied through the lenses of substantive fields such as national security law[36] and civil rights law.[37] Yet scholars have not generally focused on how courts interact with and understand executive orders per se.[38] They have not sought to define or divine a case law of executive orders.

26. Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996) ("It does not seem to us possible to deny that the President's Executive Order seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers."); *see generally* Kagan, *supra* note 21.

27. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861).

28. Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 28, 1948).

29. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

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

31. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007).

32. Exec. Order No. 13,636, 78 Fed. Reg. 11,739 (Feb. 12, 2013).

33. E.O. 12,333.

34. *See, e.g.*, WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003); MAYER, *supra* note 21; Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 34 (2002); Kagan, *supra* note 21; Andrew Rudalevige, *The Executive Branch and the Legislative Process*, *in* THE EXECUTIVE BRANCH 419 (Joel D. Aberbach & Mark A. Peterson eds., 2005); Stack, *supra* note 24.

35. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); *see also* MAYER, *supra* note 21, at 36 ("It is not a coincidence that many of the most important Supreme Court rulings on presidential power have involved executive orders . . . .").

36. *See, e.g.*, STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (5th ed. 2011).

37. *See, e.g.*, Debra A. Millenson, *W(h)ither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679 (1999).

38. One exception to this generalization is Kevin Stack, whose work looks at executive orders whose authority derives from congressional delegations of power (hereinafter "Article I executive orders") and the acts of statutory interpretation that these orders implicitly undertake. *See* Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COL-

To that end, this Note surveys executive orders as a unified field and contributes a nuanced view of how courts interact with these instruments. Its conclusions largely derive from a study that was designed to elucidate the contexts in which courts have considered executive orders; to identify the questions that courts have posed about executive orders; and to synthesize the doctrine that courts have developed in response to those questions.

Executive orders vary greatly in their forms, sources of authority, purposes, and interactions with statutory law—among other variables.[39] They are not self-contained pronouncements; instead, they may spawn volumes of implementing rules and regulations.[40] Executive orders find their ways into judicial decisions via all sorts of avenues: challenges to the President's power to promulgate an order, efforts to overturn the regulations issued pursuant to an order, allegations that an order violates constitutional rights, arguments that an order has been improperly interpreted, or claims that resolution of a question of statutory interpretation ultimately hinges on the interpretation of an antecedent order.[41] These orders raise legal questions that are complex and variegated, and that often feel context-specific. Indeed, interrogating executive orders in court

UM. L. REV. 263, 308 (2006); Stack, *supra* note 24. Stack compares these executive orders to agency regulations that interpret and implement statutory schema and asks why courts treat the two so differently. Stack emphasizes that the courts' failure to require that Article I executive orders "be justified by some identifiable statutory authorization" has resulted in the transfer of considerable power to the President. Stack, *supra* note 24, at 600. While this Note engages with a broader set of questions concerning executive orders, Stack's work tees up one of its central premises—namely that doctrine has much to do with the power that presidents can and do exert through executive orders. Other scholars who have engaged with the doctrine that buttresses executive orders have engaged with even narrower questions. *See, e.g.*, Noyes, *supra* note 22; Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 661 (1987) ("Do injured parties have a cause of action to challenge administrative conduct on the ground that it violates an executive order? Should agency action under an executive order be treated differently than agency action pursuant to a federal statute? Finally, does enforcing executive orders through the Administrative Procedure Act (APA) comport with the separation of powers principle?").

39. *See generally infra* Appendix II. Each executive order, like every act of governance, is also part of the larger narrative of a particular presidency. *Cf.* Kagan, *supra* note 21, at 2272-2315 (explaining that post-New Deal Presidents have adopted starkly different positions on the role of the administrative state and showing how their respective executive orders reflect those positions).

40. *See, e.g.*, 41 C.F.R. Ch. 60 (Office of Federal Contract Compliance Programs' regulations implementing Exec. Order 11,246); *cf.* Ostrow, *supra* note 38, at 663-64 ("Moreover, regulations promulgated to carry out these executive orders have the status of law as long as they are reasonably within the contemplation of some statutory grant of authority." (citing Chrysler Corp. v. Brown, 441 U.S. 281, 304, 306, 308 (1979); Association for Women in Science v. Califano, 566 F.2d 339, 344 (D.C. Cir. 1977)).

41. *See infra* Appendix II.

may be no less ambitious than interrogating statutes in court—a project to which the entire field of legislation scholarship is devoted.

Despite the daunting breadth of executive order jurisprudence, this Note aims to survey and appraise a meaningful selection of it. This Note presents a study built around review of 297 judicial opinions and the coding of 152 of them—each opinion was issued by either the Court of Appeals for the D.C. Circuit or the Supreme Court of the United States. In each of the 152 opinions, judges or Justices engaged with doctrinal questions relating to executive orders. These cases reveal that courts inconsistently invoke those checks and balances that are available to temper executive action.

The resulting judicial elevation of executive orders does not seem to take the form of a studied esteem for the President's greater flexibility, expertise, or role in our constitutional system.[42] Rather, it seems to be born of disorder. Courts have not tended to acknowledge, in a particularly theorized way, the special challenges and demands of the executive order as a form of lawmaking.[43] Nor have they tended to recognize the common jurisprudential questions that executive orders raise about sources of lawmaking and interpretive authority[44] or to demand clarity or specificity from the orders themselves.[45] While this Note does not attribute intentionality to the jurisprudential status quo, there may well be good justifications for these "defects." Perhaps our system is *better* served by a jurisprudence that grounds each executive order in its respective siloed, substantive area of law—for example, procurement, labor, or national security law—rather than one that adopts a transsubstantive doctrine of executive orders. Perhaps courts should brush aside, as gestures toward an empty formalism, entreaties that they interrogate the intrasystemic role of executive

42. Stack, *supra* note 24, at 575, argues the opposite in his work on how courts should think about how to interpret statutes that may authorize executive orders.

43. This point echoes one made by Abbe Gluck and Lisa Bressman, who have argued that the actual, rather than idealized, processes by which *statutory law* is created should inform how courts interpret statutes. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Statutory Interpretation from the Inside: Part I*]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

44. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999); *cf.* Rattigan v. Holder, 689 F.3d 764, 768 (D.C. Cir. 2012) (discussing how to reconcile an executive order and an independent statutory command (Title VII) that appeared to conflict with the order and failing to cite *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), which dealt with an apparent conflict between regulations promulgated pursuant to an executive order and an independent statutory command (18 U.S.C. §1905)).

45. *See infra* Part III.A.

orders; maybe judges should focus instead on pragmatic, functionalist policing of the ebbs and flows of executive authority—on keeping the gears of government grinding.[46] But, especially in this era of weak congresses and strong presidents, a failure to move beyond *Youngstown* and develop a thicker jurisprudential conception of the executive order as a form of law carries costs as well.[47] It is these costs that lie at the heart of this piece.

The first set of these costs falls on the legislative branch. Uneven judicial engagement with executive orders denies Congress guidance, making it more difficult for legislators to design statutes that comprehensively occupy a field or to correct course once the President has made an opening volley via executive order.[48] Judicial vagueness with respect to how executive orders interact with statutory law—and the courts' parallel tolerance for *presidential* vagueness regarding executive orders—makes it all the more difficult for Congress to participate in the separation of powers dance. Congress may have a hard time even identifying whether it should be dancing the salsa or the tango.

Doctrine has also insulated executive orders from the commitment devices typically associated with statutory law. While courts will entertain challenges to the legitimacy of executive orders, they will no longer hold the President to promises made in orders that partially or wholly (the line between the two is often left unclear) draw on the President's Article II authority.[49] Courts will, however, hold third parties to the requirements of these orders; this is, after all, what courts mean when they write that executive orders have the "force and effect of law."[50] Thus, insofar as the studied cases share a commonality, it is that they generally allow the President to broaden the scope of his own powers

46. *See, e.g.*, Sea-Land Serv., Inc. v. I.C.C., 697 F.2d 1166, 1168 (D.C. Cir. 1983) (explaining that an executive order was so unclear that the court was "unwilling at this time to choose between . . . two interpretations of" it and "withhold[ing] any decision in this case [for five months] to give the Executive Branch an opportunity to make clear its wishes").

47. *Cf.* Stack, *supra* note 24, at 559, 568-70 (discussing the costs associated with the failure of courts to "articulate a standard of review for [the President's] statutory assertions of power").

48. *See id.* at 568; *cf.* Jonathan R. Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2420, 2422 (2006) (observing that "[t]he executive possesses considerable power to affect policy unilaterally both in the implementation of laws and in the preemption of legislative activity through the use of executive orders, proclamations, and memoranda. . . . Presidents act entrepreneurially as well as unilaterally. Presidents can preempt legislative action by acting first"). However, Macey frames this executive entrepreneurialism as simply depriving Congress of the *motivation* to act. *Id.*

49. As discussed *infra* Part IV, this has not always been the case.

50. United States v. Trucking Mgmt., Inc., 662 F.2d 36, 42 (D.C. Cir. 1981); *see* Micei Int'l v. Dep't of Commerce, 613 F.3d 1147, 1153 (D.C. Cir. 2010).

and to bind those governed by executive orders while simultaneously insulating himself from reciprocal demands of adherence to the same orders.

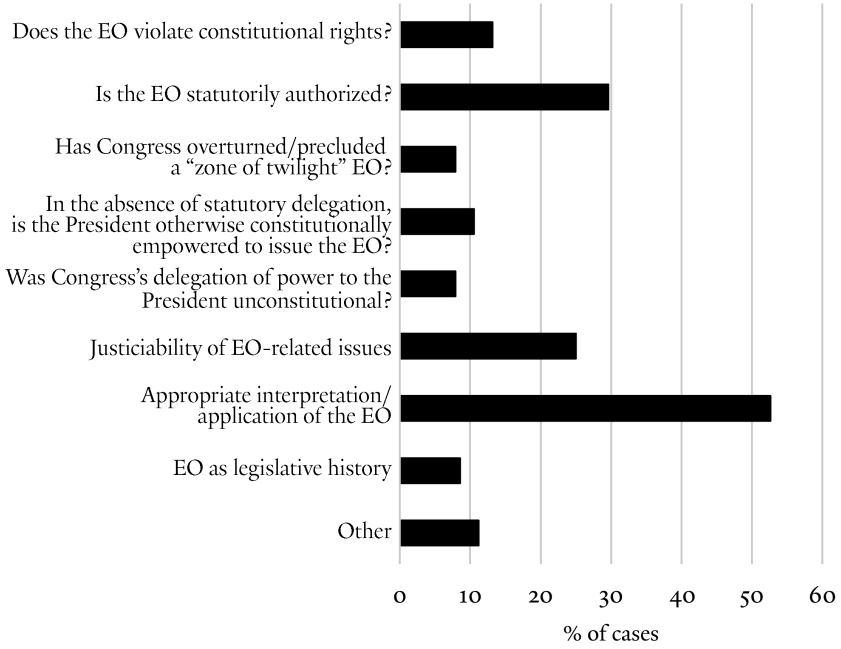
This Note proceeds as follows. Part I highlights some of the findings of the study, focusing on general aspects of judicial engagement with executive orders and vehicles through which courts have, perhaps incidentally, affirmed executive authority; further findings are described in Appendix II. Part II offers an overview of the methodology of this study – which involved identifying, sorting, reviewing, and coding judicial decisions – and discusses its strengths and limitations.[51] Part III, drawing on the study's findings, suggests that in the absence of a well-developed judicial theory of the triangular relationship that links Congress, the President, and those executive orders whose authority derives from congressional delegations of power (hereinafter "Article I executive orders"), courts show a tendency to box Congress out. While these doctrinal moves make it easier to associate executive orders with a single object of accountability (the President), they also expand the scope and permanence of these instruments. Part IV discusses how an apparent judicial reluctance (and perhaps, at times, inability) to bind the executive to commitments made in executive orders creates a doctrinal asymmetry that merits closer attention.

I. OVERVIEW OF FINDINGS

This Part presents an overview of a study of over 150 judicial decisions pertaining to executive orders. The methodology employed in this study is discussed in Part II and in Appendix I.

51. Appendix I provides a more detailed account of the study's methodology.

Figure 1.
ISSUES RESOLVED BY THE COURTS



More than 50% of coded cases engaged with the executive orders on their own terms—that is, with how to interpret an executive order or with whether the executive order had been implemented improperly. In 39% of cases, courts directly engaged with whether the President was duly authorized to issue a particular executive order.[52] In only 13% percent of coded cases did courts decide whether the executive order violated constitutionally protected rights.[53]

52. This number was calculated by adding together the number of cases in which courts resolved (a) whether the executive order was statutorily authorized; (b) whether Congress had overturned/precluded a "zone of twilight," *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); (c) whether, in the absence of statutory delegation, the President is otherwise constitutionally empowered to issue the executive order; or (d) whether Congress's delegation of power to the President was unconstitutional.

53. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985) (upholding an executive order against a First Amendment challenge). Only one of these challenges succeeded, but this success, while described in terms of the Due Process Clause, might well be better conceptualized as a successful challenge to the President's power to issue the executive order. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431 (1935) (finding that the executive order, in addition to violating the non-delegation doctrine, violated the Due Process Clause because it "contain[ed] no finding, no statement of the grounds of the President's action in enacting the prohibition").

The study used categories designed to capture the questions *resolved* in the coded cases as well as categories designed to capture the content of relevant discussions in which the courts *engaged*. Figure 2 organizes these discussion points into five topical categories, each with overlapping subparts. These categories are described in more detail in Appendix II.D.

Figure 2.
TOPICS OF JUDICIAL DISCUSSION

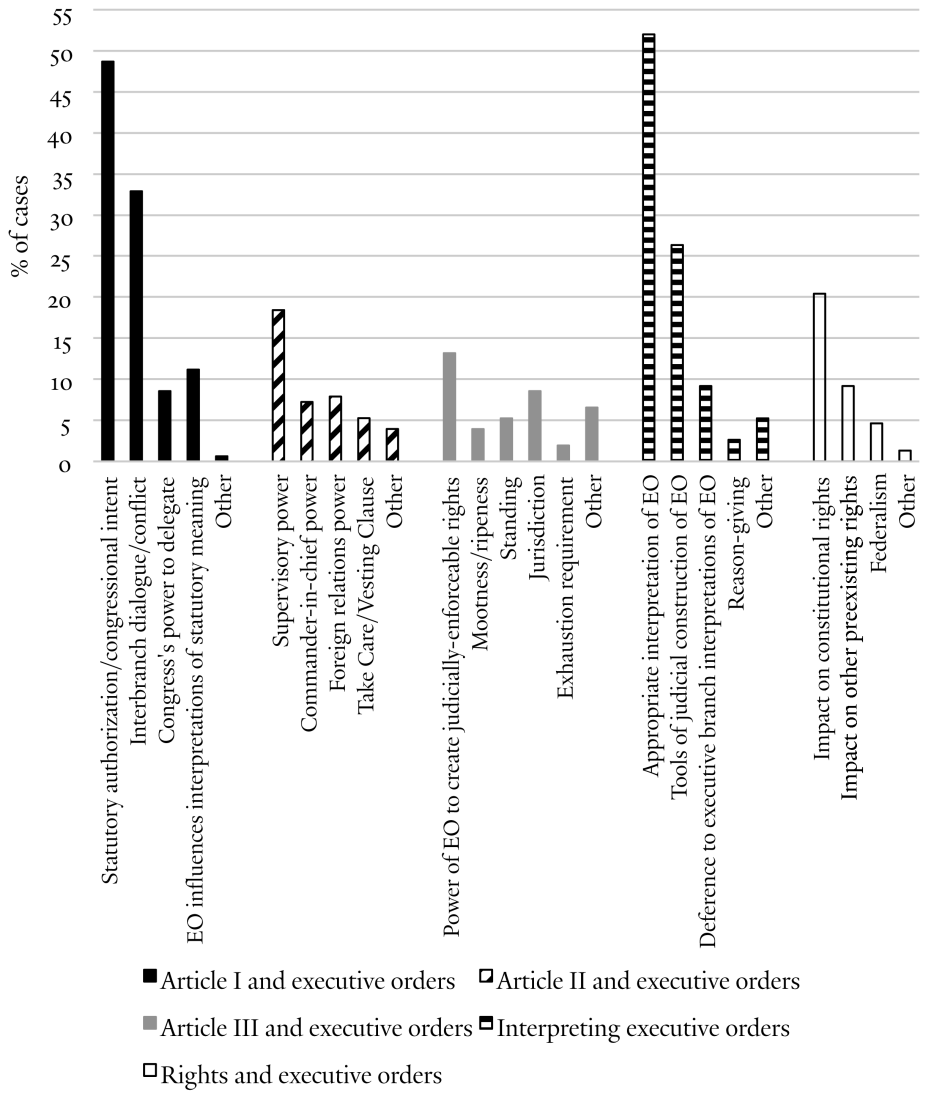


Figure 3.
TOPICS OF JUDICIAL DISCUSSION: CUMULATIVE DATA

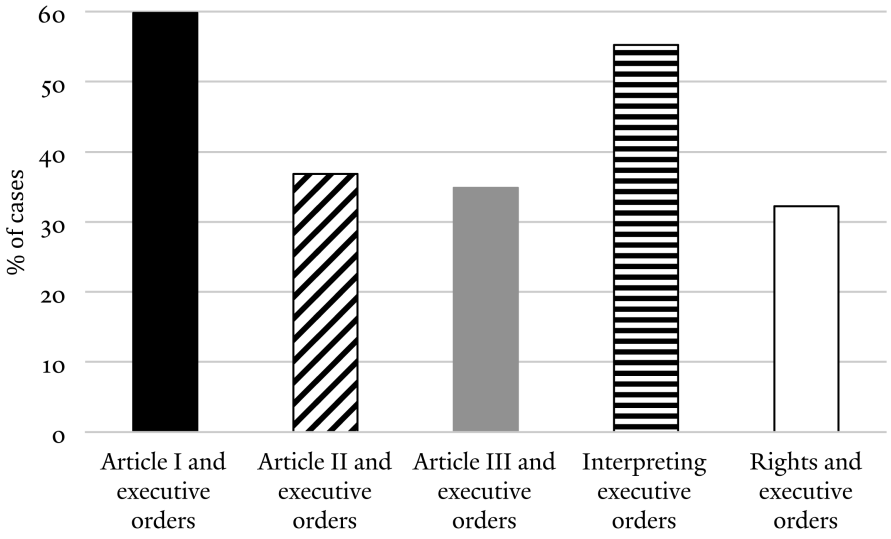
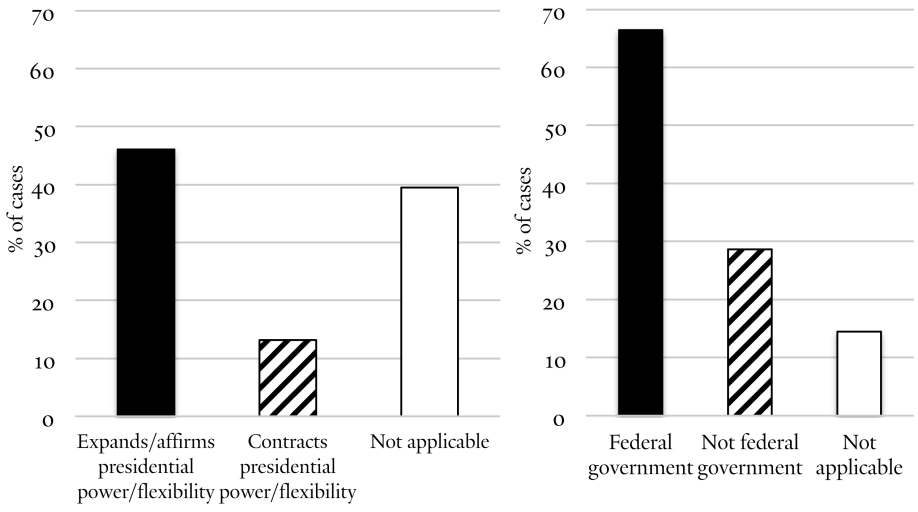


Figure 4, Figure 5, Figure 6, as well as the discussions in the Parts that follow, show that courts have strengthened executive authority through their decisions concerning executive orders.

