

**Masaryk University, Faculty of Law**  
**Field of study: Law**  
**Department of Constitutional Law and Political Science**

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# **Judicial Review of Executive Orders**

**Diploma Thesis**

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**Brno 2018**



### **Declaration**

I hereby declare that the diploma thesis **Judicial Review of Executive Orders** is the result of my own individual work. All sources of information and bibliographical references used in this thesis have been duly cited in the footnotes and in the bibliography.

In Brno, March 31<sup>st</sup> 2018

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Monika Slezáková



### **Acknowledgment**

I would like to express my gratitude to JUDr. Ladislav Vyhnánek, Ph.D., LL.M. for his valuable input and friendly approach. I also want to thank my family and friends for supporting in me throughout my studies and O. for everything.



**Abstrakt:**

Tématem diplomové práce je soudní přezkum exekutivních nařízeních. Práce začíná první kapitolou věnovanou exekutivní normotvorbě se zaměřením na kontext dělby moci. Druhá kapitola pak popisuje exekutivní nařízeních jakožto právní akty, pozornost je věnována specifikám jejich právní závaznosti, využití a procesu vydávání. Třetí kapitola rozebírá soudní přezkum těchto aktů, nejdříve vymezuje pravomoc pro přezkum a specifiká přezkoumatelnosti, následně analyzuje kontexty přezkumu exekutivních nařízeních a nakonec formuluje tzv. směrnici, která má být následována při stanovování platnosti exekutivních nařízeních. Poslední kapitola aplikuje tuto směrnici a všechny dosavadní informace na vybrané případy, které jsou analyzovány.

**Klíčová Slova:**

Exekutivní nařízeních, exekutivní normotvorba, dělba moci, soudní přezkum, pravomoc, doktrína případu práva a spravedlnosti

**Abstract:**

The topic of the diploma thesis is the judicial review of executive orders. The thesis begins with the first chapter dedicated to executive lawmaking with a focus on the separation of powers context. The second chapter then describes executive orders as legal acts, paying attention to the specifics of their binding force, usage and issuance procedure. The third chapter delves into the judicial review of these acts, first delineating the authority for review and specifics of jurisdiction, followed by analyzing the context of review of executive orders, ultimately formulating a guideline to follow when determining the validity of executive orders. The final chapter applies this guideline and all the foregoing information to chosen cases which are analyzed.

**Key Words:**

Executive orders, executive lawmaking, separation of powers, judicial review, authority, case or controversy doctrine





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# 1 Introduction

In light of Donald Trump's active approach as regards the use of executive orders ever since the first week of assuming the office of President of the United States, the matter of executive lawmaking authority has been at the forefront of debates among constitutional lawyers and the media alike. Especially in view of the travel ban which is still yet to be resolved by the Supreme Court, the concept of executive orders, the possibility of their review by the courts and what this represents in terms of the separation of powers scheme has generated much attention and controversy. The times in history when executive orders represented such a current issue as they do now have been few and far between.

Another reason why the topic of executive orders is a current one and one worth exploring is the fundamental role these tools play in terms of the differences between our and the American systems of government. Different countries have chosen varying approaches to the amounts of power their constitutions place in the executive branch. The Czech Republic and the United States stand at nearly opposite ends of the spectrum - the former having chosen a parliamentary form of government while the latter representing a rather typical presidential democracy. The differences between these two regimes lie not only in the formal aspects of the force of executive legal acts but also in their material content. While the American systems allows the executive to issue legal acts with the force of the law<sup>1</sup> and allows these to regulate individual rights and obligations even on the constitutional level,<sup>2</sup> parliamentary democracies have chosen a much careful approach and limit legal acts of the executive to sub-statute level with no room to regulate primary rights and obligations of individuals.<sup>3</sup> These vast differences of deference given to the executive as regards lawmaking is one of the main reasons for choosing to analyze this topic as well as why it is interesting to a Czech reader.

Notwithstanding the fact that executive orders and their judicial review are topics discussed in great extent at present, very few materials exist on the matter. The monographies

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<sup>1</sup> United States Court of Appeals for the District of Columbia Circuit Decision from August 14th 1981, *United States v. Trucking Management, Inc*, 662 F.2d 36 (D.C. Cir. 1981).