Figure 4.
(A) IMPLICATIONS FOR EXECUTIVE AUTHORITY & (B) WINNING PARTY (ON EXECUTIVE ORDER RELEVANT ISSUES)



The chart on the left in Figure 4 features the label "expands/affirms presidential power/flexibility." This label was applied to those cases that, on their face, appeared to establish or affirm generalizable doctrinal principles relating to executive orders that strengthen executive presidential power.[54] Such principles could be transsubstantive or could apply within a single substantive area. The chart on the right, by contrast, records the federal government's wins and losses on the issues relevant to executive orders that were resolved in the coded cases. These two metrics differ in important ways. A narrow, technical win for the government, for example, might not have implicated broader questions of executive power. In fact, on occasion, the government even sought to convince courts that Article I executive orders that had been signed by presidents of bygone eras, and that potentially created third-party reliance interests, should not be given the force of law.[55]

This study's data, while limited by its volume, also offers preliminary support for arguments advanced elsewhere about the means through which courts augment and affirm executive authority. For example, it has been observed that courts "often abstain from addressing questions surrounding the allocation of authority between Congress and the President"[56] and that this abstention implicitly favors the executive.[57] Indeed, of those cases that most directly engaged

54. *See, e.g.*, Sea-land Services v. I.C.C., 738 F.2d 1311 (D.C. Cir. 1984) (applying executive-, rather than Congress-, focused tools of construction to interpret an executive order); Wagner Seed Co. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991) (holding that when the President delegates to the EPA his authority under a statute that "vests initial authority in 'the President' and not in the EPA . . . [t]hat delegation is sufficient to render the EPA the administering agency for purposes of *Chevron*."). One class of cases that earned this label merits special attention: those that prevented courts from interfering with how *presidents* enforce executive orders. In these cases, courts held non-justiciable litigants' claims that the President or an element of the executive branch had violated an executive order. *See, e.g.*, Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965); Air Transport Ass'n of America v. F.A.A., 169 F.3d 1 (D.C. Cir. 1999). While there is an argument to be made that by stepping aside and refusing to put the judicial power behind executive orders, courts in fact contracted executive authority, functionally, this abstention enhanced the President's flexibility to enforce orders according to his terms and thus strengthened his power. *See infra* Part V. Some cases, of course, "contract[ed] presidential power/flexibility," *see, e.g.*, Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), while many failed to plant a flag cleanly in either camp.

55. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Chemical Found., 272 U.S. 1 (1926) ("[T]he United States argues that as construed below the provision in question is unconstitutional because it attempts to delegate legislative power to the executive.").

56. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109-10 (2013).

57. *See* Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of* Zivotofsky v. Clinton, 123 YALE L.J. 253 (2013).

"questions surrounding the allocation of authority between Congress and the President"—namely those in which courts resolved whether Congress had overturned or precluded a "zone of twilight" executive order—83% saw the federal government win and the status quo maintained, compared with a 65% win rate for the federal government in all other cases. A "zone of twilight" executive order, to borrow Justice Jackson's phrase from *Youngstown*, is promulgated "[w]hen the President acts in absence of either a congressional grant or denial of authority" under circumstances in which "he and Congress may have concurrent authority, or in which its distribution is uncertain."[58] Such orders—which generally include "supervisory" or "managerial" executive orders promulgated to govern the basic functioning of the executive branch—can be precluded by congressional "denial of authority" or directly overruled by Congress.[59]

Of these cases in which courts resolved whether Congress had overturned or precluded a "zone of twilight" executive order, 83% also appeared to affirm or expand executive authority, compared with 43% of all other cases. And of those cases in which courts engaged with conflict or dialogue between Congress and the Executive, 56% expanded or affirmed executive authority or flexibility, compared with 42% of all other cases.

Figure 5 and Figure 6 track outcomes via Figure 1's eight-category taxonomy.[60]

58. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

59. *Id.*

60. The answer "not applicable" (not shown here) was entered where the federal government either had no clear interest in the resolution of the particular issue or when the court's resolution of the issue did not clearly favor or disfavor the government's position.

Figure 5.
ISSUES RESOLVED BY THE COURTS

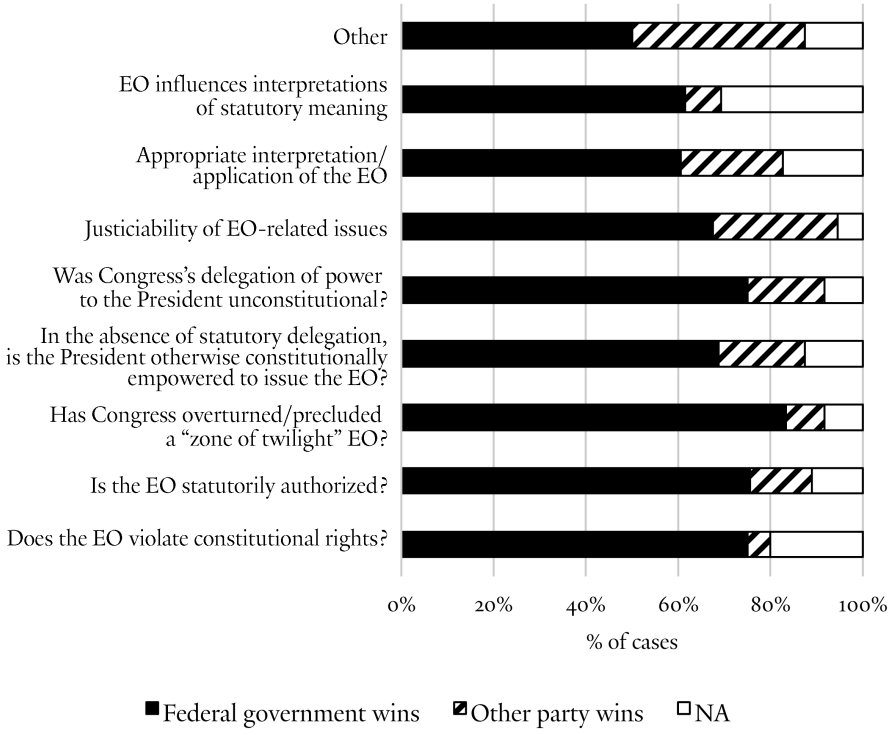
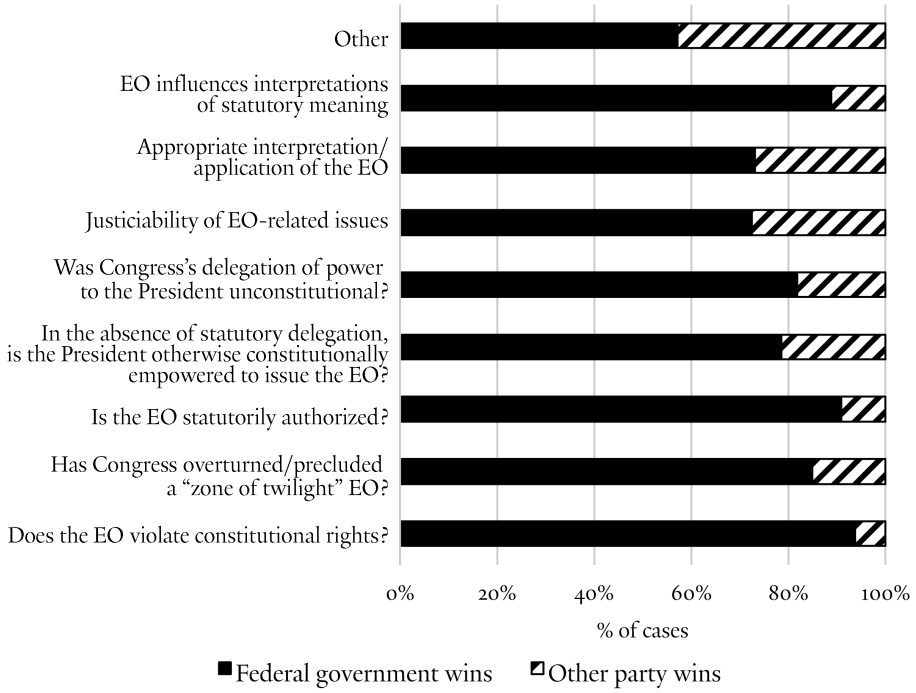


Figure 6.
IN WHOSE FAVOR WERE ISSUES RESOLVED BY THE COURTS? ("NA'S" EXCLUDED)



II. METHODOLOGY

The discussions that follow provide a brief overview of the methodology that this project developed and used to search, organize, and study the case law on executive orders. Further details can be found in Appendix I.

A word of caution is in order. As any first-year law student can attest, legal opinions do not easily sort themselves into little boxes with hard edges. To invoke a well-worn cliché, cases are like snowflakes: each carries with it unique facts and thus unique features. Meanwhile, different judges at times deploy different vocabulary, and norms of judicial discretion produce decisions that obfuscate key issues.[61] Any effort to code cases on substantive characteristics will

61. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 304-06 (1979) (abstaining from deciding whether Executive Order 11,246 was "authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority" because

therefore feature some inherent subjectivity. Nonetheless, this type of analysis can yield important insights. It can point toward patterns and areas deserving further inquiry, and it can impose much-needed structure and form on case law that can seem otherwise difficult or impossible to tame.

A. The Scope

Presidents have at their disposal a variety of unilateral lawmaking tools—presidential findings, national security instruments, presidential directives, presidential proclamations, presidential memoranda, and executive orders, among others—that, under the appropriate circumstances, have the force and effect of law.[62] Indeed, the functional differences among these different types of presidential orders can be difficult to identify.[63]

This study cast its net to capture cases that meaningfully discuss not only official "executive orders,"[64] but also presidential proclamations and presidential memoranda.[65] These three types of presidential orders were selected for

the "pertinent inquiry" could be resolved without identifying the precise source of the Order's authority).

62. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., ORDER CODE 98-611 GOV, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW (2008), http://fas.org/sgp/crs/misc/98-611.pdf [http://perma.cc/9BYG-47LV].

63. *See id.* (surveying the constellation of "presidential directives"); MAYER, *supra* note 21, at 34 ("The lack of any agreed-upon definition means that, in essence, an executive order is whatever the president chooses to call by that name."); STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., EXEC. ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957) [hereinafter COMM. REP. ON EXEC. ORDERS AND PROCLAMATIONS] ("The difference between Executive orders and proclamations is more one of form than of substance . . . ."); *cf.* Legal Effectiveness of a Presidential Directive, as Compared to an Exec. Order, 24 Op. O.L.C. 29, 29 (2000) ("[T]here is no substantive difference in the legal effectiveness of an executive order and a presidential directive . . . . [I]t is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner. . . . [A]s with an executive order, a presidential directive would not lose its legal effectiveness upon a change of administration . . . unless otherwise specified, pending any future presidential action.").

64. Formal "executive orders" are generally published in the Federal Register and are numbered sequentially. *See* 44 U.S.C. § 1505 (2012). This numbering system was not instituted until 1907; orders published before 1907 that could be located in the records were retrospectively numbered by the State Department. *See* COMM. REP. ON EXEC. ORDERS AND PROCLAMATIONS, *supra* note 63, at 37.

65. Presidential proclamations are likewise published in the Federal Register. *See* 44 U.S.C. § 1505 (2012). Only one coded case, *Medellín v. Texas*, 552 U.S. 491 (2008), meaningfully engaged with a presidential memorandum. Meanwhile, executive orders posed the interesting doctrinal questions in over 80% of coded cases. The remaining cases discussed presidential proclamations. A small number of cases raised issues relating to both executive orders and presidential proclamations. *See, e.g.*, Gubbins v. United States, 192 F.2d 411 (D.C. Cir. 1951).

four reasons. First, each can significantly impact individual rights, as well as the structure and function of government. Second, none is limited in scope to one specific type of substantive issue (such as national security). Third, these types of orders are often (though not always) public and so are far more likely to figure into courtroom battles. And fourth, even courts have resisted drawing lines to distinguish among them.[66] Given the need for manageable standards to guide the study, other forms of "executive action"[67] were excluded from its scope.

This Note adopts the practice of scholars and journalists alike, all of whom generally use the catch-all phrase "executive orders" to describe not only de jure executive orders but also presidential orders of other stripes.[68] I note meaningful distinctions among the different classes of orders as needed.

B. The Courts

Courts have been wrestling with executive orders for over 150 years.[69] Because a study of every relevant judicial opinion would have produced more data

66. *See, e.g.*, Meyer v. Bush, 981 F.2d 1288, 1296 (D.C. Cir. 1993) ("We do not think much should turn on whether the President delegates authority to a White House group by memorandum or by Executive Order.").

67. For example, *Boumediene v. Bush*, 553 U.S. 723 (2008), was one of the cases surfaced through the methodology described here and in Appendix I. It was removed from the corpus for two reasons. First, while the Court spoke of detention by "executive order," it never actually named the order. Second, the order to which the Court likely referred was neither an "executive order," a "presidential proclamation," nor a "presidential memorandum" but rather a "military order." *See* Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001). Cases involving presidential directives that did not qualify as presidential memoranda, presidential proclamations, or official executive orders were likewise excluded from this study.

68. *See, e.g.*, MAYER, *supra* note 21. *Compare* Ashley Parker, *Obama Announces Gun Control Actions,* N.Y. TIMES: CAUCUS (Jan. 3, 2014, 10:38PM), http://thecaucus.blogs.nytimes.com/2014/01/03/obama-announces-gun-control-actions [http://perma.cc/V54F-JQ9S] (explaining that in 2013, President Obama "issued 25 executive orders intended to tighten the rules of gun ownership"), *with Executive Orders,* WHITE HOUSE, http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders [http://perma.cc/7QVD-LSSZ] (showing that none of the President's 2013 executive actions described in the Parker article involved officially designated executive orders), *and Now is the Time: Gun Violence Reduction Executive Actions*, WHITE HOUSE (Jan. 16, 2013), http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf [http://perma.cc/GE7Y-CW89] (announcing "23 executive actions to reduce gun violence," several of which were designated presidential memoranda, but none of which was an official executive order).

69. *See, e.g.*, The Admiral, 70 U.S. 603 (1865) (indicating that the President could lawfully order a blockade of Southern ports during the Civil War); *Ex parte* Merryman, 17 F. Cas. 144, 148

than could feasibly have been analyzed, this study focuses on cases decided by two courts: the U.S. Supreme Court and the Court of Appeals for the D.C. Circuit.[70] Including the U.S. Supreme Court cases was an obvious choice: Supreme Court cases originate in geographically and topically diverse controversies, and the Court's decisions have national reach. The D.C. Circuit was a likewise intuitive target of study. Because the structure and function of the federal government are the central subjects of many executive orders, the D.C. Circuit resolves many of the judicial battles over these orders and sets a fair amount of governing precedent. Moreover, no Circuit more regularly deals with the fundamental questions of separation of powers and checks-and-balances that executive orders implicate.[71] A focus on the D.C. Circuit does affect the types of cases that this Note analyzes: Freedom of Information Act (FOIA)[72] cases, for example, make a strong showing. Of course, there remains much to learn from looking at decisions issued by other federal courts that hear different flavors of cases.

C. The Cases

The U.S. Supreme Court and the D.C. Circuit have together decided over 700 cases that reference executive orders (that is, executive orders, presidential proclamations, or presidential memoranda).[73] However, this project did not seek to identify cases in which executive orders were mentioned as mere historical footnotes or in which clearly established precedent was applied in a rote manner, with little evaluation or justification. Rather, the study aimed to help elucidate the doctrine from which executive orders derive their powers. Drawing distinctions about the relative centrality of executive orders introduces an additional source of potential subjectivity into the study. Nonetheless, narrowing the scope of cases studied by means of this distinction ensured that results were better tailored to the central questions of this project, and this compensated for the loss in comprehensiveness.

(C.C.D. Md. 1861) (holding that the President could not suspend the writ of habeas corpus by executive order).

70. Thanks to Abbe Gluck for suggesting a focus on these two courts.

71. *See* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of District of Columbia*, 90 GEO. L.J. 549, 562 (2002) (explaining that the D.C. Circuit and the United States District Court for the District of Columbia "became specialists in both separation of powers disputes and oversight of administrative actions taken by the federal agencies").

72. Pub. L. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2012)).

73. This number was calculated by querying WestlawNext for ["Executive order!" or "president! memorand!" or "president! proclamation"].

The project's methodology featured a three-step process designed to separate the more than 700 cases into those that illuminated how courts think about executive orders and those that did not. This methodology is described in greater detail in Appendix I, but it merits brief discussion here.

The first step relied on a few different Westlaw features—headnotes, case synopses, and frequency searches—to narrow the pool of over 700 cases. Westlaw's headnotes capture the "specific point[s] of law" made in each case.[74] This made headnotes a useful tool for identifying decisions in which judges were likely to have engaged with legal questions pertaining to executive orders. At this step, the 339 cases with a headnote that mentioned executive orders were retained as part of the dataset. The 117 cases that referenced executive orders within their respective Westlaw case synopses were also retained.[75] Finally, to ensure that no Supreme Court decisions featuring substantive discussions of executive orders had been overlooked, the twenty-six additional Supreme Court cases that included at least 5 mentions of executive orders were kept as well.[76] All other cases were discarded. Through this first step, the initial pool of over 700 cases was narrowed to 416.

The second step in this process began with a review of each of the headnotes identified in the first step. Cases identified through the headnotes-based search were retained unless their associated headnotes (1) merely referenced executive orders in passing (often as a historical footnote)[77] or (2) included only highly fact-specific, non-analytic statements or assessments in reference to executive orders. Ambiguities were resolved in favor of retaining cases.

74. *See Westlaw Next Tip of the Week: Headnotes and Synopses Make Cases Easier To Find on Westlaw Next*, WESTLAW NEXT: LEGAL SOLUTIONS BLOG (July 8, 2013), http://blog.legalsolutions.thomsonreuters.com/legal-research/reference-attorney-tips/07-08-13 [http://perma.cc/BW6Z-GWPZ] ("A headnote is a single sentence that reflects a point of law made by the court. Attorney-editors craft a headnote for every specific point of law covered in every published opinion, making it possible to quickly determine what the case means and whether it is relevant.").

75. *See Editorial Enhancements*, THOMPSON REUTERS WESTLAW (2014), https://lawschool.westlaw.com/marketing/display/RE/37 [http://perma.cc/J9CP-RCWY] ("Synopsis: a paragraph-length summary of the facts, procedural posture and main holding(s) of an opinion. The synopsis may also include a summary of the central issues of the case, the name of the trial level judge and the name of the judge who wrote the opinion." (emphasis omitted)).

76. Thanks to Abbe Gluck for suggesting this query.

77. For example, a headnote in *League of United Latin American Citizens v. Hampton*, 501 F.2d 843 (D.C. Cir. 1974) references Exec. Order 11,478, which sets out the procedures through which a rejected job applicant can allege racial discrimination in the hiring process. However, in the opinion itself, the executive order is merely mentioned in passing. *Id.* at 845. The opinion simply restated the general rule that all administrative remedies must be exhausted before class action suits may be pursued and reasserted that no exceptions are available just because the plaintiffs believe that pursuing the procedures would be futile. *Id.* at 847.

The third step involved reading the cases that remained from the headnote search, the cases identified through the synopsis search, and the cases found through the Supreme Court frequency search. In total, 297 cases were read in full. These cases were evaluated against an initial list of issues and questions related to this project's focus—modified versions of these lists are shown in Figure 1 and Figure 2, and the lists are discussed in more detail in Appendix II. The overarching question that guided these determinations was "does this contribute anything to our understanding of executive orders?" Those cases that were found to implicate none of the items on the lists were removed from the corpus. Borderline cases were marked as such and retained.