<sup>2</sup> For example United States Supreme Court Decision from December 18th 1944, *Korematsu v. United States*, 323 U.S. 214 (1944)

<sup>3</sup> See for example Finding of the Czech Constitutional Court from June 23rd 2013, no. Pl. ÚS 13/12.

dedicated specifically to executive orders are very few and I have not managed to find a single one on the topic of their judicial review in particular and the implications it has on the separation of powers scheme. This fact has greatly influenced the sources which are relied in this thesis. While there is no shortage of publications to pull from as regards the topics of separation of powers and executive lawmaking, the remainder of the thesis relies mainly upon judicial decisions and the doctrine inducted therefrom as its sources.

The lack of coverage by academic titles is the reason why the primary aim of this thesis is to provide a comprehensive understanding of this topic since such a publication is yet to be issued. The first particular goal of this thesis is to find out what power the executive has as regards lawmaking within the American constitutional system. After such powers are identified, the next goal is to identify the placement of executive lawmaking within the separation of powers scheme as well as define the main tool used for putting forth executive legislature – executive orders, what these tools are and what purposes they can serve. Next, I aim to identify the way courts interact with executive orders and formulate the reasons why they might proclaim executive orders invalid. By means of this analysis I intend to ultimately formulate a guideline - the process which a judge should undertake when determining the validity of an executive order and subsequently apply this to chosen cases. The methods implored in order to achieve these goals will be especially ones of description, analysis, as well as comparison. In order to formulate the general principles courts apply when evaluating executive orders, an inductive method in combination with synthesis will be used.

In order to comprehensively satisfy these aims, the thesis is divided into four chapters. The first chapter deals with the concept of executive lawmaking on a broader scale while paying close attention to the implications inherently connected therewith on the separation of powers scheme. After delineating the role of executive lawmaking in a more general sense, the following chapter explores a particular type used to realize such a form of lawmaking - executive orders, describing their uses and the process prescribed for their issuance. The third chapter will analyze the specifics of judicial review of these legislative tools of the executive, with a focus on the separation of power issues foreseen by the first chapter in order to formulate a so called judicial guideline for evaluating executive orders. Finally, I will apply the identified steps when dissecting chosen cases.

## 2 Executive Lawmaking

Seemingly perhaps an oxymoron, the first chapter of this thesis is dedicated to exploring the possibility of the executive in the USA<sup>4</sup> becoming a lawmaker as this is an essential theoretical basis for the rest of the topics to follow. First I will lay down the basics of the separation of powers scheme, followed by paying attention to the scope of the legislative power in the U.S. and the body which is entrusted with it. Next, I intend to explore the ways in which some of the legislative power may end up in the hands of the executive.

### 2.1 Separation of Powers

Inevitably, when dissecting the early fundamentals of American constitutional law, one cannot overstate the profound impact the “past regime” had on the newly forming country. After enduring decades of oppression at the hands of the British king even after fleeing Europe, the Declaration of Independence served as a proclamation of how weary the settlers had become with an all-powerful monarch, how unfair the system had been treating its subjects and how strongly society longed for a more just form of government. As “[a]ny society which lacks a sure guarantee of rights or a fixed separation of powers, has no constitution”,<sup>5</sup> the makers of the Constitution rightly sought to end the aggregation of nearly all powers in the hands of one single monarch and saw a desperate need to divide these into equally powerful institutions. This resulted in the structure of the Constitution we know today, its first three articles being dedicated to the three branches of government amongst which the powers were to be divided: the legislative, executive, and judicial branch.

Perhaps due to a strong repulsion towards even the mere threat of usurpation of powers of one branch by another, in the earlier days of the Country there was a tendency to view the separation of powers as unwavering and absolute in its nature making the individual branches limited to the exercise of the powers conceded to them with no possibility of

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<sup>4</sup> For the purposes of this thesis, the word “executive” shall refer exclusively to the office of the President, unless the passage happens to apply to the government as well. This is due to the topic of the thesis being focused on a particular power reserved solely for the head of state as well as to avoid a redundant use of the word “President”.

<sup>5</sup> Art. 16 of the French Declaration of the Rights of Man and of the Citizen from August 26<sup>th</sup> 1789.

overreaching and claiming some of the responsibilities of another branch.<sup>6</sup> This approach was inherently doomed to fail, however – a conclusion reached simply by a quick glance at the Constitution. It is immediately obvious that this document itself gives the executive a legislative function in being able to veto bills,<sup>7</sup> the Senate the role of nothing short of a judge in impeachment proceedings<sup>8</sup>, and the vast jurisdiction granted to the Supreme Court provided for it to be later acknowledged to *“make’ such law as it must in expounding or modifying the corpus of federal legal principle pursuant to its exercise of the judicial power under article III.”*<sup>9</sup>

The shift towards a more realistic conception of separated powers slowly came into focus as the need for an effective government became more and more apparent. Although in earlier, perhaps careful,<sup>10</sup> decisions proclaiming the fact that separation of powers did not intend to make each branch autonomous but left them dependent on each other,<sup>11</sup> the court was quite unequivocal on this topic in 1980. Justice Rehnquist best summed up the development in the approach to the concept of separation of powers in saying that *“a hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a national government capable of effectively exercising the substantive powers granted to the various branches by the Constitution”*.<sup>12</sup> I can certainly identify with the view articulated by Justice Rehnquist, recognizing the fact that a need for an effective government requires at the very least cooperation between the three branches of government and even the concession of some of the powers of one onto another. To offer an example and step away from the focus on the President for a while, and from the focus on the United States, the cabinet in the Czech Republic is entrusted with issuing regulations which most often serve to specify the general provisions of a statute passed by parliament. As it is often impossible for the parliament to keep in mind all the minute details of a regulation, the task of specifying some aspects of the law are left to the cabinet as the process of issuing such legislation is less cumbersome than passing a bill through parliament. While it would be ideal if the cabinet, or any other body

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<sup>6</sup> United States Supreme Court Decision from February 28<sup>th</sup> 1881, *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

<sup>7</sup> U.S. Constitution, art. I. § 7, cl. 2

<sup>8</sup> U.S. Constitution, art. I § 3, cl. 6

<sup>9</sup> *TRIBE*, Laurence H. *American Constitutional Law*. 2. ed. Mineola: The Foundation Press, Inc., 1988, p. 19.

<sup>10</sup>The fact that the cited opinion came from a dissent of Justice Brandeis speaks for itself.

<sup>11</sup> United States Supreme Court Decision from October 25<sup>th</sup> 1926, *Myers v. United States*, 272 U. S. 52 (1926).

<sup>12</sup> United States Supreme Court Decision from July 2<sup>nd</sup> 1980, *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980).



entrusted with powers traditionally reserved for another, kept strictly to the guidelines controlling its power to issue such regulations, “[e]very power has a tendency to concentration, growth and corruption; absolute power to an uncontrollable corruption.”<sup>13</sup>

This inevitable threat of corruption, whether found in exceeding the powers solely vested in one branch or in usurping another branch’s power or more of the powers delegated by it, shaped the need for a complex system of checks and balances to be put into operation, since “[i]f one of the branches of powers exceeds its constitutional framework, its authority, or on the contrary, does not fulfil its tasks and thus prevents the proper functioning of another branch..., the control mechanism of checks and balances, which is built into the system of separation of powers, must come into play.”<sup>14</sup> This is not to say that a system of checks and balances came at a later date as a consequence to the later realized threat of corruption, not by any means. The framers of the Constitution kept the need to effectively control the execution of powers by each branch in mind when drafting this document and some of the ways in which branches keep tabs on one another are codified in the Constitution itself.

Realizing the enormity of the topic of checks and balances and not wanting to steer away from the topic of this thesis, I consider it sufficient to name a demonstrative list of the mechanisms the executive has to check the other branches and the means the legislative and judicial branches have to check the executive.

a) *Checks the executive has over the functioning of the legislative branch*

The executive is able to keep tabs on the legislative branch for example by the simple fact that the right hand of the head of state, the vice president presides over the Senate. Also not insignificantly, the executive has the power to call one or both Houses of Congress into an emergency session. The importance of the presidential veto cannot be overstated, as this tool may prevent proposed bills from becoming laws. The power of the presidential veto as a potentially powerful tool will be a topic of a more detailed analysis later in this thesis.