After reading all 297 cases in full, the final survey instrument used in this study was developed.[78] The cases that had not been discarded—including the borderline cases—were reread and coded in accordance with the survey instrument. The cases that, upon a full read, did not implicate any of the items in the lists shown in Figure 1 and Figure 2 were removed from the corpus. In total, 152 cases were coded, each of which offers a snapshot of doctrinal development. Taken together, these cases tell the story of executive orders in court.

III. COURTS APPEAR TO LACK A THEORY OF THE CONSTITUTIONAL RELATIONSHIP OF CONGRESS TO EXECUTIVE ORDERS

This Part discusses the ways in which doctrine conceptualizes the triangular relationship among executive orders, the executive branch, and Congress. It suggests that courts lack a theory of the executive order's role in our separation of powers system and that, in the absence of such a theory, doctrine has developed along lines that augment executive branch power at Congress's expense.

There are two sources of authority through which executive orders may claim "the force and effect of law."[79] The first is Article II of the Constitution. Article II authorizes presidents to issue executive orders that operate within areas exclusively subject to presidential power.[80] Article II also authorizes the President to issue executive orders that (a) operate in areas of concurrent congressional-executive authority *and* (b) do not contravene the "expressed or implied will of Congress."[81] The second source of authority through which execu-

78. *See infra* Part III, Appendix I (discussing the process of developing the survey instrument).

79. United States v. Trucking Mgmt., Inc., 662 F.2d 36, 42 (D.C. Cir. 1981) (citing United States v. Trucking Mgmt., Inc., No. 74-453, 1979 WL 278, at 8 (D.D.C. July 17, 1979)); *see also* Micei Int'l v. Dep't of Commerce, 613 F.3d 1147, 1153 (D.C. Cir. 2010).

80. Youngstown Sheet & Tube Co., 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

81. *Id.*

tive orders assume the force and effect of law is statutory—that is, congressional delegation of power.[82]

As Kevin Stack has observed, one cause of the aforementioned doctrinal incoherence is the long-established judicial practice of allowing presidents to "aggregate" sources of law—multiple statutes and Article II powers—to create a general gestalt of authority to issue their executive orders.[83] For example, Executive Order 12,333 likely derives some authority from the President's Commander-in-Chief and foreign relations powers—and his related authority to manage the activities of the executive branch.[84] But the order also operates against a backdrop of congressional legislation—the National Security Act of 1947, which the order cites, as well as more recent legislation, such as the USA PATRIOT ACT and the FISA Amendments Act.[85]

The 1974 Supreme Court case *Old Dominion Branch No. 496 v. Austin*[86] illustrates how challenging it can be to isolate the source of an executive order's authority. In *Old Dominion Branch*, the Court was confronted with an executive order that governed labor relations for federal employees. The Court held that the order derived its power in part from "the President's [Article II] responsibility for the efficient operation of the Executive Branch."[87] But the Court also rooted the President's power to issue the order in 5 U.S.C. § 7301, "which provides that 'the President may prescribe regulations for the conduct of employees in the executive branch.'"[88] The Court took a similar tack in *Chrysler Corp. v. Brown*, when it sidestepped the question of whether Executive Order 11,246 was "authorized by the Federal Property and Administrative Services Act of

82. *See supra* notes 15-18 and accompanying text.

83. *See* Stack, *supra* note 24; *see, e.g.*, sources cited *supra* note 17.

84. *See Presidential Policy Directive—Signals Intelligence Activities*, WHITE HOUSE (Jan. 17, 2014), http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities [http://perma.cc/CAL8-BJRY] ("Presidents have long directed the acquisition of foreign intelligence and counterintelligence pursuant to their constitutional authority to conduct U.S. foreign relations and to fulfill their constitutional responsibilities as Commander in Chief and Chief Executive."); Rear Admiral John S. Jenkins, USN (Ret.), *Chapter 2: Discussion*, *in* SPECIAL OPERATIONS IN US STRATEGY 89 (Frank R. Barnett, et al. eds., 1984) ("As members of the Executive Branch, we must also take heed of Executive Order 12333, which is the policy guidance of the President and Commander-in-Chief with respect to the intelligence community.").

85. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S. Code); FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. §§ 1801-29 (2012)).

86. 418 U.S. 264 (1974).

87. *Id.* at 273 n.5.

88. *Id.* (quoting 5 U.S.C. § 7301 (1970)).

1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority."[89] Aggregation renders the distinction between "Article I executive orders" and "Article II executive orders"—terms that are used here as a shorthand and that courts implicitly invoke—somewhat artificial.

While Stack argues that aggregation inappropriately empowers the President, aggregation may in fact create conditions that can facilitate checks on the executive branch. Stack presents aggregation as occurring "when the court is unable to identify which statutory provision, or interlocking set of statutory provisions, authorize the action but nonetheless upholds the action as authorized by statute."[90] In other words, courts sometimes draw on Article II powers to imply statutory authority for Article I executive orders, as the Supreme Court famously did in *Dames & Moore v. Regan*. But as *Old Dominion Branch* suggests, aggregation can also work in the opposite direction: courts sometimes draw on statutory law to bolster Article II executive orders.

At the very least, this latter version of aggregation admits a role for Congress in governing subject matters over which the executive also has clear authority, and over which the executive has often claimed *exclusive* authority.[91] Without the option of aggregation, it is just as possible that courts—driven by the imperatives of current events—would render broad, executive-empowering rulings that box Congress out of the game altogether as it is that courts would circumscribe executive power.

89. Chrysler Corp. v. Brown, 441 U.S. 281, 304-06 (1979) (footnotes omitted).

90. *See* Stack, *supra* note 24, at 570.

91. *See* Memorandum from Jack Goldsmith, Assistant Att'y Gen., for the Att'y Gen., Re: Review of the Legality of the STELLAR WIND Program 64 (May 6, 2004) (explaining that in certain circumstances, the President "has inherent constitutional authority to direct electronic surveillance without a warrant to intercept the suspected communications of the enemy—an authority that Congress cannot curtail"); Brief for Respondent at 18-30, Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012) (No. 10-699), 2011 WL 4442690, at *18-30 (arguing, on behalf of the U.S. government, that "[t]he Constitution grants the President the exclusive power to recognize foreign sovereigns and to determine passport content insofar as it pertains to such recognition determinations" and that "[t]he Constitution assigns exclusively to the Executive Branch the authority to recognize foreign states and foreign governments, and to determine the territorial boundaries of foreign states"); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 15 (2006) (explaining that "[t]he so-called 'Torture Memo' argued that the anti-torture statutes could not prohibit the President from ordering the use of torture in interrogations of enemy combatants because such a prohibition would violate the President's constitutional powers"); *id.* at 7-8 (discussing claims of exclusive executive presidential authority made by Presidents Ronald Reagan and George H.W. Bush).

The current Part and Part IV thus accept aggregation, but they also call for more doctrinal clarity with respect to *how* Presidents and courts should manage aggregation. While the presidential practice of obfuscation discussed in Part III.A below does not help matters, a lack of clarity by courts, this Part argues, also undermines opportunities to check executive power.

A. Presidents Often Fail To Clarify the Sources of Their Authority To Issue Executive Orders

While presidents sometimes aggregate authorities when issuing executive orders, other times, they fail to name any specific authority at all. Instead, presidents often issue executive orders "based on sweeping claims of authority."[92] For example, of the thirty-four executive orders that President Obama issued in 2011,[93] the second year of his presidency, only fifteen claimed any specific law or laws as their source(s) of authority.[94] President Obama's other nineteen executive orders generically claimed "the authority vested in me as President by the Constitution and the laws of the United States of America."[95] In 2003, the second year of the Bush Presidency, only twenty-three of President Bush's forty-one executive orders cited a specific statute as a source of authority.[96]

92. Tara L. Branum, *supra* note 34, at 34; *cf.* Nestor v. Hershey, 425 F.2d 504, 506 (D.C. Cir. 1969) (involving judicial confusion over which statutory provision an executive order was issued pursuant to).

93. The numbers presented in this Part were calculated based on a review of the opening paragraphs of each executive order that President Obama issued in 2011 and that President Bush issued in 2003. The Presidents' claims that specific statutory text authorized their respective orders were not checked against the statutes themselves.

94. *See* Exec. Order No. 13,565, 76 Fed. Reg. 7681 (Feb. 11, 2011); Exec. Order No. 13,566, 76 Fed. Reg. 11,315 (Mar. 2, 2011); Exec. Order No. 13,567, 76 Fed. Reg. 13,275 (Mar. 10, 2011); Exec. Order No. 13,568, 76 Fed. Reg. 13,495 (Mar. 11, 2011); Exec. Order No. 13,570, 76 Fed. Reg. 22,289 (Apr. 20, 2011); Exec. Order. No. 13,572, 76 Fed. Reg. 24,787 (May 3, 2011); Exec. Order No. 13,573, 76 Fed. Reg. 29,143 (May 20, 2011); Exec. Order No. 13,574, 76 Fed. Reg. 30,505 (May 25, 2011); Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 27, 2011); Exec. Order No. 13,582, 76 Fed. Reg. 52,209 (Aug. 22, 2011); Exec. Order No. 13,584, 76 Fed. Reg. 56,945 (Sept. 15, 2011); Exec. Order No. 13,586, 76 Fed. Reg. 63,533 (Oct. 12, 2011); Exec. Order No. 13,590, 76 Fed. Reg. 72,609 (Nov. 23, 2011); Exec. Order No. 13,593, 76 Fed. Reg. 78,451 (Dec. 16, 2011); Exec. Order No. 13,594, 76 Fed. Reg. 80,191 (Dec. 23, 2011).

95. *See, e.g.*, Exec. Order 13,588, 76 Fed. Reg. 68,295 (Nov. 3, 2011) (Announcing, in an order titled "Reducing Prescription Drug Shortages," that "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows: . . . .").

96. Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 28, 2003); Exec. Order No., 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003); Exec. Order No. 13,287, 68 Fed. Reg. 10,635 (Mar. 3, 2003); Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003); Exec. Order No. 13,290, 68 Fed. Reg. 14,306 (Mar. 20, 2003); Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003); Ex-

This practice presents a contrast with, for example, section 553 of the Administrative Procedure Act, which requires that notices of proposed rulemaking include a "reference to the legal authority under which the rule is proposed" and that final rules include "a concise general statement of their *basis* and purpose."[97] Courts have interpreted this language as requiring particularity and precision on the part of the agency.[98] But unlike agencies, when presidents—to whom the APA does not apply[99]—do justify their executive actions

ec. Order No. 13,297, 68 Fed. Reg. 22,565 (Apr. 23, 2003); Exec. Order No. 13,298, 68 Fed. Reg. 24,857 (May 8, 2003); Exec. Order No. 13,302, 68 Fed. Reg. 27,429 (May 20, 2003); Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 28, 2003); Exec. Order No. 13,304, 68 Fed. Reg. 32,315 (May 29, 2003); Exec. Order No. 13,305, 68 Fed. Reg. 32,323 (May 30, 2003); Exec. Order No. 13,307, 68 Fed. Reg. 33,338 (June 3, 2003); Exec. Order No. 13,308, 68 Fed. Reg. 37,691 (June 24, 2003); Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 30, 2003); Exec. Order No. 13,311, 68 Fed. Reg. 45,149 (July 31, 2003); Exec. Order No. 13,312, 68 Fed. Reg. 45,151 (July 31, 2003); Exec. Order No. 13,313, 68 Fed. Reg. 46,073 (Aug. 5, 2003); Exec. Order No. 13,314, 68 Fed. Reg. 48,249 (Aug. 13, 2003); Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Sept. 3, 2003); Exec. Order No. 13,318, 68 Fed. Reg. 66,317 (Nov. 25, 2003); Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 23, 2003); Exec. Order No. 13,323, 69 Fed. Reg. 241 (Jan. 2, 2004).

97. 5 U.S.C. §§ 553(b)(2), (c) (2012) (emphasis added); *cf.* Stack, *supra* note 24, at 581 ("By requiring that the statutory authority of a presidential order be identifiable in at least one statute or set of interlocking statutory provisions, the judiciary [could] constrain[] the scope of presidential assertions of statutory authority. It [could] ensure[] that the president's claims of statutory power are reasonably contemplated by the delegations the president invokes. This [would] ensure[] that the . . . president's power follows from congressional consideration.").

98. S*ee* United States v. Whitlow, 714 F.3d 41, 46 (1st Cir. 2013), *cert. denied,* 134 S. Ct. 287 (2013) (explaining that it is important that the agency "identify a statutory provision that gave [it] the power to issue [the] rule," and that "the invocation of a broad enabling statute that technically encompasses a more specific authority might leave the public unclear as to the ostensible basis and scope of the agency's authority, thus frustrating the purpose of § 553(b)(2)"); Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 759 (D.C. Cir. 1987) (holding that invoking a statutory authority only once litigation has begun is insufficient under the APA), *aff'd,* 488 U.S. 204 (1988); Global Van Lines, Inc. v. Interstate Commerce Comm'n, 714 F.2d 1290, 1297-98 (5th Cir. 1983) ("The Senate report on this part of the bill explains that '[a]gency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto,' and the House report adds that '[t]he required specification of legal authority must be done *with particularity*.' The authoritative and virtually contemporaneous *Attorney General's Manual* also concludes that '[t]he reference [to legal authority] must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule.'" (citations omitted)); Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 900 (D.C. Cir. 1978).

99. *See* Dalton v. Specter, 511 U.S. 462 (1994).

with "references . . . to statutes, they are very general in nature and implicate relatively ambiguous legislative provisions."[100]

An executive order that is ambiguous about the statutory source(s) of its claimed authority can obscure the contours of its power. The potential implications of this phenomenon are nicely illustrated by the 1969 D.C. Circuit case *Nestor v. Hershey*.[101] The litigation in *Nestor* arose from uncertainty over which of two provisions of the Military Selective Service Act of 1967 authorized Executive Order 11,360.[102] Graduate student James Nestor's eligibility for a preferential draft deferment hinged on judicial resolution of the ambiguity; the D.C. Circuit ultimately found in Nestor's favor, and he was able to claim the deferment.[103]

As we turn our focus from executive orders to the judicial decisions that interact with them, *Nestor* serves as a useful reminder: imprecision in executive orders may create flexibility for the executive, but it also affects individuals whose rights and responsibilities the orders potentially implicate.

B. Doctrines that Negotiate the Relationship of Executive Orders to Statutory

100. *Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H. Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 113 (1999) (statement of Phillip Cooper, Gund Prof. of Liberal Arts, Dep't of Pol. Sci., Univ. of Vermont); *cf.* Am. Fed'n of Gov't Employees, AFL-CIO v. Reagan, 870 F.2d 723, 724 (D.C. Cir. 1989) ("This appeal summons us to decide whether a presidential executive order purportedly exerting a statutorily-conferred power is legally ineffective because it does not show facially and affirmatively that the President made the determinations upon which exercise of the power is conditioned. We hold that the challenged order is entitled to a rebuttable presumption of regularity, and on the record before us we sustain it."). In an earlier era, the President was held to higher standards. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431 (1935) (finding that because an executive order "contain[ed] no finding, no statement of the grounds of the President's action in enacting the prohibition" it violated the Due Process Clause).

101. 425 F.2d 504, 512-21 (1969).

102. Exec. Order No. 11,360, 32 Fed. Reg. 9787 (1967) ("By virtue of the authority vested in me by the Military Selective Service Act of 1967 (62 Stat. 604), as amended, I hereby prescribe the following amendments . . . .").

103. Nestor had sought a preferential, "I-S draft deferment" pursuant to paragraph 6(i)(2) of the Military Selective Service Act of 1967. *Nestor*, 425 F.2d at 506-07, 512. His local draft board denied the deferment on the grounds that selective service registrants were limited to a single I-S (6(i)(2)) deferment, and that Nestor had already received one such deferment pursuant to Executive Order 11,360. *Id.* at 515-16. Nestor countered that E.O. 11,360 was issued pursuant to paragraph 6(h)(2) of the Act, and not pursuant to paragraph 6(i)(2); thus, his earlier deferment did not qualify as a 6(i)(2) deferment. *Id.* Undertaking a careful reading of the statutory text, the Court concluded that the executive order had been issued pursuant to paragraph 6(h)(2) and that Nestor therefore should receive his sought-after 6(i)(2) I-S deferment. *Id.*

Law Interact so as To Augment Presidential Power

This Part discusses three ways that imprecision in the doctrine supporting executive orders contributes to expanded executive power. Part III.B.1 discusses the acquiescence and ratification doctrines. These doctrines allow an executive order that would otherwise require some sort of ex ante congressional authorization to obtain that authorization either through ex post congressional ratification[104] of the order or, under certain circumstances, through congressional silence (acquiescence)[105] over a long period of time. While these long-established doctrines have been well covered in the literature,[106] the discussion here emphasizes that they fail to establish how and when Congress might take back the reins.

While Part III.B.1 discusses how courts identify congressional authorization for executive orders, Part III.B.2 focuses primarily on how courts determine the scope of executive orders, with a particular emphasis on orders that threaten to conflict with statutory law. Finally, Part III.B.3 discusses how courts have allowed those executive orders that implement statutory mandates to alter the meaning of statutory law in real time.

Taken together, these Parts paint a picture of a doctrine that defaults to an inchoate—and perhaps even unrealized—preference for presidential lawmaking over congressional lawmaking. At each stage of presidential lawmaking—authorization, interpretation, and implementation—courts have strengthened presidential lawmaking power at the cost of congressional lawmaking power.

1. *Authorizing Executive Orders: Congress Need Not Act in Order To Delegate Its Powers to the President*

When issuing executive orders of the type that would generally require statutory authorization, presidents have at times adopted the "better to ask for forgiveness than permission" approach to lawmaking. Courts have generally

104. *See, e.g.*, Hamilton v. Dillin, 88 U.S. 73, 88 (1874) ("Our first inquiry, therefore, will be, whether the action of the executive was authorized, or, if not originally authorized, was confirmed by Congress.").

105. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 475 (1915) ("These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.").

106. *See, e.g.*, MAYER, *supra* note 21, at 205; Branum, *supra* note 34, at 69-71.

supported presidents in this practice of lawmaking-in-reverse.[107] In so doing, courts have generated doctrinal asymmetries—that is, they have afforded executive orders certain legal privileges without imposing comparable legal responsibilities— that reappear throughout this Note.

When the President operates in spheres in which he clearly lacks Article II authority to issue executive orders, the Supreme Court has held that Congress may delegate that authority ex post—*after* the order has been issued.[108] Such delegation can be effectuated through mechanisms that fall on a spectrum that spans (belated) action to inaction.

On the "action" end of this spectrum is ratification, which is the least controversial of these mechanisms: it "is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might have authorized,' and give the force of law to official action unauthorized when taktaken."[109] On the "inaction" end of the spectrum is the more controversial—and less well-delineated—acquiescence mechanism of ex-post delegation: when Congress knows about an order[110] and fails to "repudiate the power claimed,"[111] courts sometimes find that "acquiescence . . . operate[s] as an implied grant of power."[112] Acquiescence "may sometimes be found from nothing more than silence in the face of an administrative policy."[113] The discussion that follows, while relying on ratification cases as points of reference, especially focuses on cases that fall closer to the acquiescence end of the spectrum. However, acts of

107. The practice dates back at least to President Lincoln's suspension of habeas corpus. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,437).

108. *See, e.g.*, United States v. Alaska, 521 U.S. 1, 44 (1997) (concluding "that Congress ratified the terms of the 1923 Executive Order in § 11(b) of the Statehood Act"); Propper v. Clark, 337 U.S. 472, 480-81 (1949) (holding that the definition of a term, as used in an executive order, "has had congressional ratification"); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 118-19 (1947); Hirabayashi v. United States, 320 U.S. 81, 91-92 (1943) (explaining that Congress ratified Roosevelt's Executive Order No. 9066, used to justify curfews for Japanese-Americans); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937); McConaughey v. Morrow, 263 U.S. 39, 43 (1923); United States v. Midwest Oil Co., 236 U.S. 459, 475 (1915); *id.* at 470-71 ("Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive orders making reservations for useful, though nonstatutory, purposes."); Donnelly v. United States, 228 U.S. 243, 258-59 (1913); Hamilton v. Dillin, 88 U.S. 73, 88 (1874); Rose v. McNamara, 375 F.2d 924, 928-29 (D.C. Cir. 1967).

109. Swayne & Hoyt v. United States, 300 U.S. 297, 301-02 (1937) (citing Mattingly v. Dist. of Columbia, 97 U.S. 687, 690 (1878)).

110. United States v. Midwest Oil Co., 236 U.S. 459, 475 (1915).

111. *Id.* at 470.

112. *Id.* at 475.

113. Haig v. Agee, 453 U.S. 280, 300 (1981) (citing Zemel v. Rusk, 381 U.S. 1, 11 (1965)).

ratification and acquiescence can be difficult to distinguish from each other, and courts sometimes deploy the respective terms interchangeably.

The acquiescence and ratification cases are notable for a few reasons. First, they treat executive orders and their complementary congressional "approval" as if they occurred in lockstep, even when the two events[114] took place years apart. Courts do not (and realistically cannot) ask whether, if the order had been put to a vote when signed, the then-sitting Congress would have approved the document; rather, they ask whether some Congress, at some unspecified point in time, either actively ratified, appropriated funds in pursuance of, or generally failed to disapprove the order. Once ratification or acquiescence has been established, courts engage in the legal fiction that, even in the temporal gap between promulgation of an executive order and "approval," the order was authorized by law.[115] But *acquiescence*, in particular, is a fairly weak justification for a jurisprudence that endorses retroactive lawmaking, especially given that courts otherwise apply a clear statement rule before enforcing statutes retroactively.[116]

114. Referring to the acquisition of congressional acquiescence as an "event" is a bit misleading; acquiescence is often inferred from congressional inaction or from a series of indirect actions, such as the approval of relevant appropriations.

115. For example, in the 1937 Supreme Court case *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, the Court located congressional ratification of an executive order in legislative activity that occurred *after* the events that had given rise to the case and had prompted appellants to challenge the order. *Compare Isbrandtsen-Moller Co.*, 300 U.S. at 140-41 ("The suit was brought to restrain enforcement of an order issued November 18, 1935, by the Secretary of Commerce pursuant to § 21 of the Shipping Act, 1916, requiring the appellant to file with the Secretary on December 16, 1935, a copy or summary of its books and records for the period September 1 to November 12, 1935. . . ."), *with id.* at 147-48 ("Congress appears to have recognized the validity of the transfer and ratified the President's action by the appropriation acts of April 7, 1934, March 22, 1935, and May 15, 1936, all of which make appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the [S]hipping [A]ct as amended and refer to the executive order. . . . [B]y the Merchant Marine Act of 1936 . . . the functions of the former Shipping Board are referred to as 'now vested in the Department of Commerce pursuant to § 12 of the President's Executive Order . . .'"). *See also* Swayne & Hoyt v. United States, 300 U.S. 297, 302 (1937) ("The mere fact that the validation is retroactive in its operation is not enough, in the circumstances of this case, to render it ineffective.").

116. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994). While this acquiescence doctrine does find common heritage with statutory law's acquiescence doctrine, which has been used to find congressional acquiescence vis-à-vis *judicial* interpretations of its statutes, *see, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972), inexplicably, the statutory doctrine appears to be more contested than is its executive order equivalent. *See* Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("[V]indication by congressional inaction is a canard."); Deborah Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 864 n.23 & 931 n.399 (2012) (citing cases and sources criticizing the statutory acquiescence doctrine).

Second, and related, these cases generally cast their analyses as inquiries into *congressional* rather than *presidential* intent: did Congress, again, at some undifferentiated point in time, intend to allow the executive order to persist?[117] Certainly, no inquiry is made into the President's subjective intent: did *he* believe that Congress would have approved the order? Given that the relevant question in ratification and acquiescence cases is whether the President can claim Article I authorization to issue the order, the focus on congressional intent is quite sensible. It simply merits mention here because, as Part B.2 illustrates, it presents a marked contrast with other paths that courts have taken when evaluating executive orders.

While courts regularly accept ex post *statutory* ratification of an executive order as constituting statutory authorization of the order, a variety of factors appear to influence their willingness to accept as due authorization indications of congressional intent that are less unambiguous. In a foundational case, *United States v. Midwest Oil Co.*, the Supreme Court cited third-party reliance on an executive order as justification for finding, from congressional silence, legislative acquiescence to the order.[118] In *Rose v. McNamara*,[119] the D.C. Circuit found that congressional awareness[120] of a treaty-related executive order, along with general appropriations that happened to cover "the governmental arrangements provided by" that order, were together sufficient to establish congressional acquiescence to the order.[121] Elsewhere, courts have applied a sliding scale to determine whether they will presume congressional approval of executive action in the absence of actual legislation: the greater the potential deprivation of individual rights that is associated with the executive order, the less likely courts are to find ex-post approval in anything other than explicit statutory ratification.[122] (This sliding scale approach dovetails with the norm of con-

117. *See* sources cited *supra* note 108.

118. 236 U.S. 459, 472-73 (1915) ("[G]overnment is a practical affair, intended for practical men. Both officers, lawmakers[,] and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle . . . .").

119. 375 F.2d 924 (D.C. Cir. 1967).

120. *Id.* at 928-29 (emphasizing that acquiescence could be found in part because Congress had "awareness of the arrangements which the President has made," was "kept informed" of relevant activities, and was not otherwise "ignoran[t] of . . . the Presidential course").

121. *Id.* at 928.

122. *See Ex parte* Mitsuye Endo, 323 U.S. 283, 303 & n.24 (1944) (narrowing the application of the acquiescence/ratification doctrine in order to avoid rights-based constitutional questions about the internment of American citizens of Japanese descent); *id.* at 297, 299 (discussing constitutional avoidance); *id.* at 308-10 (Roberts, J., concurring) (accusing the Court of narrowing the acquiescence doctrine); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 114

stitutional avoidance: by refusing to find congressional approval when questions of constitutional rights are otherwise likely to be implicated, courts can more easily dodge the constitutional questions.)[123] The case law further suggests, although the doctrine does not definitively hold, that acquiescence may be more difficult to establish when the order "reaches deep into the heart of the State's police powers."[124]

The Supreme Court has also implied, in the context of a "zone of twilight" case, that ex-post congressional approval may prove easier to achieve "in the areas of foreign policy and national security."[125] With respect to instances of purported congressional acquiescence in particular, this suggestion demands a closer look. National security is indeed an area in which courts have long granted the President comparably greater latitude.[126] But it is also an area in which Congress legislates[127] and about which legislators have access to compar-

n.46 (1976) (explaining that "in view of the consequences of the rule it would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule" and construing *Ex parte Mitsuye Endo* as supporting this sliding-scale approach); Greene v. McElroy, 360 U.S. 474, 507 (1959) ("Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions cannot be assumed by acquiescence or nonaction. They must be made explicitly . . . because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (citations omitted)).

123. *See Ex parte* Mitsuye Endo, 323 U.S. at 297, 299 (explaining that because it found no congressional ratification of the implicated executive order, it could avoid "stir[ring] the constitutional issues which have been argued at the bar").

124. Medellín v. Texas, 552 U.S. 491, 532 (2008).

125. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) ("Such failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." (quoting Haig v. Agee, 453 U.S. 280, 291 (1981))); *see also* Rose v. McNamara, 375 F.2d 924, 928 (D.C. Cir. 1967).

126. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

127. *See, e.g.*, Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1885 (2012); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 50 U.S.C.).

atively less information.[128] Insofar as congressional access to relevant information is a precondition to a finding of acquiescence,[129] application of the doctrine should raise more eyebrows — not fewer — when applied to national security-related executive orders.

128. *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 166-81 (1990); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 330-32 (2010) ("The George W. Bush presidency revealed how often, and how easily, the vast majority of Congress may be cut out in the area of national security. The administration never told most members of Congress about the evidentiary holes in the claim that Saddam Hussein's regime possessed weapons of mass destruction. It never told most members about its plans to use interrogation methods widely seen as torture. It never told most members about its plans to launch the Terrorist Surveillance Program. It never alerted Congress to its most controversial Office of Legal Counsel (OLC) opinions. When the administration did provide congressional briefings on highly sensitive subjects, it frequently sought to limit them to the Gang of Eight and to prohibit the Gang from sharing what it learned with cleared staff or with other members. These briefings may have helped create a historical record of the administration's conduct, but at the time they led to little pushback, exposure, or statutory revision. . . . The Bush era undermined confidence in the ability of the Gang of Eight to stand in for the full Congress. Gang-of-Eight notification laws are meant to temper the depth of the administration's most sensitive plans with institutional and political diversity. Yet as the process is currently structured, the Gang has little capacity to constrain executive secret-keepers, or even to engage them in meaningful discussion." (footnotes omitted)); Vicki Divoll, *The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493 (2011). Congress's difficulty acquiring information from, and therefore legislating with respect to, classified information generally was memorably summarized by Rep. Justin Amash:

> You don't have any idea what kind of things are going on. So you have to start just spitting off random questions: Does the government have a moon base? Does the government have a talking bear? Does the government have a cyborg army? If you don't know what kind of things the government might have, you just have to guess and it becomes a totally ridiculous game of 20 questions.

Andrea Peterson, *Obama Says NSA Has Plenty of Congressional Oversight. But One Congressman Says It's a Farce*, WASH. POST: SWITCH, Oct. 9, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/09/obama-says-nsa-has-plenty-of-congressional-oversight-but-one-congressman-says-its-a-farce [http://perma.cc/2RXP-YBGH]; *see also* Letter from Sen. Mark Udall and Sen. Ron Wyden to Att'y Gen. Eric Holder 2 (Mar. 15, 2012), http://www.fas.org/irp/congress/2012_cr/wyden031512.pdf [http://perma.cc/P62Z-TKGU] (explaining that documents provided to Congress "are so highly classified that most members of Congress do not have any staff who are cleared to read them. As a result, we can state with confidence that most of our colleagues in the House and Senate are unfamiliar with these documents . . . .").

129. *See Rose*, 375 F.2d at 928-29; *see also* United States v. Midwest Oil Co., 236 U.S. 459, 475 (1915) ("The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved.").

Executive Order 12,333 again provides a useful illustration. While members of the Senate and House intelligence committees—and the so-called Gang of Eight—have received at least some briefings on the executive branch's creative interpretations of the surveillance provisions in the USA PATRIOT Act, presidents appear to have kept congressional leadership in the dark about how related provisions in E.O. 12,333 have been interpreted and implemented. In 2013, a senior Senate Intelligence Committee staff member told the *Washington Post* that the Committee is "far less aware of operations conducted under [Executive Order] 12333" than they are of operations conducted under the USA PATRIOT Act.[130] The NSA "would not routinely report these things, and, in general, [E.O. 12,333 programs] would not fall within the focus of the committee," the staffer explained. And if congressional leadership were to seek information about E.O. 12,333 programs, they would not even know the right questions to ask.[131] If the President's greater access to information justifies affording him greater latitude on matters relating to national security,[132] then it should also caution against application of the acquiescence doctrine, or any variant thereof, in the national security context. After all, Congress cannot meaningfully acquiesce to activities that it knows little about.[133]

More generally, the cases that fall on the inaction portion of the ratification-acquiescence spectrum point to an important asymmetry: activities within Congress that amount to less than enactment of a statute, including silence, *can* be taken to imply approval of an executive order but *cannot* be taken to "imply

130. Gellman & Soltani, *supra* note 6.

131. *Id.*

132. *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

133. *Cf.* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1258 (2006) (applying similar reasoning to argue that the executive branch should not apply the constitutional avoidance theory of statutory interpretation in the context of near-secret interpretations about which Congress is not notified). In December 2014, Congress passed an intelligence authorization bill that imposed limitations on how long the executive can retain data collected under E.O. 12,333. *See* Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293, §309, (2014). Some privacy advocates have expressed fears that the legislation "sanctions for the first time the executive branch's warrantless collection of American communications under Executive Order 12333." Steven Nelson, *Congress 'Endorses' Warrantless Collection, Storage of U.S. Communications*, U.S. NEWS & WORLD REP., Dec. 11, 2014, http://www.usnews.com/news/articles/2014/12/11/congress-endorses-warrantless-collection-storage-of-us-communications [http://perma.cc/N35J-L2E4]. However, in light of the secrecy surrounding intelligence practices under the Order, courts should not read Congress's decision to impose retention guidelines as an implicit ratification of either the Order or the programs pursued under it. Instead, the provision is best read as a partial effort to narrow (however slightly) the executive's powers under E.O. 12,333.

'congressional disapproval' of action taken by the Executive."[134] Meanwhile, courts have left Congress with little direction as to when its (in)actions will prove sufficient to legitimize a preexisting executive order.

2. *Executive Orders in the Statutory Shadow: The Tools of Interpretation that Courts Apply to Executive Orders Often Augment Executive Power*

In fifty-two percent of coded cases, courts engaged with questions about how executive orders should be interpreted. To answer these questions, they often had to first determine whether the canons of interpretation (and other interpretive lenses)[135] that apply to federal statutes, agency rules,[136] and state laws also apply to executive orders. The Supreme Court acknowledged this dilemma in its 1999 case *Minnesota v. Mille Lacs Band of Chippewa Indians*.[137] There, the Court explained that "[a]lthough this Court has often considered the severability of *statutes,* we have never addressed whether *Executive Orders* can be severed into valid and invalid parts, and if so, what standard should govern the inquiry." It decided that, "for purposes of this case we shall assume, *arguendo*, that the severability standard for statutes also applies to Executive Orders."[138] This assumption echoed the Court's statement in *Ex parte Mitsuye Endo* that "[w]e approach the construction of [this] Executive Order . . . as we would approach the construction of legislation in this field."[139]

Rules of interpretation often reflect underlying theories of interpretation;[140] but the cases studied suggest that executive orders command no such theory (or theories). Focusing on two means through which courts implicitly elevate the status of executive orders, this Part argues that the lack of motivating theories and the easy availability of "common-sense" tools of interpretation

134. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)); *see also* MAYER, *supra* note 21, at 205 ("[J]udges have found a basis for presidential authority in implicit congressional approval."); *cf.* Sea-Land Serv., Inc. v. Interstate Commerce Comm'n, 738 F.2d 1311, 1314 (D.C. Cir. 1984) ("Absent appropriate legislative action, Congress's approval or disapproval of the [duly authorized] President's Order is immaterial . . . ." (citation omitted)).

135. For example, preemption doctrines. *See infra* Part III.B.2.1.

136. *See, e.g.*, Sherley v. Sebelius, 689 F.3d 776, 785 (D.C. Cir. 2012).

137. 526 U.S. 172 (1999).

138. *Id.* at 191.

139. 323 U.S. 283, 298 (1944).

140. *See, e.g.,* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

imported from other contexts have contributed to an expansion of the executive's authority vis-à-vis Congress.

a. Defining the Relationship: How Courts Handle Statutes and Executive Orders that Potentially Collide

Courts have been inconsistent with respect to how they determine when a statute can preclude or overturn an executive order. The D.C. Circuit's 2012 opinion in *Rattigan v. Holder* offers a useful starting point for discussion.[141] In *Rattigan*, the facts of which are presented below, the court effectively applied the harmonization canon of statutory interpretation, which provides that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[142] When courts, faced with two arguably conflicting laws (federal statutory law or otherwise), refuse to allow one law to override the other and instead invoke the goal of harmonization, they implicitly place the two potentially conflicting laws on equal footing.[143] Decisions by courts to deploy—or not to deploy—the harmonization canon in cases involving conflicts between executive orders and statutes offer insights into how judges think about these orders.

In *Rattigan*, the D.C. Circuit evaluated whether Title VII liability could coexist with Executive Order 12,968, under which employees with security clearances "are encouraged and expected to report any information that raises doubts as to whether another employee's continued eligibility for access to classified information is clearly consistent with the national security."[144] E.O. 12,968 was issued by President Clinton under the vaguest of authorities—"by the authority vested in me as President by the Constitution and the laws of the United States of America."[145]

In 2001, Rattigan had registered complaints about race- and national origin-based discrimination; shortly thereafter, an internal memorandum

141. Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012).

142. *Id.* at 770 (quoting J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001)).

143. In contrast, federal preemption doctrine invokes the Constitution's Supremacy Clause to elevate federal law over state law, often giving a wide berth to federal law. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 321 (2011).

144. Exec. Order No. 12,968, 3 C.F.R. 40245, 40253 (1995). The court also separately considered whether Title VII liability could coexist with doctrine that affords the executive wide latitude to set standards for access to classified information. *See Rattigan*, 689 F.3d at 767-68.

145. Exec. Order No. 12,968, 3 C.F.R. 40245, 40245 (1995).

raised concerns about his loyalty to the U.S. government, prompting a security investigation that was ultimately closed.[146] Rattigan brought a Title VII suit in the District Court for D.C., alleging, inter alia, "unlawful retaliation for Rattigan's pursuit of discrimination claims."[147] The government responded by arguing that the Supreme Court's 1988 decision in *Department of the Navy v. Egan*, which has been read to ban all judicial review under Title VII of final FBI decisions to grant or deny security clearances[148]—a different set of circumstances than those presented here—required that courts read E.O. 12,968 as wholly overriding Title VII.[149] The case proceeded to jury trial, and after a jury verdict in Rattigan's favor, the Government appealed.[150] A three-judge panel for the D.C. Circuit vacated and remanded, but explained that jury members should be permitted to "weigh the strength of the evidence . . . submitted in support of [the] claim that Rattigan might pose a security risk" and to infer pretext when assessing this evidence.[151] Before the case returned to the trial court, however, the same three-judge panel granted a rehearing.[152] It is the opinion on rehearing that merits further unpacking.

On petition for rehearing, the Government had argued that the standard set forth in the three-judge panel's earlier decision would inappropriately permit "jurors [in Title VII litigation to] infer pretext based on their own judgment that the information reported was either unlikely to prove true or raised insufficiently weighty security concerns."[153] The court agreed. Highlighting the "deference owed 'the executive in cases implicating national security,'"[154] the court wrote that its previously announced standard "plainly conflicts with Executive Order 12,968's expectation that employees will report even overheard rumors and small details that may ultimately prove irrelevant."[155]

146. *Rattigan*, 689 F.3d at 765-66.

147. *Id.* at 766.

148. *See* Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[U]nder *Egan* an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII.").

149. *Rattigan*, 689 F.3d at 767.

150. *See* Rattigan v. Holder, 643 F.3d 975, 977 (D.C. Cir. 2011).

151. *Id.* at 987-88.

152. Rattigan v. Holder, No. 10-5014, 2011 WL 4101538 (D.C. Cir. Sept. 13, 2011).

153. Rattigan v. Holder, 689 F.3d 520, 769 (D.C. Cir. 2011); *see id.* at 768, 765 ("On rehearing, however, the government has persuaded us that our earlier decision was too broad. For the reasons set forth below, we narrow the scope of Title VII liability in these circumstances and remand for further proceedings consistent with this opinion.").

154. *Id.* at 769 (quoting Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003)).

155. *Id.*

However, the court also felt a "duty not only to follow *Egan,* but also to 'preserv[e] to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation.'"[156] It proceeded to quote a Supreme Court rejoinder that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[157] The court announced that it would split the difference, allowing Title VII suits to proceed where reports made pursuant to E.O. 12,968 were "knowingly false."[158] Such a solution, it explained, would effectuate the purpose of E.O. 12,968 (since a "knowingly false" report does nothing to advance national security) without completely gutting Title VII protections.

To summarize: the court's judicial jujitsu, while rejecting the government's argument that E.O. 12,968 should trump Title VII, treated the executive order as equal in stature to the statute. The court then effectively applied the harmonization canon[159] to its interpretation of the order, the statute, and the civil liability standards that accompany the latter.