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<sup>13</sup> Finding of the Czech Constitutional Court from February 28<sup>th</sup> 2006, no. Pl. US 20/05. Translation taken from DORSEN, Norman; ROSENFELD, Michel; SAJÓ, András; BAER, Susanne. *Comparative Constitutionalism Cases and Materials*. 2nd ed. St. Paul: West, 2003, p. 240.

<sup>14</sup> *Ibid.*

b) *Checks the executive has over the functioning of the judicial branch*

An incredibly far-reaching power the President has, by means of which he<sup>15</sup> is able to directly influence the decision-making of the Supreme Court and of all other courts,<sup>16</sup> is the power to appoint Supreme Court Justices. Since Justices are appointed largely based on their political views, a President-democrat will most likely push forth the appointment of a democratic leaning Justice. This caused particular controversy in the beginning of 2016 when the deeply religious Justice Scalia passed away and his very traditional views along with him, leaving President Obama – infinitely more liberal and still in office for another 11 months – to appoint Justice Scalia’s replacement.<sup>17</sup> Another important tool the President has which may directly impact the functioning of the judicial branch is the power of pardon by means of which he may prevent the judiciary from exercising jurisdiction over persons he chooses to pardon.

c) *Checks the legislature has over the functioning of the executive branch*

As it would be impossible to even state, let alone analyze, all the ways in which Congress is able to directly influence and check the executive, the following powers serve as an illustration. For example, while the President has the power to appoint federal judges, the Senate is entrusted with approving such appointments. Another one of the significant ways the legislature is capable of checking the executive is by means of an appropriations act which serves to allocate funds and in the words of Charles Black, may leave the President carrying out his duties in a modest apartment with one secretary to answer the mail.<sup>18</sup> Congress may also by a two thirds majority override the presidential veto thus basically making the stance of the President on a particular bill irrelevant. Of course, the most significant power granted to the legislative branch to control the functioning of the executive is the power to impeach the President in the gravest of circumstances.

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<sup>15</sup> I fully recognize the possibility of a female President of the United States and at present wish the President was a “she”. However, for the purposes of a better readability and to avoid the confusion that sometimes accompanies gender-neutral pronouns, I will use the pronoun “he” and its variables for the remainder of this thesis. After all, the Constitution itself (at this time and age incorrectly) uses the pronoun “he”.

<sup>16</sup> Since the decisions of the Supreme Court have precedential value and bind all courts in the country, to vulgarize it, the rulings of the Supreme Court are the rulings of all courts.

<sup>17</sup> For the controversy, see for example DAVENPORT, David. The Scalia Replacement Battle Calls for Putting the Constitution First. *Forbes* [online]. Published February 17<sup>th</sup> 2016 [cit. 14. 2. 2018]

<sup>18</sup> BLACK, Charles. Some Thoughts on the Veto. *Law and Contemporary Problems*. 1976, vol. 40, no. 2. p. 89.

d) *Checks the judiciary has over the functioning of the executive branch*

When comparing the lists of checks and balances the individual branches have over the others, the enumerated powers granted to the judiciary seem the shortest and perhaps most limited. However, that could not be farther from the truth. While the Chief Justice presiding over the Senate in impeachment proceedings is one of the more specific forms of checking the executive, the most prominent one is the power of judicial review. Federal courts are granted jurisdiction to pronounce acts even signed by or affecting the President unconstitutional,<sup>19</sup> to condemn direct action taken by the President<sup>20</sup> and even narrow the scope of what were thought to be his powers.<sup>21</sup> As an entire chapter is dedicated to the judicial review of a particular type of Presidential direct action, I will not go into further detail at this point.

To summarize, the scheme of separation of powers stands at the very core of the United States Constitution. The division of power amongst three equal branches of government serves as a mechanism to prevent corruption inevitably resulting from the exercise of all powers by one official or body of officials. Since the separation of powers does not and cannot mean that the three branches exist completely separate of each other, the system of checks and balances is in place to keep the power balanced between the three. Having now laid down the basics of the division of power in the United States, I will now focus on the ways in which the executive branch may overlap with the legislative by first outlining the scope of legislative power in the United States.

## 2.2 Legislative Power

Although in the contemporary political power dance it is difficult to deem one branch of government more important than the other – most constitutional lawyers would probably give this title to the legislative branch. After all, if there are no laws to enforce, the executive loses much of its purpose and if there are no laws to apply, the courts are left empty-handed.