At its narrowest, *Rattigan* implies equality of stature between a statute and an executive order issued pursuant to constitutional authority that the executive holds exclusively, rather than concurrently, with Congress. But Judge Kavanaugh's dissent—ironically arguing for stronger deference to executive authority—suggests that there are even more interesting questions at stake. Judge Kavanaugh offered a reminder that "[i]f Congress wishes to re-strike the balance between personnel and employment discrimination laws on the one hand and national security on the other, it is free to do so."[160] Under this formulation, the power that the President exercised in issuing E.O. 12,968 is a power shared concurrently with Congress.

In other words, in *Rattigan*, the court placed an executive order that was issued in the "zone of twilight," and pursuant to concurrently shared authority, on equal footing with a *conflicting* statute—and then tried to harmonize the two. It did so without inquiry into whether Congress, in passing Title VII, in-

156. *Id.* at 770 (quoting Rattigan v. Holder, 643 F.3d 975, 984 (D.C. Cir. 2011)).

157. *Id.* (quoting J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001)) (internal quotation marks omitted).

158. *Id.* (emphasis omitted).

159. *See* Watt v. Alaska, 451 U.S. 259, 267 (1981) (explaining that a court "must read the [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.").

160. *Rattigan*, 689 F.3d at 776 (Kavanaugh, J., dissenting).

tended[161] to preclude "zone of twilight" executive orders of this nature.[162] This case thereby illustrates one means through which courts[163] interpret executive orders to deprive Congress—and its statutes—of their due power.[164]

161. The court's shallow inquiries into congressional "purpose" were used to push back against suggestions that the order preempts Title VII rather than the reverse. *See id.* at 770-71 (majority opinion). This offers some indication of the extraordinary power that the government, and Judge Kavanaugh in dissent, sought to vest in the executive order.

162. Earlier cases, *see, e.g.*, Ryan v. Reno, 168 F.3d 520, 524 n.3 (D.C. Cir. 1999), identified congressional intent to prevent judges from inquiring into the validity of *final* security clearance determinations rendered by the FBI. But *Rattigan* presented a different question: whether a jury may consider the intentions behind (or other indicia relevant to) a mere *report* about a security concern filed by a plaintiff's colleague.

163. The decision in *Rattigan*, and especially Judge Kavanaugh's dissent, could potentially be read to imply a finding of congressional acquiescence to E.O. 12,968. Application of the acquiescence doctrine here, however, would seem to be inconsistent with the principles discussed by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (explaining that "[b]efore we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action"). *See also* sources cited *supra* note 122.

164. For examples of harmonization used elsewhere, see, for example, *Harris v. United States*, 19 F.3d 1090 (5th Cir. 1994) (holding that a stipulated Article I executive order, Executive Order 11,990, was not implicitly overruled by later statutes and explaining that because the order and the statutes can "operate concurrently," *id.* at 1095, both should stand); *see also* Feliciano v. United States, 297 F. Supp. 1356, 1358-59 (D.P.R. 1969), *aff'd*, 422 F.2d 943 (1st Cir. 1970) (explaining that congressional intent to supplant an executive order—in this case, an Article I executive order—will not be implied); United States v. Angcog, 190 F. Supp. 696, 699 (D. Guam 1961) (explaining that congressional intent to use a statute to supplant an executive order—in this case, a "zone of twilight" executive order—will not be implied and that the statute and executive order should instead be harmonized); United States v. LaGrange, 3 C.M.R. 76, 78 (1952) (explaining that "Article 36 of the Uniform Code of Military Justice, 50 USC § 611, provides that the President may prescribe rules of procedure, . . . provided they are not contrary to or inconsistent with the provisions of the Code. This Article brings into the Code the oft-expressed rule that the terms of a congressional enactment can not be defeated by terms engrafted thereon by an executive order, and if the two are inconsistent, the statute must stand alone. But, it imposes on this Court the duty to reconcile any conflicting provisions [of a statute and an executive order] dealing with the same subject matter and to construe them, in so far as reasonably possible, so as to be in harmony with each other" but focusing its inquiry, unlike the court in *Rattigan*, on congressional intent); United States v. Lucas, 1 C.M.R. 19, 22 (1951) ("For the purposes of this case we can and do hold that the act of Congress (the Code) and the act of the Executive (the Manual) are on the same level and that the ordinary rules of statutory construction apply. In that event the general rule is that statutes dealing with the same subject should, if possible, be so construed that effect is given to every provision of each."); *cf.* Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1199 (D. Utah 2004) ("[D]efendants contend that FLPMA implicitly repealed E.O. 10355, transferring all authority under the Antiquities Act, if it ever was dele-

The Supreme Court made a similar, if more subtle, move in *U.S. ex rel. Knauff v. Shaughnessy*.[165] In *ex rel. Knauff*, the Justices debated whether the War Brides Act of 1945, which sought to ease the immigration process for alien brides of servicemen, prevented the executive from detaining and denying entry to such a "war bride" without a hearing. The President sought to detain the war bride under a 1941 presidential proclamation and regulations promulgated pursuant thereto.[166] The majority decision read the capacious War Brides Act narrowly—with a "decimating spirit"[167]—and was therefore able to give wide berth to the President's proclamation and to uphold its application to the case. Justice Jackson, in an incisive dissent,[168] insisted that, in considering the proclamation's relationship to the War Brides Act, the majority had given short shrift to the statute.[169]

While *Rattigan* and *ex rel Knauff* might be read to suggest a transparent doctrine of "presidential exceptionalism,"[170] the case law does not bear this out.[171] The data discussed in Part II illustrates the President's strong win-loss ratio, but there are a few too-big-to-ignore exceptions to the generally pro-

gated, back to the President. 'The test used to determine whether a statute has been repealed is also used for an executive order.'" (quoting Mille Lacs Band of Chippewa Indians v. Minn., 861 F. Supp. 784, 829 (D. Minn. 1994)). In each of these cases, the courts were quite explicit about the fact that they were importing a canon of interpretation that usually applies to two statutes to the statute-executive order context. *Cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 307-08 (1979) (finding that the "thread between . . . regulations," an executive order, and "any grant of authority by the Congress" was too tenuous to justify granting the regulations "binding effect of law" sufficient to justify harmonizing the regulations with a potentially conflicting statute (internal quotation marks omitted)).

165. 338 U.S. 537 (1950).

166. The proclamation was issued pursuant to statutory authority, *see id.* at 540, but it also appeared to draw on inherent and concurrently held executive authority, *see id.* at 542.

167. *Id.* at 548 (Frankfurter, J., dissenting).

168. In particular, see, for example, *id.* at 551 (Jackson, J., dissenting) ("So he went to court and sought a writ of habeas corpus, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the Government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.").

169. *Id.* at 551-52 (Jackson, J., dissenting). For the invocation of similar reasoning with respect to appropriate application of the acquiescence doctrine, see sources cited *supra* note 122 and note 163.

170. *See* Stack, *supra* note 24, at 559-60.

171. *Cf. infra* Appendix II (showing that presidents fare better in cases involving domestic-focused executive orders than in cases involving national security- or war power-related orders).

executive trend.[172] For example, in the 1996 case *Chamber of Commerce v. Reich*,[173] the D.C. Circuit struck down an executive order that President Clinton had issued pursuant to authority delegated by the Procurement Act. The order had provided that "contracting agencies [of the federal government] shall not contract with employers that permanently replace lawfully striking employees."[174] But the NLRA generally "guarantees the right [of management] to hire permanent replacements"[175] during labor strikes. Unlike in *Rattigan* (which post-dates *Reich* by fourteen years), the court did not seem interested in harmonization. Acknowledging that "undeniably there is some tension between the President's Executive Order and the NLRA," the court explained that "[t]o determine whether that tension constitutes unacceptable conflict we look to the extensive body of Supreme Court cases that mark out the boundaries of the field occupied by the NLRA."[176] Moreover, while "the progenitors of these cases originally arose in the context of state actions that were thought to interfere with the federal statute," they apply "equally to federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory."[177] Applying this preemption doctrine, the court found that the NLRA preempted the executive order.

What distinguishes a case like *Reich* from a case like *Rattigan*—or from an even more analogous case like *ex rel. Knauff*? After all, both *Reich* and *ex rel. Knauff* featured a potential conflict between a partially Article I executive or-

172. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (discussed *supra* note 164); Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996); United States v. Trucking Mgmt., Inc., 662 F.2d 36 (D.C. Cir. 1981) (refusing to harmonize an executive order of uncertain authorization, *see* Chrysler Corp., 441 U.S. at 304-06, with Title VII, but issuing this holding in the context of a then-recently decided case in which the Supreme Court resolved, fairly definitively, the implicated substantive questions of Title VII interpretation, leaving little room for harmonization).

173. 74 F.3d 1322.

174. Exec. Order No. 12,954, 3 C.F.R. 329 (1996).

175. *Reich*, 74 F.3d at 1339.

176. *Id.* at 1333-34.

177. *Id.* at 1334; *see also* UAW-Labor Emp. & Training Corp. v. Chao, 325 F.3d 360, 363 (D.C. Cir. 2003) (explaining that "*Garmon* [preemption] preempts state (or here, federal executive) regulation of 'activities [that] are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8'" but concluding that the executive order at issue was not so preempted (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (second set of brackets in original))); Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 34 (D.C. Cir. 2002) (applying NLRA preemption doctrine but concluding that the executive order was not preempted by the NLRA).

der[178] and a distinct statute. The Supreme Court in *ex rel. Knauff* implicitly treated the order and the statute as coequals, while the D.C. Circuit in *Reich* allowed the relevant statute to preempt the order.

Perhaps the best explanation is that the plaintiffs in *Reich* (the Chamber of Commerce) could bring the court a pre-packaged preemption doctrine — an extensive body of NLRA-specific doctrine — on which it could rely to determine if *Congress* had preempted *executive authority*. But in the absence of subject matter-specific doctrine, courts do not usually apply the vocabulary of preemption (traditionally understood as a federalism doctrine[179]) in these cases. Left with a doctrinal void, the generic advice of *Youngstown*, and little in the way of a theory of executive orders, courts draw on canons of statutory interpretation, even though these canons were developed to apply to a pair of statutes rather than to a statute and an executive order. In so doing, courts subvert Congress's role in making law.

b. Roads Paved with Good Intentions: Presidential Versus Congressional Intent in the Interpretation of Executive Orders

Courts have long used the same set of tools to interpret both executive orders and statutes. But while courts often seek to effectuate (some version of) congressional intent when interpreting statutes,[180] their guiding principle when interpreting executive orders — including Article I executive orders — has generally been to give effect to *presidential* intent.[181] In many respects, the wis-

178. With respect to *ex rel Knauff*, see *supra* note 166. For a discussion of how lenient the judicial test is for determining whether an executive order (like the one challenged in *Reich*) was properly issued pursuant to the Procurement Act, see Stack, *supra* note 24, at 563-65.

179. *See* Chamber of Commerce v. Reich, 74 F.3d 1322, 1333-34 (D.C. Cir. 1996). *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (providing an overview of the classic preemption doctrines that govern state-federal interactions).

180. *See* William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 843 (4th ed. 2007) (discussing purposivist approaches to statutory interpretation); *cf.* Gluck & Bressman, *Statutory Interpretation from the Inside: Part I*, *supra* note 43, at 905 (explaining that "[m]ost practicing judges claim allegiance to an exceedingly general model of the judge as a 'faithful agent' of the legislature," but also observing that the "model has been deployed to justify an enormous number of canons that seem to be doing very different types of work").

181. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999); Cappaert v. United States, 426 U.S. 128, 139-40 (1976) ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 275 (1974); Confederated Bands of Ute Indi-

dom of such an approach is incontrovertible. Executive orders are written by Presidents, and so when interpreting these orders, courts should see themselves as faithful agents of the President. Moreover, intentionality is far easier to locate in a single President than in the hydra that is Congress.[182] The President is also far better situated to correct a mistaken interpretation than is Congress.[183]

A 1984 case, *Sea-Land Service, Inc. v. Interstate Commerce Commission*, illustrates this move.[184] In *Sea-Land*, the D.C. Circuit found itself choosing between the presumption that Congress does not legislate retroactively and the explicit, contradictory intent of the President, whose executive order—promulgated pursuant to authority delegated by Congress—sought to apply the legislation retroactively. Presidential intent carried the day. Explaining that the relevant

ans v. United States, 330 U.S. 169, 176 (1947); United States v. Morrison, 240 U.S. 192, 213 (1916) ("The evident purpose of the proclamation was to confirm and make permanent the prior withdrawal for forestry purposes, not to override it."); Diaz v. United States, 222 U.S. 574, 578 (1912) ("It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction."); Sea-Land Serv., Inc. v. I.C.C., 738 F.2d 1311, 1314 (D.C. Cir. 1984); Halperin v. Dep't of State, 565 F.2d 699, 703 (D.C. Cir. 1977); Bailey v. Richardson, 182 F.2d 46, 52 (D.C. Cir. 1950) ("The question is not what the word might mean otherwise or elsewhere; the question is simply what the President used it to mean."), *aff'd by an equally divided court*, 341 U.S. 918 (1951), *abrogated by* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 & n.9 (1972).

182. On the difficulty of locating intent in a multi-member body like Congress, see Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

183. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) (arguing that when judges interpret statutes and "when enactable preferences are unclear, often the best choice is . . . a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could"). *Compare* Cole v. Young, 351 U.S. 536, 556 (1956) ("[W]hatever the practical reasons that may have dictated the awkward form of the Order, its failure to state explicitly what was meant is the fault of the Government. Any ambiguities should therefore be resolved against the Government."), *with* Sea-Land Serv., Inc. v. I.C.C., 697 F.2d 1166, 1168 (D.C. Cir. 1983) (explaining that in light of an executive order's ambiguity, the court was "unwilling at this time to choose between . . . two interpretations of" it and was "withhold[ing] any decision in this case [for five months] to give the Executive Branch an opportunity to make clear its wishes") *and* Ass'n for Women in Sci. v. Califano, 566 F.2d 339, 345 (D.C. Cir. 1977) (holding in favor of the executive while explaining that "we do express concern about the length to which one must go to reach this conclusion with regard to these forms. . . . We believe this shortcoming springs from the inconsistent and awkward construction of Executive Order 11222, and we suggest that now might be an appropriate time to consider publishing a new executive order on standards of ethical conduct, with its authority squarely based on 5 U.S.C. § 7301 (1970)").

184. 738 F.2d 1311 (D.C. Cir. 1984).

question was "one of statutory interpretation" and that "[t]he 'law' at issue in this instance is an Executive Order promulgated by the President," the court concluded that "*it is to his intent* that we must turn for guidance in deciding the issue" at hand.[185] In other words, when interpreting an executive order that drew on statutory authority, the court's source of "law" lay in the President's inherent *constitutional* powers rather than in his delegated *statutory* ones. The court thereby endowed the President with a power that Congress may not have intended to delegate.

The cases discussed in this Part share in common an under-theorized understanding of the executive order as a form of lawmaking. *Reich*, explicitly drawing on statute-specific doctrine, treats executive orders as subsidiary to statutory law in much the same way that state law is subsidiary to federal law. *Rattigan*, *Sea-Land*, and other cases in this study present examples of how courts sometimes elevate executive orders over statutory law, and the President over Congress. Meanwhile, *Old Dominion Branch*,[186] discussed above, suggests that executive orders of indeterminate provenance can preempt state law via the Supremacy Clause, raising sensitive questions about federalism with no obvious answers.[187]

3. Executive Orders as Tools of Statutory Construction

The previous Parts discussed how courts resolve tensions between statutory law and executive orders. But executive orders interact with statutes in another way as well[188]: for the better part of a century, courts have been using executive orders as a crutch for divining *statutory* meaning.[189]

185. *Id.* at 1314 (emphasis added) (remarking, as an afterthought, that "[a]bsent appropriate legislative action, Congress's approval or disapproval of the President's Order is immaterial").

186. 418 U.S. 264 (1974).

187. This open question parallels open questions about whether federal agencies can "[p]reempt or [o]therwise [d]irect [s]tate [i]mplementation of [f]ederal [l]aw" and "[d]isplace [s]tate [l]egislation [i]mplementing [f]ederal [l]aw," Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2027-30 (2014).

188. Many thanks to Abbe Gluck for pointing this out to me.

189. *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 288 (1949) (looking to the President's interpretation of the relevant statute, as indicated in executive orders issued pursuant to the statute, before concluding that "we have not been able to find, nor has our attention been directed, to any orders" that shone light on the interpretive question before the Court); Dakota Cent. Tel. Co. v. S. Dakota *ex rel.* Payne, 250 U.S. 163, 184-85 (1919) ("The contemporaneous official steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of [a particular interpretation of the relevant statutes], since they all make it clear

For example, in the 1947 case, *Fleming v. Mohawk Wrecking & Lumber Co.*,[190] the Supreme Court considered a controversial *presidential* construction of Section I of the First War Powers Act. The Court wrote that while

> Section 1 of the First War Powers Act does not explicitly provide for creation of a new agency which consolidates the functions and powers previously exercised by one or more other agencies . . . the Act has been repeatedly construed by the President to confer such authority. Such construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight.[191]

More recently, the D.C. Circuit explained that "[w]e have considered Executive Order practice as relevant only when we have been 'unable to determine congressional intent after applying traditional tools of statutory construction.'"[192]

Even if executive orders do not sit at the top of the judiciary's interpretive toolbox, they clearly retain power to mold the judicially recognized meaning of statutory law.[193] Executive orders are certainly more powerful than presidential signing statements—a reality that has not been lost on Congress.[194] In negotiations with the White House over the Affordable Care Act, Representative Bart

that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out."); Am. Fed'n of Gov't Employees, AFL-CIO v. Fed. Labor Relations Auth., 793 F.2d 333, 337 n.9 (D.C. Cir. 1986) ("Although the Executive Order is no longer in force, all parties agree that precedent developed thereunder is compelling authority for the interpretation of section 7116(a)(3) of the Statute."); Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979) ("This survey of the terms of the FPASA, its legislative history, and *Executive practice since its enactment* suggests that the District Court misapprehended the President's statutory powers in this case." (emphasis added)); U.S. *ex rel.* Crow v. Mitchell, 89 F.2d 805, 807 (D.C. Cir. 1937) ("Precisely what was in the mind of Congress in the use of this language is not apparent from its terms; but from the fact—of which we take judicial notice—that various Presidents have from time to time issued executive orders pursuant to which designated persons were brought into the classified civil service without regard to the eight fundamental rules, we assume that these words have been, in practice at least, construed to include the sort of action taken in the instant case. This was the view taken at one time by Attorney General Bonaparte . . . .").

190. 331 U.S. 111 (1947).

191. *Id.* at 116; *cf.* Zemel v. Rusk, 381 U.S. 1, 11 (1965).

192. Dep't of Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal. v. Fed. Labor Relations Auth., 877 F.2d 1036, 1041 (D.C. Cir. 1989) (quoting Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth., 834 F.2d 191, 202 (D.C. Cir. 1987)).

193. *See, e.g.*, sources cited *supra* note 189.

194. Thanks to Abbe Gluck for sharing the insight that executive orders and signing statements, and judicial treatment of the two, should be compared and should sit in conversation with each other.

Stupak insisted that the President issue an executive order, rather than a signing statement, to promulgate his preferred interpretation of the controversial statute.[195] According to Tom Daschle, Representative Stupak "thought signing statements were worthless" and wanted "a Presidential action that would carry actual force."[196]

Stupak's assessment carries with it no small amount of historical irony. The Reagan Administration famously fought a multi-front war to increase executive power vis-à-vis Congress. One of the Administration's many battles in this war took the form of promoting signing statements as evidence of the legislative intent behind statutes.[197] In an effort to make signing statements available to "[b]oth the Bench and the Bar" as a form of legislative history, then-Attorney General Edwin Meese worked to have the statements printed in the U.S. Code Congressional and Administrative News.[198] As then-Deputy Assistant Attorney General Samuel Alito wrote, "the President's approval is just as important as that of the House or Senate, [so] it seems to follow that the President's understanding of the bill should be just as important [to courts and litigants] as that of Congress."[199] Years later, the second Bush Administration took up this fight, inspiring such controversy over its use of signing statements that an American Bar Association task force published a report critical of the practice.[200] Today, despite all the furor, signing statements play a de minimis

195. *See* TOM DASCHLE, GETTING IT DONE: HOW OBAMA AND CONGRESS FINALLY BROKE THE STALEMATE TO MAKE WAY FOR HEALTH CARE REFORM 252 (2010).

196. *Id.*

197. *See generally* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987). The article argues that signing statements are "inherently unreliable as a measure of legislative intent." *Id.* at 363.

198. *See id* at 367; Edwin Meese III, U.S. Att'y Gen., Address at the National Press Club, Washington, D.C. at 78-79 (Feb. 25, 1986), http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/02-25-1986.pdf [http://perma.cc.86C2-4JKL].

199. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Litig. Strategy Working Grp., Using Presidential Signing Statement To Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law 1 (Feb. 5, 1986), http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf [http://perma.cc/48QW-QWRK].

200. *See* AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf [http://perma.cc/8DBR-C8DK] (putting forth recommendations adopted by the ABA House of Delegates on Aug. 7-8, 2006); *see also* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. GLOBE, Apr. 30, 2006, http://www.boston.com/news/nation/washington/articles/2006/04/30/bush_challenges_hundreds_of_laws [http://perma.cc/4F4B-F66T].

role in judicial construction of statutes,[201] while executive orders play a far more important part.

While the practice of relying on executive orders as evidence of statutory meaning is a cousin of the congressional acquiescence doctrine discussed earlier, it serves a different purpose. The acquiescence doctrine rests on a legal fiction that congressional assent can be inferred from silence and that this assent suffices as congressional authorization of the order. The interpretive tool described in this Part is concerned not with the source of authority for a given executive order, but rather with the information that an executive order can provide courts about the proper construction of statutory law. Executive orders that are contemporaneous with legislation are seen both as *reflecting* the "objectively" correct construction of the statute in question and as "determining the meaning of [the] statute"[202] in real time.

However, the practices described both here and in Parts III.B.1 and III.B.2 do share something in common. Each invites the President to expand his own power vis-à-vis Congress—whether by creating law that Congress has not yet blessed, by delineating the boundaries of the authority that Congress purportedly delegated, or by altering the meaning of congressional legislation altogether.

201. *See* TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 23-25 (2012), http://fas.org/sgp/crs/natsec/RL33667.pdf [http://perma.cc/2ESF-SVJF] (explaining that courts themselves do not seem to place much weight on signing statements as interpretive tools, but that signing statements may be used to influence agency interpretations of statutes—interpretations that are then given deference by the courts); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 600 (2006) (explaining that courts "have rarely relied on signing statements and have ruled on neither their constitutionality (as executive interpretations that [can] directly contradict legislative mandates) nor the amount of judicial deference they should receive"); *cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting) (castigating the majority for "wholly ignor[ing] the President's signing statement, which explicitly set forth *his* understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases"); Charlie Savage, *Scalia's Dissent Gives 'Signing Statements' More Heft*, BOS. GLOBE, July 15, 2006, http://www.boston.com/news/nation/washington/articles/2006/07/15/scalias_dissent_gives_signing_statements_more_heft [http://perma.cc/3T4U-7ZQ6] (claiming that Justice Scalia's deference to signing statements marked a "milestone" in judicial norms around signing statements—a claim that has not held up in the intervening years).

202. United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915) ("[I]n determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.").

IV. EXECUTIVE ORDERS BIND THE GOVERNED BUT NOT THOSE WHO GOVERN

Part III discussed judicial elevation of the executive at sites of executive-congressional dialogue—an elevation born not necessarily from "presidential exceptionalism"[203] but rather from an under-theorized understanding of the role of executive orders in our system. This Part concerns a different means through which the relevant doctrine empowers the executive: it allows the President to circumvent commitment devices that might otherwise bind him to his own orders.

A. The Non-Justiciability of Executive Orders

Part III argued that courts have applied doctrines that widen, rather than narrow, the distance between legislative intent and presidential exercises of authority. Congress's reduced role vis-à-vis executive orders is compounded by the failure of courts to force other types of commitment devices on presidential use of these instruments. For example, drawing on a gestalt of aggregated Article I, "zone of twilight," and inherent authority,[204] the President may use an executive order to vest the executive branch with judicially enforceable rights vis-à-vis third parties,[205] to fill in the gaps of criminal statutes and thereby define prosecutable crimes,[206] to "make the fundamental policy determination re-

203. Stack, *supra* note 24, at 559.

204. *See id.* at 557-58*; see also* Dames & Moore v. Regan, 453 U.S. 654 (1981).

205. *See, e.g.*, *Dames & Moore*, 453 U.S. at 655 (holding that the President, aggregating statutory and Article II authorities, acted within his powers in terminating all litigation against Iran and its nationals); United States by Clark v. Local 189, United Papermakers & Paperworkers, 282 F. Supp. 39, 43 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969) (according "the force and effect of statutory law" to an executive order of indeterminate provenance); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1630-31 n.131 (1969) (discussing *Clark* and explaining that, "[i]n allowing suit under the executive order, the court did not specify whether the Government's relief against the contractor would be limited to enforcement of the obligations agreed to by the contractor—a form of specific performance of a contractual obligation —or whether it could secure other relief under the executive order. The court also found that the executive order conferred a right of action on the Government against labor organizations to enjoin interference by a threatened strike with the employer's compliance with his obligations under the order.").

206. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 598-99 (1985); Presidential Proclamation No. 4771, 3 C.F.R. 82 (1981).

specting the factors that warrant the death penalty,"[207] to deny an immigrant a detention hearing,[208] and to override state law via the Supremacy Clause.[209]

Yet executive orders often do not bind the President himself.[210] Today, it is established law that executive orders that derive their power from Article II of the Constitution "are not judicially enforceable in private civil suits."[211] There are three classic rationales for this doctrine. First, "[f]ederal courts have stated that no federal [subject matter] jurisdiction exists over private causes of action alleging violations of constitutionally based executive orders."[212] Courts have generally rejected the argument that 28 U.S.C. § 1331, which vests federal courts with "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," creates subject-matter jurisdiction over civil actions arising under executive orders.[213] This presents something of a

207. Loving v. United States, 517 U.S. 748, 755, 768 (1996) ("In the circumstances presented here, so too may Congress delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty, with the regulations providing the narrowing of the death-eligible class that the Eighth Amendment requires.").

208. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

209. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

210. For an overview of the different—legal and political—ways that the President might be "constrained" (if not bound) by law generally, see Bradley & Morrison, *supra* note 56. Bradley and Morrison suggest that "law should be understood to operate as a constraint on the President when it exerts some force on decisionmaking because of its status as law. This definition does not require that law will always be the deciding factor in motivating presidential behavior, but it does require that law have the potential to be the deciding factor." *Id.* at 1122. They admit that "[t]his test admittedly imposes a low burden." *Id.*

211. *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980). In *Meyer v. Bush*, the Court of Appeals explained that "[a]n Executive Order devoted solely to the internal management of the executive branch— and one which [explicitly stated it] does not create any private rights—is not, for instance, subject to judicial review." 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993).

212. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 858 (1981); *see* Micei Int'l v. Dep't of Commerce, 613 F.3d 1147, 1153 (D.C. Cir. 2010).

213. *See, e.g.*, *Micei*, 613 F.3d at 1153 ("This court would have jurisdiction pursuant to the President's order only if the President has the authority to confer jurisdiction—an authority that, if it exists, must derive from either the Executive's inherent power under the Constitution or a permissible delegation of power from Congress. . . . The former is unavailing, as the Constitution vests the power to confer jurisdiction in Congress alone. . . . Whether the executive order can provide the basis of our jurisdiction, then, turns on whether the President can confer jurisdiction on this court under the auspices of IEEPA."); Kuhn v. Nat'l Ass'n of Letter Carriers, Branch 5, 570 F.2d 757, 761 (8th Cir. 1978) (citing sources); Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1200 (D. Utah 2004) ("It is well settled that '[g]enerally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.' Furthermore, 'to assert a judicially enforceable private

paradox. Even though Article II executive orders are authorized by the Constitution rather than by statute, may well have the power to bend the meaning and scope of congressional law,[214] and can preempt conflicting state law,[215] civil actions that arise under executive orders fail to qualify as "arising under the Constitution [or] laws" of the United States.

The second and third rationales for refusing to find private rights of actions in executive orders are prudential. Courts have explained that (1) an alternative remedy for violations of executive orders can be found through appeal to the President, who has the authority to direct the activities of the executive branch, and (2) the principle of separation of powers counsels a hands-off approach for the judiciary. The D.C. Circuit referred to both of these rationales in its 1965 decision *Manhattan-Bronx Postal Union v. Gronouski*, in which it held that an executive order governing labor relations with federal employees did not vest any justiciable rights in those employees:

> If appellants disagreed with the Postmaster General's decision as to this aspect of personnel policy, and believed it to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch. Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees.[216]

cause of action under an executive order, a plaintiff must show (1) that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent [on the part of the President] to create a private right of action.' E.O. 10355 fails on both counts to create a private right of action." (alteration in original) (citations omitted)).

214. *See* Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012) (demonstrating a narrow reading of the case).

215. Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 322 (1983) (arguing that if "executive orders can be considered law for purposes of . . . [the Supremacy Clause], it may be reasonable to consider them law for purposes of the federal question jurisdictional statute and [A]rticle III of the Constitution").

216. 350 F.2d 451, 457 (D.C. Cir. 1965); *see also* Sullivan v. United States, 348 U.S. 170, 173-74 (1954) (holding that a person indicted by a grand jury did not have a cause of action arising out of the fact that the District Attorney failed to comply with an executive order that purported to limit the introduction of certain types of evidence to the grand jury, and explaining that the District Attorney "is answerable to the Department [of Justice], but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence").

Manhattan-Bronx has been consistently reaffirmed by the courts.[217] So today, even if a President were explicitly to offer to subject himself to suit, it is not clear that he could do so without help from Congress.[218] A Congress looking to reassert its powers vis-à-vis executive orders might consider clarifying jurisdictional grants.

It has not always been this way.[219] For example, in the 1956 case *Haynes v. Thomas*, the D.C. Circuit considered a claim brought by Frank L. Haynes, a "trial" (or "probationary") employee who alleged he had been "discharged for security reasons without observance of the procedures prescribed by an Act of August 26, 1950."[220] While the Act, by its own terms, did not cover trial employees like Haynes, the Court observed that Executive Order 10,450 "was intended to extend the provisions of the statute even to applicants for employment."[221] In so doing, the President was not drawing on a delegated power, but rather on his supervisory authority over the executive branch:

> In the exercise of his power to employ and discharge executive personnel, which is absolute unless limited by statute, the President can impose upon his subordinates the duty of observing statutory procedures in cases which the statute itself does not reach. This he has done in the Executive Order, even if it be thought [the Act] does not by its own terms apply to probationary employees.[222]

Yet even though Executive Order 10,450 was effectively indistinguishable from those orders later ruled incapable of creating judicially enforceable rights, the D.C. Circuit held in this case that the government's failure to follow the order was a remediable injury. It ordered that Haynes be reinstated.[223] *Haynes* and

217. *See, e.g.*, sources cited *supra* notes 211 and 213.

218. *See* sources cited *supra* note 213.

219. *See, e.g.*, Peters v. Hobby, 349 U.S. 331, 338, 345, 348-49 (1955) (holding that an agency's failure to follow a supervisory executive order that created protections for individuals who were subject to scrutiny by the Loyalty Review Board gave rise to a justiciable and remediable injury and that to find otherwise would be "to sanction administrative lawlessness."); Haynes v. Thomas, 232 F.2d 688, 689 (D.C. Cir. 1956) (discussed *infra*); Bailey v. Richardson, 182 F.2d 46, 52 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (suggesting that if a supervisory executive order has been differently worded it could have created judicially enforceable private rights).

220. *Haynes*, 232 F.2d at 689.

221. *Id.* at 692.

222. *Id.*

223. *Id.* ("Since Haynes was dismissed without observance of the procedure required by the Act under consideration, he was wrongfully discharged and is entitled to reinstatement as a pro-

related cases[224] have since been superseded by *Manhattan-Bronx* and its progeny.

Article I executive orders are often associated with statutes that create private rights of action. Yet private parties are rarely able to enforce the provisions of such executive orders via these statutory causes of action. For when courts evaluate claims brought pursuant to executive orders, even claims brought pursuant to Article I executive orders, they generally inquire into whether the *President* intended to create a justiciable right.[225] The clear answer is usually "no": the typical modern executive order explains that it is "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[226] But as John Noyes has pointed out, it is odd for courts to look to *presidential* intent when interpreting the justiciability of the rules set down via executive orders that derive their authority from *congressional* statute.[227] As Noyes has suggested, courts might instead look to the original source of authority—the statute—to determine if Congress intended to empower the judiciary to enforce any gap-filling rules that might thereafter be established by executive order.[228]

Juxtaposing this doctrine with the discussion in Part III, an inconsistency emerges: courts broadly interpret congressional intent to delegate authority—so broadly, in fact, that Congress need not pass an actual law in order to effect such a delegation. But courts also give presidents license to narrowly interpret congressional intent with respect to those causes of action that might empower individuals to enforce rights against the executive. While this asymmetry is consistent with some of the judiciary's recent efforts to narrow access to the courts,[229] it is inconsistent with any coherent theory of the executive order.

bationary employee, with 44 days of his trial period to be served. Upon remand, the District Court should enter an order to that effect.").

224. *See* sources cited *supra* note 219.

225. *See, e.g.*, Nat'l Ass'n of Gov't Emps. v. Fed. Labor Relations Auth., 179 F.3d 946, 951 (D.C. Cir. 1999) (looking to an executive order to see whether the President intended to create a right ultimately enforceable by the courts).

226. S*ee, e.g.*, Exec. Order No. 13,636, 3 C.F.R. 217 (2014).

227. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 837-38 (1981).

228. *Id.* at 868-69.

229. *See generally* Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823 (2012) (discussing increasingly restricted access to the federal courts in the Rehnquist Court era and after).

B. In Practice, Executive Orders Lack Commitment Devices

Part IV.A discussed how justiciability doctrine deprives the public of access to the courts to vindicate any interest in executive compliance with executive orders. This Part suggests that, in practice, executive orders subvert even the public's basic reliance interest in knowing the content of its government's laws. This is because the non-justiciability of many orders makes it possible for presidents to regularly waive,[230] or even secretly modify, executive orders when such orders prove uncooperative.

For example, according to Senators Russ Feingold and Sheldon Whitehouse, an OLC memo issued under the George W. Bush Administration held that a President may "depart from the terms of a previous executive order" whenever he so desires because "an executive order cannot limit a President"[231] —and this despite the fact that presidents are required, by statute, to publish executive orders in the Federal Register.[232] Moreover, as Senators Feingold and Whitehouse explained, under OLC's interpretation, the President need not "change the executive order, or give notice that he's violating it, because by

230. *See, e.g.*, John M. Broder, *Regulatory Nominee Vows To Speed Up Energy Reviews*, N.Y. TIMES, June 12, 2013, http://www.nytimes.com/2013/06/13/us/politics/environmental-rules-delayed-as-white-house-slows-reviews.html [http://perma.cc/SJ8M-LNT6] ("[T]he administration has spent as long as two years reviewing some of the energy efficiency rules proposed by the Energy Department, bypassing a 1993 executive order that in most instances requires the White House to act on proposed regulations within 90 days."); *cf.* Stack, *supra* note 24, at 554 ("Indeed, the only procedural requirements applicable generally to executive orders are themselves established in a sequence of executive orders issued by Presidents Kennedy and Johnson. . . . Important orders have been issued without complying with this procedure, and there is no legal consequence to noncompliance."); *The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?: Hearing Before the Subcomm. on Legislative and Budget Process of the H. Comm. on Rules*, 106th Cong. 151 (1999) (statement of Robert Bedell, former OMB Administrator), http://www.gpo.gov/fdsys/pkg/CHRG-106hhrg62209/html/CHRG-106hhrg62209.html [http://perma.cc/J5W4-PLZ9] ("Because most executive orders are dependent upon the President for enforcement, if the President or his senior staff does not follow-up to make sure that they are complied with, and there is no adverse consequence for failing to abide by its terms, compliance with the executive order becomes a matter of discretion with the President's appointees to whom it is directed. If they do not elect to follow the directions in the order, the order will not have the effect in practice that it may appear to from its language. . . . Furthermore, knowing that there are usually no judicial remedies available for the failure to carry out executive orders and that compliance usually depends on an Administration's subsequent enforcement, I'm sure that at least some features of some executive orders have been included knowing that they will not be enforceable. Agencies often take these factors into account in determining whether, or how strongly, to object to proposed orders during the OMB pre-issuance clearance process.").

231. 154 CONG. REC. S. 17739 (daily ed. July 31, 2008) (statement of Sen. Feingold).

232. 44 U.S.C. § 1505(a) (2012).

'depart[ing] from the executive order,' the President 'has instead modified or waived it.'"[233]

As the Senators observed:

> Now, no one disputes that a President can withdraw or revise an Executive Order at any time; that is every President's prerogative. But abrogating a published Executive order without any public notice works a secret change in the law. Worse, because the published Order stays on the books, it actively misleads Congress and the public as to what the law is.[234]

As discussed above, since there is generally no private right of action to enforce an executive order, individual plaintiffs can do little to challenge these practices – if they even know about them.[235]

This secrecy subverts one common rationale for exempting executive orders from the constraints of the Administrative Procedure Act and for giving the President a long leash on which to interpret congressional delegations: the orders' purported publicity, which – in theory[236] – permits public scrutiny that can serve as a pressure point on executive decision making.

Returning to an example with which this Note opened, statutes like FISA not only empower the government to conduct surveillance activities, but also

233. 154 CONG. REC. S. 17739 (daily ed. July 31, 2008) (statement of Sen. Feingold) (observing as well that "the Department of Justice has taken the position that a President can 'waive' or 'modify' any Executive Order without any notice to the public or Congress – simply by not following it. In other words, even in cases where the President is required to make the law public, the President can change the law in secret.").

234. *Id.*

235. Because of these limitations on justiciability, courts have only weighed in on this issue indirectly. *Compare* Mille Lacs Band of Chippewa Indians v. State of Minn., 861 F. Supp. 784, 829-30 (D. Minn. 1994) (explaining that during an era in which "executive order records were generally chaotic," the executive branch could implicitly repeal an executive order by "failing to enforce [it] for a long period of time"), *with* Meyer v. Bush, 981 F.2d 1288, 1302 n.6 (D.C. Cir. 1993) (Wald, J., dissenting) (observing that "[t]he government acknowledges that an executive order remains in effect until formally rescinded").

236. *See, e.g.*, Stack, *supra* note 24, at 590 ("Presidential orders are transparent assertions of power. They leave no doubt as to who is responsible for the policies that they embody, and the president is directly politically accountable for those policies."); *cf.* Bradley & Morrison, *supra* note 56, at 1127 (arguing that the law constrains the President even when the "enforcement mechanisms are entirely informal" and providing, as example of such informal mechanisms of constraint, "enforcement through informal mechanisms such as congressional backlash and public disapproval"). Michael Korzi's defense of signing statements also comes to mind: "the signing statement is a fundamentally *public* action; it is *transparent*." Michael J. Korzi, *"A Legitimate Function": Reconsidering Presidential Signing Statements*, 38 CONG. & PRESIDENCY 195, 205 (2011).

place restrictions on those activities—restrictions that are, theoretically anyway, legally enforceable.[237] Moreover, such restrictions may not be withdrawn or modified without the public approval of Congress and the President. In contrast, E.O. 12,333, the executive order counterpart to these statutes, appears to have created new surveillance powers for the federal government "with the stroke of the pen."[238] Meanwhile, judicial decisions have rendered the restrictions that the order publicly purports to place on government activities[239] unenforceable in courts. Indeed, the George W. Bush Administration reportedly ignored these restrictions when setting up its warrantless wiretapping program[240]—a program that has become synonymous with presidential abrogation of the rule of law.[241]

The doctrine discussed in this Part thus provides the "two" in a one-two punch: once given the power to bind the governed—and the permission to circumvent the procedural hurdles of bicameralism and presentment—executive orders are exempted from one of the hallmarks of law: they bind those who are governed but not those who do the governing.