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<sup>19</sup> United States Supreme Court Decision from February 24th 1803, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>20</sup> United States Supreme Court Decision from June 2<sup>nd</sup> 1952, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>21</sup> *Ibid.*

The fact that the “People of the United States” decide to address the legislature as the first order of business supports my above-stated stance. The simple clause “*All legislative Powers herein granted shall be vested in a Congress of the United States,...*”<sup>22</sup> served as a means to entrust a chosen body – the Congress – with the monumental task of setting down the laws for the entire country.

As will be reinstated in one of the following subchapters, the word “herein” and what it represents seemed to create quite an upheaval in the early days of the country and subsequently in legal doctrine. The delegates to the Constitutional Conventions were undoubtedly deliberate in choosing a wording which did not grant Congress all legislative power by means of an inclusive statement of national legislative power.<sup>23</sup> The obvious motivation for the definition of the legislative powers specifically vested in Congress by using the wording “*Powers herein granted*” lies not in the intent to protect the newly forming system of separation of powers, rather in the goal of providing protection to the States.<sup>24</sup> The founding fathers were careful in choosing to grant powers to Congress by expressly enumerating them in § 8 of the Constitution<sup>25</sup> only to seemingly contradict themselves just “letters later” in the very same section.

By using general terminology loved, used, yet loathed by every lawyer, Congress was empowered to “*make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government....*”<sup>26</sup> The need for an at least similar clause is clear, since had the Constitution been silent and failed to equip Congress with the power to proclaim laws in order to execute the express powers, all the powers requisite for the execution of such power would, by definition, fall to the executive branch.<sup>27</sup> The necessary and proper clause then, according to Madison, embodied the centuries old

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<sup>22</sup> U.S. Constitution, art. I, § 1.

<sup>23</sup> Although they seriously considered it at first, as a broad delegation of legislative power was part of the Virginia Plan. For the delegates’ debate on this, see FARRAND, Max. *Record of the Federal Convention of 1787*. Vol. 1. Revised Ed. New Haven: Yale University Press, 1966, p. 53.

<sup>24</sup> The tenth amendment officially makes this intent part of the Constitution “The powers not delegated to the United States, nor prohibited by it to the States are reserved to the States respectively, or to the people”.

<sup>25</sup> Congress was granted the power to lay and collect taxes, duties, to borrow money, regulate commerce with foreign nations, to coin money, to declare war and raise and support armies, to name a few, all of which by law, of course.

<sup>26</sup> U.S. Constitution, art. I, § 8, cl. 18

<sup>27</sup> MADISON, James. *The Federalist No. 44*. 1788 In: HAMILTON, Alexander; JAY, John, MADISON, James. *The Federalist Papers*. New York: Cosimo Inc., 2006, p. 294.

“the end justifies the means” notion. The “necessary” part of the clause proved to be quite problematic, however.

It goes without saying that the terms “necessary and proper” will procure a hundred different shades of meaning in a hundred different people. Jefferson and Hamilton had vastly differing views, for example. While Jefferson argued for the strict interpretation of the word “necessary” as vital due to a fear that a more lenient interpretation would lead to a usurpation of powers delegated to the executive, Hamilton held the view that the only question to consider must be whether the means to be employed relate to the enumerated powers, or ends.<sup>28</sup> Ultimately, Hamilton’s view prevailed when Chief Justice Marshall authoritatively construed the necessary and proper clause: *“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”*<sup>29</sup>

It is thus reasonable to conclude that the Constitution vested the legislative power in Congress by means of enumerating specific powers this body would be tasked with enforcing. Congress was simultaneously equipped with the power of issuing laws in order to see these powers through. As constitutional interpretation is never as easy as reading its text, it was explained that the general language used in parts of the Constitution provided for doctrinal dilemmas which needed to be resolved in order to completely understand what the legislative power of Congress meant.

### 2.3 Presidential “Legislative” Power

However unclear the Constitution may be with its necessary and proper clause, it is absolutely clear and unequivocal about the fact that the federal legislative power is vested in Congress and Congress alone. Had it not been so and had the powers generally associated with the executive and those pertaining to the legislature been aggregated in one office, this approach would inevitably lead to a monarch-like figure which the Constitution had no intention of institutionalizing. After all, “[t]here can be no liberty where the legislative and executive powers are united

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<sup>28</sup> For both, see TRIBE, *supra* note 9, p. 301.