CONCLUSION

This Note has discussed the doctrinal asymmetries that characterize the "jurisprudence" of executive orders. Just like statutory law, executive orders

237. *See, e.g.*, 50 U.S.C. § 1810 (2012).

238. James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES, July 5, 1998, http://www.nytimes.com/1998/07/05/us/true-to-form-clinton-shifts-energies-back-to-us-focus.html [http://perma.cc/Z9D9-RUEC] (attributing to Paul Begala, former Counselor to President Clinton, the quote "Stroke of the pen. Law of the land. Kind of cool."); *see also* MAYER, *supra* note 21. While non-congressional bodies regularly make "law" in the administrative state, agencies must go through lengthy, public, process-driven notice-and-comment rulemaking to make legally cognizable changes in the "law" they create. *See* 5 U.S.C. § 553 (2012).

239. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *as amended by* Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003).

240. 154 CONG. REC. S. 17339 (daily ed. July 31, 2008) (statement of Sen. Feingold) ("[T]he Bush administration's warrantless wiretapping program not only violated the Foreign Intelligence Surveillance Act; it was inconsistent with several provisions of Executive Order 12333, the longstanding executive order governing electronic surveillance and other intelligence activities. Apparently, the administration believed its actions constituted a tacit amendment of that Executive Order."). *But see* Lapeyre v. United States, 84 U.S. 191 (1872) (holding that a presidential proclamation must be published to go into effect).

241. *See, e.g.*, Editorial, *We Can't Tell You*, N.Y. TIMES, Apr. 3, 2010, http://www.nytimes.com/2010/04/04/opinion/04sun1.html [http://perma.cc/R6NH-XV8B]; Editorial, *Illegal, and Pointless*, N.Y. TIMES, July 16, 2009, http://www.nytimes.com/2009/07/17/opinion/17fri1.html [http://perma.cc/8VCE-ZZ6H].

can impose legal obligations on citizens and create new powers for the federal government, and they can be harnessed to alter the judicially acknowledged meaning of statutory language. At least some, and possibly all, valid executive orders can preempt conflicting state law.

But unlike statutes, under current doctrine and practice, executive orders do not similarly constrain those who do the governing. Their imprecision about the sources and boundaries of their authority, especially in "[t]he absence of a framework for review," does "nothing to check the incentives of the president and his counsel to seek the widest possible construction of the president's authority."[242] Indeed, the courts have generally, and generously, affirmed these capacious constructions, at least where courts lack direct guidance from other areas of the law. Meanwhile, the President can wish away many uncooperative executive orders, without risk of lawsuit, rendering these instruments fair-weather friends for everyone but the President himself.

This Note has suggested that this jurisprudence of executive orders may not derive from any coherent doctrine of presidential exceptionalism but instead from an under-theorized understanding of the role of executive orders and how they should function as part of our separation of powers. The doctrinal imbalances highlighted here should motivate further study of executive orders and of the doctrine that has developed around them. Does this doctrine, some of it quite old, suggest that the aforementioned asymmetries have become a gloss on our constitutional design? Given the diverse genealogies of different types of executive orders, is the term "executive order" itself misleadingly broad? Are courts in fact intentionally buttressing the executive order—perhaps as a tool that preserves flexibility that the modern presidency requires?[243] Or have courts failed to realize that in the shadows of this inchoate doctrine, executive orders—as repeat players in the push and pull of debates over the separation of powers—have taken on a life of their own?

242. Stack, *supra* note 24, at 541; *see id.* at 552-57.

243. *See* David Pozen, *Interpretation and Retaliation in the Obama Administration*, JUST SECURITY (June 9, 2014, 10:35 AM), http://justsecurity.org/11388/david-pozen-countermeasures-interpretation-retaliation-obama-administration [http://perma.cc/GP5P-BLAN].

APPENDIX I: METHODOLOGY

A. Identifying Cases of Potential Relevance

This section details the process that I designed to identify cases that fall within the parameters described in Part II of this Note.

I isolated an initial corpus of cases through three Westlaw Next search queries. I conducted the first of these searches (search #1) within Westlaw Next's "Key Number search" (searching within *all* key numbers). A "key number" search identifies Westlaw headnotes that include the search terms. Because headnotes aim to capture the "specific point[s] of law" made in each case,[244] they are useful for identifying decisions in which judges engage with legal questions pertaining to executive orders. Through the key number search, headnotes, along with associated case information, can be exported into Excel for sorting and reviewing. I conducted this first search using the following search query: adv: ("Executive order!" or "president! memorand!" or "president! proclamation").[245] Exporting the results and filtering them for decisions issued by the U.S. Supreme Court and the Court of Appeals for the D.C. Circuit yielded 894 headnotes (excluding duplicates) from 339 cases.

I conducted the second search (search #2) using Westlaw Next's general search function. Here, I used the SY() field, which queries Westlaw's case synopses.[246] I searched on the query adv: SY("Executive order!" or "president! memorand!" or "president! proclamation") and filtered for decisions issued by either the Supreme Court or the Court of Appeals for the D.C. Circuit. This search returned 117 cases, 48 of which had not been identified in the keynote search.

The third search (search #3) was designed as a sort of safety net: the goal here was to make sure I had not missed any Supreme Court decisions featuring substantive, but otherwise overlooked, discussions of executive orders.[247] This search query identified those Supreme Court cases that included five mentions of any of the three types of presidential orders. I conducted the following search using Westlaw's Next general search function: adv: LE(ATLEAST5("Executive order!") or ATLEAST5("president! memorand!") or ATLEAST5("president! proclamation")) % HE("Executive order!" or "pres-

244. *See Westlaw Next Tip of the Week*, *supra* note 74.

245. The exclamation mark expander allows for any terms following the root to be included in the search results. For example "memorand!" will return results for "memoranda" and for "memorandum."

246. *See Editorial Enhancements*, *supra* note 75.

247. The idea to run this query came from Abbe Gluck.

ident! memorand!" or "president! proclamation") % SY("Executive order!" or "president! memorand!" or "president! proclamation").[248] I then filtered for cases heard by the Supreme Court. This search yielded 26 cases.

I initially conducted these searches in March 2013. In November 2013, I searched for new cases (search #4), using all of the searches described above, and identified three new cases for further review.

B. Isolating Cases for Further Study

The 416 cases I initially identified using the methodology described above were found by casting a wide net. The next step involved narrowing this pool of cases.

I began by reviewing each of the 894 headnotes from the 339 cases that I had identified in search #1. When first reading a headnote, I operated from a presumption of "relevance." At this stage, I marked as "irrelevant" only those headnotes that (1) merely referenced an executive order in passing (often as a historical footnote) or (2) only included exceedingly fact-specific, non-analytic statements or assessments in reference to executive orders. Because I was using headnotes, rather than the full text of the case, to make this relevance determination, I erred heavily toward including cases.[249] Where the Order's context was not clear, I retained the case. I ultimately marked 369 headnotes from 192 cases as "relevant." I read these 192 "relevant" cases in full.

Search #2 had yielded 117 cases, 48 of which had not been identified in search #1. Of the 117 cases, I read all of those that I had not already read in full in conjunction with search #1 (the 48 that had not been identified in search #1 plus 27 cases whose headnotes I had discarded as "irrelevant" using the process described above). I also read all 26 cases that I identified during search #3.

When reading these decisions in full, I applied a more exacting standard of "relevance" (call it a "highly relevant" standard). I considered each case against initial lists of potential "issues resolved" and "topics of judicial discussion."[250] If the case neither implicated any of the items on these lists nor fell within the general categories of "Article I and executive orders," "Article II and executive orders," "Article III and executive orders," "interpreting executive orders," or

248. The "%" sign excluded cases that I had already identified through searches 1 and 2.

249. I also discarded as irrelevant D.C. Circuit cases for which the Supreme Court granted certiorari and cases involving presidential pardon proclamations. Unlike the other presidential orders considered here, pardon proclamations derive from a specific, exclusive constitutional grant of authority and implicate a wholly different set of issues.

250. *See* Figs. 5 & 7, Part II.A, Appendix II. As *infra* Part II discusses, these initial lists diverged slightly from the lists shown in the Figures, the latter of which are the lists against which the 152 cases were coded.

"rights and executive orders," then I discarded it. The overarching question that I kept in mind while making these determinations was: "Does this contribute anything to our understanding of the role of executive orders in our system?"

I erred on the side of retaining cases and marked those that I felt might conceivably be on the border. When I re-coded the cases against the new taxonomy (see Part III, *infra*), I checked these borderline cases against the new taxonomy and ultimately chose to keep some and discard others.

The borderline cases that I ultimately discarded varied in their characteristics. For example, in *Cotton Petroleum Corp. v. New Mexico*,[251] the Supreme Court engaged in a discourse on the historical distinctions between American Indian reservations created via treaty and those created via executive order. However, neither the Court's disposition of the case nor the doctrinal discussions within the opinion shed any light on the executive order as a form of law. The Court's treatment of executive orders was purely historical and highly context specific. To take another example, in the 1989 case *U.S. v. Sperry Corp.*,[252] the Supreme Court heard a Takings Clause challenge to Section 502 of the Foreign Relations Authorization Act. The Court held that no takings could have occurred because its earlier holding in *Dames & Moore v. Regan* (itself a highly relevant case) had clarified that executive orders had validly nullified certain American property interests in Iranian assets. I determined that the Court said nothing new here about executive orders—it did not shed light on "executive orders and constitutional rights"; rather, it simply reaffirmed the holding in *Dames & Moore*. (The Court did discuss some other constitutional challenges to Section 502, challenges that had no connection to any executive order.) The Court's decision was unanimous, and it appears that the case was taken mostly for the purposes of reversing an incorrect opinion by the Federal Circuit.

Another borderline case I discarded was *Rostker v. Goldberg*.[253] In *Rostker*, the Supreme Court considered whether Congress's decision to exclude women from the draft was constitutional. In describing the history of the Vietnam War-era draft, the Court referenced presidential proclamations that instituted the draft pursuant to the Military Selective Service Act. The case had appeared relevant on the basis of its headnotes, but read in full, it contributed nothing to our understanding of executive orders.

Meanwhile, in *Amell v. United States*,[254] which referenced an executive order in a footnote (and its headnote), the only actual discussion of an executive or-

251. 490 U.S. 163 (1989).

252. 493 U.S. 52.

253. 453 U.S. 57 (1981).

254. 384 U.S. 158 (1966).

der in the text of the case came in the following sentence, which simply summarizes long-established understandings of government employment law:

> By virtue of their governmental employment, the petitioners' right to join unions and to select bargaining representatives, unlike that of private seamen, exists only by express leave of the President, Exec. Order No. 10988, 27 Fed. Reg. 551 (1962), and they are forbidden, under pain of discharge, fine and imprisonment, from exercising or asserting the right to strike, 69 Stat. 624, 5 U.S.C. §§ 118p–118r (1964 ed.).[255]

In total, I determined that 121 cases from search #1, 26 cases from search #2, and 3 cases from search #3 were highly relevant. I also read all 3 cases that I identified through search #4 (conducted in November 2013) and determined that 1 was "highly relevant." An additional case was listed in a foundational source,[256] but it was not uncovered via this methodology; it was added as well.

In total, I read 297 cases and coded 152 of them. Of the cases I coded, 72 were heard by the Supreme Court and 80 were heard by the Court of Appeals for the D.C. Circuit.

C. Designing a Draft Survey Instrument

The first time that I coded cases, I used the following procedure: upon reading a case in full, I would first determine if it was "highly relevant"; if it was, then I would immediately code it using a survey instrument (a Google Form) that I had previously designed. This procedure had a major drawback: the survey instrument had been designed before I had read enough cases to understand the nuances that the survey would need to capture. Ultimately, I used this first experience of reading and coding cases to inform design of a *second* survey instrument. The study described in this Note documents the result of rereading and re-coding the (previously labeled) "highly relevant" cases using the second survey instrument. Cases were coded in chronological order, which helped me better identify those cases that appeared to be contributing to the doctrine.

255. *Id.* at 161.

256. HOWELL, *supra* note 34.

APPENDIX II: ADDITIONAL RESULTS

As mentioned in the Introduction, this Note makes two types of contributions to the literature. First, it offers a foundational lay-of-the-land with respect to executive orders in court. Basic questions have never been answered: among them, who is bringing these doctrine-advancing cases and why? What types of executive orders are being challenged in these cases? This Appendix offers preliminary answers to these basic who, what, when, where, and why questions.

A. The Executive Orders Themselves

The orders that litigants brought into the courtroom reflected the diversity of substantive topics more broadly covered by executive orders.[257] As Figure 6 illustrates, some cases featured orders whose relevant parts covered purely domestic matters,[258] such as labor rights during peace time,[259] while others involved orders whose relevant parts implicated foreign relations,[260] national security,[261] issues of war and peace,[262] or more than one of the above.[263]

257. *See supra* text accompanying notes 28-33; *infra* Appendix II.C. While in practice, presidential proclamations cover a wide assortment of topics, those proclamations that were implicated in the coded cases were largely concerned with questions of war and peace and with land rights. Sometimes, the decision to issue a proclamation/executive order is pre-determined by statute. For example, the Antiquities Act empowers the president to issue proclamations, 16 U.S.C. § 431 (2012) ("The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . ."), while the rights created by the Freedom of Information Act can be limited by executive order. 5 U.S.C. § 552 (2012).

258. The "domestic sphere," here, is used to refer to substantive areas that are not concerned with national security (including national security designations), foreign relations, or war powers. Cases concerning American Indians were labeled "domestic sphere."

259. *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth., 464 U.S. 89, 103 (1983).

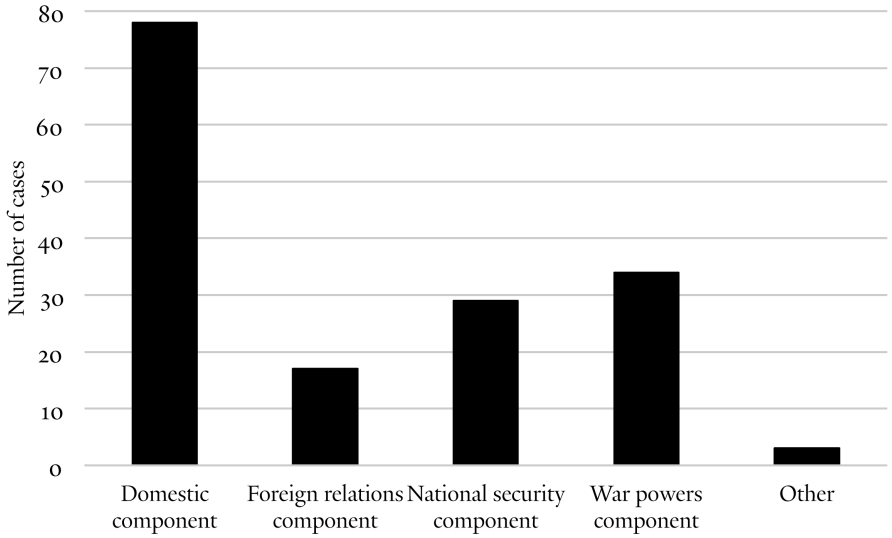
260. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981).

261. *See, e.g.*, Adams v. Laird, 420 F.2d 230, 238 (D.C. Cir. 1969).

262. *See, e.g.*, The Panama, 176 U.S. 535 (1900).

263. The executive orders were categorized on the basis of how they were discussed in the court decisions. Given the contestation over which sphere it properly belonged in, the order struck down in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was labeled as both "domestic sphere" and "war powers." Four of the cases that involved a domestic component were also labeled as involving either a national security, war powers, or a foreign relations component.

Figure 7.
SPHERES OF AUTHORITY IMPLICATED BY THE ORDER(S) AT THE CENTER OF THE LITIGATION



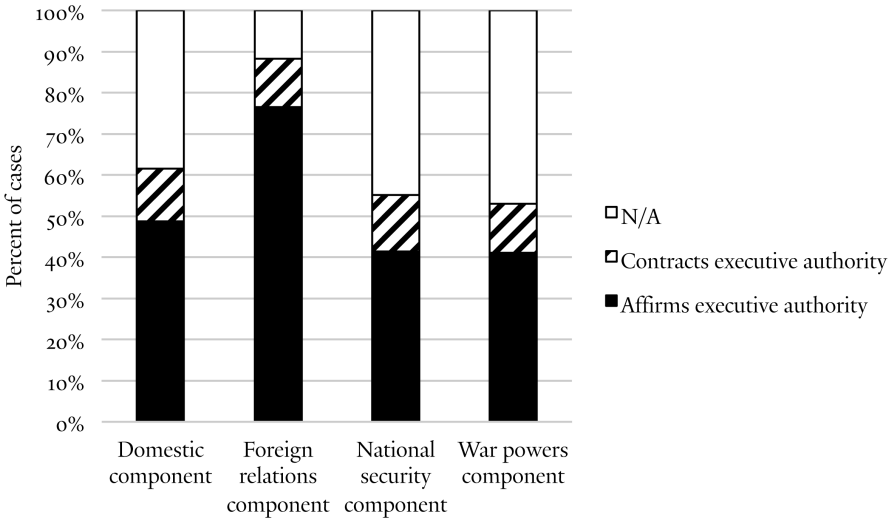
As Figure 8 and Figure 9 illustrate, across these three non-domestic categories (foreign relations, war powers, and national security), the executive's success rate was roughly correlated with the levels of historic congressional involvement in the spheres represented by the respective categories. Thus, the executive has historically fared better in cases involving foreign relations (which, the Senate's Treaty Power excepted, has largely been the special province of the executive), than in cases involving war powers and national security—in which Congress has traditionally been thought to have a more meaningful role.[264] It is, however, surprising to see that the President generally fared better in domestic cases than in those involving war powers and national security.

264. *Compare* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (discussing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"), *with Youngstown Sheet & Tube Co.*, 343 U.S. at 641-645 (1952) (explaining that Congress "has no monopoly of 'war powers,' whatever they are"), *and* Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (explaining that Congress may provide for "intru[sion] upon the authority of the Executive in military and national security affairs").

A chronological look at the data, brings this story into sharper focus. All of the national security and war power cases in which courts contracted executive authority were decided before 1960. While the sample size here is small, these cases counsel toward a reevaluation of more modern assertions that the judiciary historically deferred to the executive in these arenas.[265] Fast-forwarding to the present, courts currently may be in the process of reducing historical levels of executive primacy in foreign relations: the few foreign relations cases that contract executive authority were decided during or after 2010. These holdings are not inconsistent with the thematic bent of the Supreme Court's recent ruling in *Zivotovsky v. Clinton*.[266]

Figure 8.

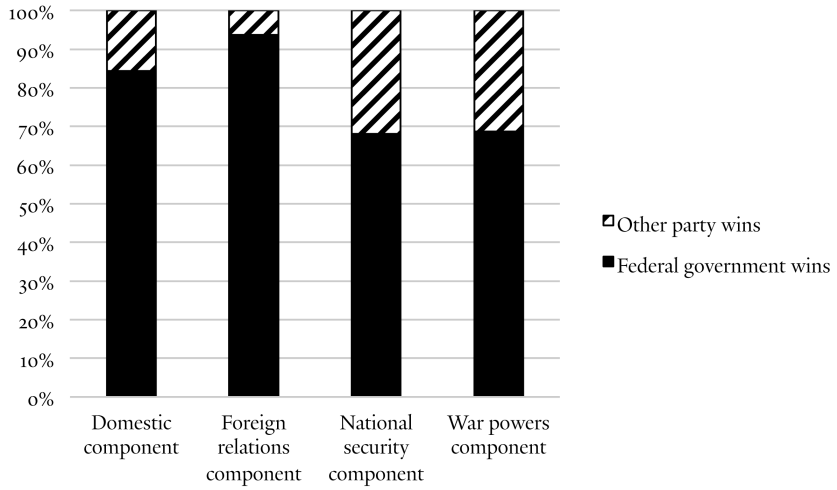
IMPLICATIONS FOR EXECUTIVE AUTHORITY, BY SPHERE



265. *See, e.g.*, Clapper v. Amnesty Int'l U.S.A., 133 S. Ct. 1138, 1149 (2013); *Dep't of Navy*, 484 U.S. at 518.

266. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

Figure 9.
FEDERAL GOVERNMENT WIN RATE



B. The Reasons for Litigating

As Figure 10 illustrates,[267] cases involving executive orders were generally litigated for one of four reasons. First, some cases (38%) arose because a private individual,[268] business,[269] interest group,[270] Congressperson,[271] or state/municipality/Indian tribe[272] sought to *prevent* enforcement of an executive order. In such litigation, common plaintiffs' arguments included assertions that the executive order was not actually authorized by statute or was even precluded by a statute, that the executive lacked independent constitutional authority to issue the order, or that the order violated a constitutional right.

Second, some plaintiffs (22%) used the courts to try to *enforce* rights created by an executive order. Such cases were brought by the federal government [273] as well as by other entities – ranging from unions[274] to Indian tribes.[275] However,

267. Cases that featured plaintiffs from multiple categories were recorded as such.

268. *See, e.g.*, McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983).

269. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981).

270. *See, e.g.*, Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987).

271. *See, e.g.*, Chenoweth v. Clinton, 181 F.3d 112, 113 (D.C. Cir. 1999).

272. *See, e.g.*, Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

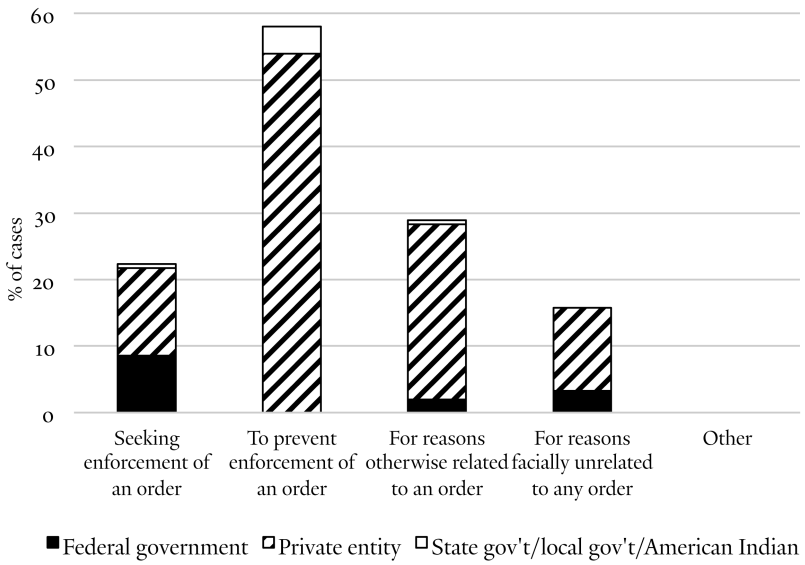
273. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943).

274. *See, e.g.*, Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965).

as Part IV discusses, unless the statute authorizing the executive order explicitly provides a cause of action, courts are generally reticent to find that executive orders create rights that are appropriate for judicial remedy.

Third, plaintiffs sometimes (29% of cases) initiated proceedings for reasons otherwise related to an executive order. For example, in the 1969 case *Nestor v. Hershey*,[276] the litigants debated which of two sections of the Military Selective Service Act an executive order was issued pursuant to; the answer would determine whether the appellant could qualify for a draft deferral. Finally, executive orders figured prominently into courts' resolution of some cases (16%) in which, upon initiation of proceedings, executive orders appeared facially irrelevant to the plaintiffs' claims.[277]

Figure 10.
REASON FOR INITIATING PROCEEDINGS



C. *The Parties*

Different types of parties have been responsible for bringing executive orders into the courtroom. In this study, a private individual was the named plaintiff in 47% of cases; interest groups—including unions—were named

275. *See, e.g.*, Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

276. 425 F.2d 504 (D.C. Cir. 1969).

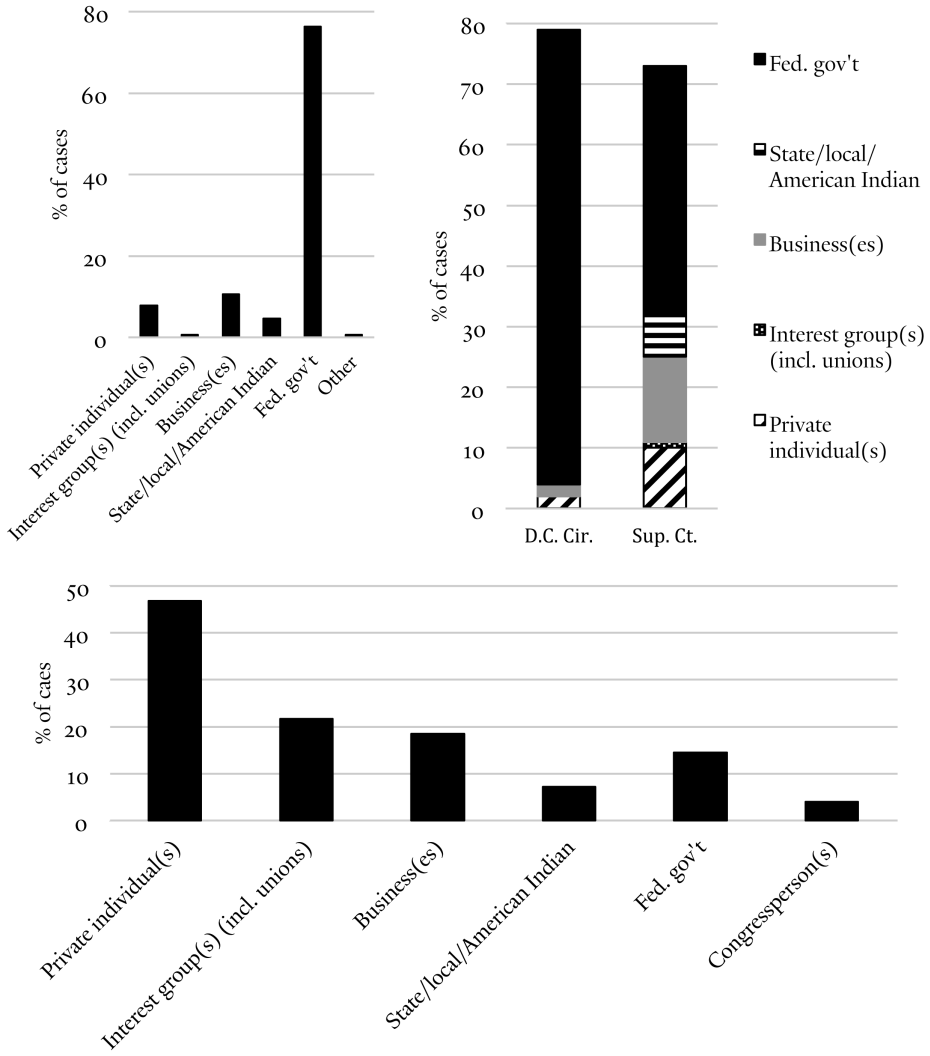
277. *See, e.g.*, Jalil v. Campbell, 590 F.2d 1120 (D.C. Cir. 1978).

plaintiffs in about 22% of cases. Businesses were responsible for bringing 18% of coded cases to court; the federal government was responsible for 14%. A handful of cases were brought by state/municipal entities or by American Indian tribes; such cases often involved disputes over allocation of land or other natural resources.[278]

While different types of plaintiffs were responsible for bringing executive orders into the courtroom, the named defendant was by and large the federal government—a statistic no doubt exacerbated by this study's focus on the D.C. Court of Appeals.

278. *See, e.g.*, *Sioux Tribe of Indians*, 316 U.S. at 317.

Figure 11.
(A) TYPE OF DEFENDANT, (B) TYPE OF DEFENDANT (BY COURT) & (C) TYPES OF PARTIES INITIATING ARTICLE III PROCEEDINGS



D. The Decades: 1865-2013

The 152 judicial decisions coded in this study—eighty from the Supreme Court and seventy-two from the Court of Appeals for the D.C. Circuit—were issued over a 148-year span. Their distribution over the decades is illustrated in Figure 12. The types of orders implicated in these cases varied, predictably,

over time. The pre-1920 cases were largely concerned with wartime proclamations—first the Civil War[279] and then the Spanish-American War[280]—as well as with executive orders and proclamations that governed land allocation.[281] Starting in the 1940s, the case law began to track some of the nation's most contentious social and political issues. The wartime restriction of Japanese-Americans' civil rights brought executive orders into the courtroom,[282] as did the Korean War,[283] the Second Red Scare,[284] desegregation,[285] the Vietnam draft,[286] affirmative action,[287] the Iran-Contra affair,[288] the War on Terror,[289] and stem cell research.[290] The fact that courts have meaningfully grappled with executive orders in all of these contexts demonstrates the degree to which executive orders are woven into the fabric of national law and policy.

279. *See, e.g.*, Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1874).

280. *See, e.g.*, The Buena Ventura, 175 U.S. 384 (1899).

281. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915) (explaining that "prior to the year 1910 there had been issued 99 Executive Orders establishing or enlarging Indian reservations; 109 Executive Orders establishing or enlarging military reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges, and rights of way for use in connection with Military Reservations; 44 Executive Orders establishing Bird Reserves").

282. *See, e.g.*, *Ex parte* Endo, 323 U.S. 283 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

283. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 579 (1952).

284. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Jason v. Summerfield, 214 F.2d 273 (D.C. Cir. 1954).

285. *See, e.g.*, Colo. Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

286. *See, e.g.*, Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969).

287. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

288. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981).

289. *See, e.g.*, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).

290. *See, e.g.*, Sherley v. Sebelius, 689 F.3d 776 (D.C. Cir. 2012).

Figure 12.
CASES CODED: DISTRIBUTION ACROSS THE DECADES

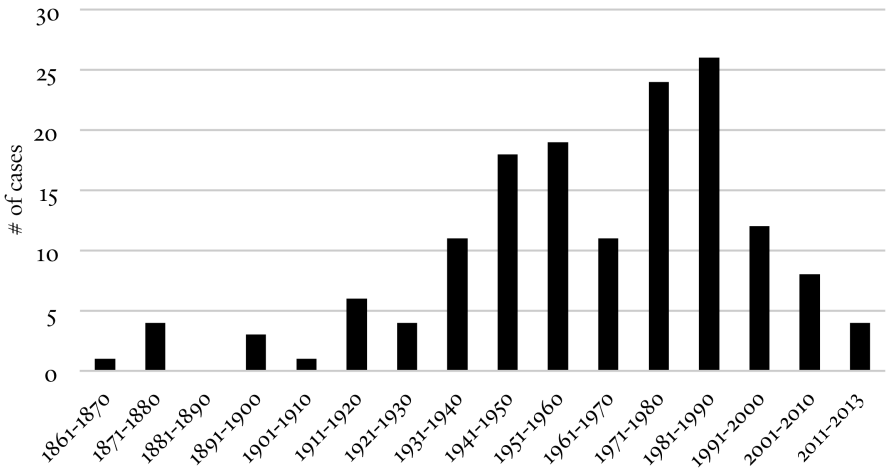
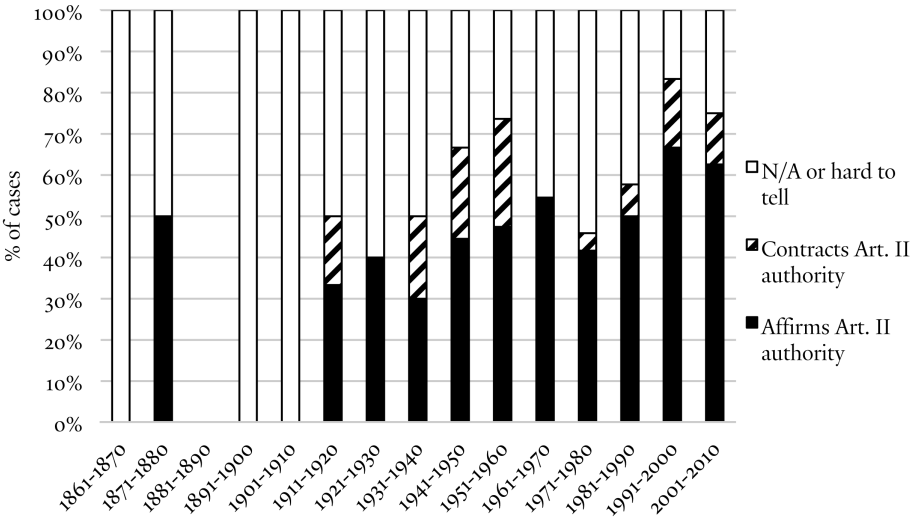


Figure 13 chronologically maps outcomes (for executive authority) over the decades, with no obvious trend emerging.

Figure 13.
IMPLICATIONS FOR EXECUTIVE AUTHORITY: OVER THE YEARS



E. The Details: More Information About Figure 2

This Part provides more information about the categories shown in Figure 2. The results featured in Figure 2 are organized into five topical categories consisting of a combined twenty-one sub-components.

The first of these topical categories is "Article I and executive orders." Its sub-components all query the extent to which a judicial decision discussed Congress's role vis-à-vis the relevant executive order. The decisions reviewed as part of this project discussed "Article I and executive orders" in different ways, each captured by a different sub-component. Some engaged with Congress's power to delegate authorities to the President,[291] while others asked whether the executive order, either in full or as interpreted or implemented, did or could rest its authority on congressional authorization.[292] In some opinions, the court studied interactions (or the lack thereof) between legislative and executive branches for guidance in interpreting the executive order or determining whether it had the force of law.[293] In cases that fell in this latter category, courts often found congressional "ratification" of,[294] or acquiescence to,[295] an executive order. Finally, in some cases, courts drew on executive orders to inform their inquiries into statutory meaning.[296]

291. *See, e.g.*, Dakota Cent. Tel. Co. v. State of S. Dakota *ex rel.* Payne, 250 U.S. 163, 184-85 (1919). Indeed, eight percent of cases involved a type of constitutional challenge aimed squarely at congressional power instead of at presidential power. In these cases, litigants argued that Congress lacked the authority to delegate to the President the power to issue a particular executive order. While such challenges are unlikely to succeed these days, *see* Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (explaining that while "we very much doubt that the alternative holding of *Panama Refining* has a great deal of separate vitality today; even the basic doctrine of unconstitutional delegation, while by no means repudiated . . . remains only a shadowy limitation on congressional power"), in early cases, courts occasionally expressed discomfort with the idea that Congress might delegate de facto policymaking activities to the President, s*ee, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

292. *See, e.g.*, Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 785 (D.C. Cir. 1979); Ass'n for Women in Sci. v. Califano, 566 F.2d 339, 344 (D.C. Cir. 1977) ("Thus, the action by the President in this instance has a distinct statutory foundation; indeed, it is to be accorded the force and effect of a statute.").

293. *See, e.g.*, Fed./Postal/Retiree Coal. v. Devine, 751 F.2d 1424, 1426 (D.C. Cir. 1985) (holding that, contrary to the union's claims, legislation had not in fact sought to supersede an executive order).

294. *See, e.g.*, Propper v. Clark, 337 U.S. 472, 480-81 (1949).

295. *See, e.g.*, Rose v. McNamara, 375 F.2d 924, 928-29 (D.C. Cir. 1967) (interpreting a decade of legislative silence about an Eisenhower executive order as a signal of congressional acquiescence to that order).

296. *See, e.g.*, sources cited *supra* note 189.

Many of the decisions reviewed as part of this study also engaged with questions of "Article II and executive orders." Figure 2 shows the different Article II powers in which courts located the authority to issue executive orders: the commander-in-chief power;[297] the President's authority over foreign relations;[298] the powers created through the Take Care Clause and the Vesting Clause;[299] and the President's supervisory authority over the executive branch.[300]

The third category, "Article III and executive orders," largely involved questions relating to justiciability doctrines, including whether an executive order had the power to create judicially enforceable rights.[301] With respect to basic mootness,[302] forum,[303] standing,[304] and exhaustion[305] questions, the courts apply the same standards to executive orders that they apply to statutes,[306] although establishing taxpayer standing to challenge activities con-

297. *See, e.g.*, Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012). Interestingly, even where an executive order appeared to draw authority from the President's power as Commander in Chief, the courts often looked to Congress for either ex ante authorization or ex post ratification. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943).

298. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

299. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915).

300. *See, e.g.*, Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 29-33 (D.C. Cir. 2002) ("We hold that the President had authority under Article II of the Constitution of the United States to issue Executive Order No. 13,202, and that the Executive Order is not preempted by the National Labor Relations Act. . . . Section 3 of Executive Order No. 13,202 is such an exercise of the President's supervisory authority over the Executive Branch.").

301. *See, e.g.*, Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965).

302. *See, e.g.*, Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

303. *See* Chamber of Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

304. *See* Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999) (applying the Supreme Court's holding in *Raines v. Byrd*, 521 U.S. 811 (1997)—which concerned a constitutional challenge, brought by a member of Congress, to the Line Item Veto Act—to a constitutional challenge, brought by a member of Congress, to an executive order).

305. *See, e.g.*, National Lawyers Guild v. Brownell, 225 F.2d 552 (1955).

306. *See, e.g.*, Chenoweth v. Clinton, 181 F.3d 112, 113 (D.C. Cir. 1999); McGehee v. Casey, 718 F.2d 1137, 1145-46 (D.C. Cir. 1983); Int'l Workers Order, Inc. v. McGrath, 182 F.2d 368 (D.C. Cir. 1950). There are no special bars to judicial review of the *legality* of an executive order: "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Reich*, 74 F.3d at 1328 (quoting Franklin v. Massachusetts, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment)). So as long as "Congress [has not] precluded nonstatutory judicial review," federal courts may review executive orders for validity under their federal question jurisdiction. *Id.*

ducted pursuant to an executive order may be even more challenging than establishing taxpayer standing to challenge statutory law.[307]

A fourth category, "interpreting executive orders" engages with the standard interpretive questions: did the court consider what might be the best interpretation of the executive order?[308] Did it discuss the rules of construction on which it relied?[309] How much deference did it give to agency interpretations of the executive order?[310] A few additional cases featured discussions of whether the executive order contained sufficiently developed reason-giving.[311]

The fifth and final category includes sub-topics related to "executive orders and rights." Did the court consider how the executive order might impact either constitutional rights[312] or other pre-existing legal rights?[313] This category also incorporated the question of whether the court discussed components of federalism.[314]

307. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 608-09 (2007) (denying taxpayer standing to plaintiffs seeking to bring an Establishment Clause challenge against activities conducted pursuant to an executive order, and explaining that "because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power . . . and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked'" (internal citations omitted)).

308. *See, e.g.*, Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 319 (D.C. Cir. 1938).

309. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999).

310. *See, e.g.*, Sherley v. Sebelius, 689 F.3d 776, 785 (D.C. Cir. 2012), *cert. denied,* 133 S. Ct. 847 (2013) (reserving the relevant question).

311. *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

312. S*ee, e.g.*, Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788 (1985).

313. *See, e.g.*, United States *ex rel.* Crow v. Mitchell, 89 F.2d 805 (D.C. Cir. 1937).

314. *See, e.g.*, Colorado Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc., 372 U.S. 714, 725 (1963).