<sup>29</sup> United States Supreme Court Decision from March 3rd 1819, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

*in the same person, or body of magistrates.*<sup>30</sup> How then, can there be talk of any executive lawmaking?

The means I have identified and chosen to describe herein by which the President is able to become somewhat of a law-maker are three-fold. First, Congress itself may delegate some of this legislative power to the executive. Next, the President is, as will be further demonstrated, entitled to issue binding acts of his own relying on his inherent powers. Lastly, the power of presidential veto is certainly a tool of legislative nature.

### 2.3.1 Delegation of Power by Congress

Though not expressly stated in the Constitution, the courts have consistently ruled over the years that Congress is, in fact, entitled to delegate *some* legislative power to the executive. The distinction between a forbidden general delegation and a more plausible partial one was made as early as 1825 when Chief Justice Marshall wrote “*A general provision may be made [by Congress], and the power given to those who are to act under such general provision, to fill up the details.*”<sup>31</sup> This has been continually upheld by the courts and reinforced that as long as Congress clearly delineates the general policy, it may be left to the agency to regulate the more minor details.<sup>32</sup>

Congress does not seem to be shy in taking advantage of this delegation of power by reserving some issues to be further decided by the President or other agencies of the executive. To name a few, Congress has enabled the President to regulate some aspects of foreign commerce,<sup>33</sup> certain details pertaining to federal property,<sup>34</sup> as well as some financial aspects of international emergencies.<sup>35</sup>

As will be proven in the chapter dedicated to judicial review, the President’s position and legitimacy is at its strongest when acting under the delegation of Congress. The question arises, however, as to how a President might regulate some of the above stated issues. The Constitution certainly gives him no legislative powers, not even when acting as a “delegate”

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<sup>30</sup> Madison quoting Montesquieu in MADISON, James. The Federalist No. 47, 1788. In: HAMILTON, Alexander; JAY, John, MADISON, James. The Federalist Papers. New York: Cosimo Inc., 2006, p. 314.

<sup>31</sup> United States Supreme Court Decision from February 12<sup>th</sup> 1825, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

<sup>32</sup> United States Supreme Court Decision from January 18<sup>th</sup>, 1989, *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>33</sup> See for example § 168 of the Internal Revenue Code, 26 U.S.C.

<sup>34</sup> See for example § 121 of the Procurement Act, 40 U.S.C.

<sup>35</sup> See for example § 1702(a) of the International Emergency Economic Powers Act, 50 U.S.C.

of Congress. The means through which the President is able to put forth legislature of his own lie in his inherent powers.

### 2.3.2 Inherent Presidential Power

Similarly broadly as the Constitution vests the legislative power into a Congress, it puts all the executive power of the United States into the presidential office by stating in the first point of its Article II, § 1 “*The executive Power shall be vested in a President of the United States of America.*” Afterwards, it talks briefly about the election process of said President and once one is appointed, it then lays out the specific powers to be attributed to him – none of which encompass any legislative power.

In 2018 it is absurd to think that the “leader of the free world” only has the few specific powers listed in the Constitution and no more whatsoever. In the earliest days of the country, however, there very much was a debate held over whether the language of Article II intended to employ the President with inherent powers not specifically listed therein<sup>36</sup> or whether the list of powers was exhaustive and final.<sup>37</sup> The former argument tended to be supported by a comparison of the wording used in Article I and Article II. While in Article I of the Constitution, “*All legislative Powers [were] herein granted...*”,<sup>38</sup> Article II did not limit the powers vested in the executive official with the wording “herein”. Besides simply arguing that the language used was not as significant as Hamilton argued, the latter position can also be easily understood due to the historical context that served as a backdrop to the formation of the United States of America. It goes without saying that a repulsion towards the British king was great and a fear of a similarly powerful President was at large. One of the first things taught to law students<sup>39</sup> is the fundamental distinction between private and public law. The fact that in legal doctrine (and hopefully in practice too), within the scope of private law, one may do anything which does not contradict the law and on the other hand, within public law,

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<sup>36</sup> HAMILTON, Alexander. First Letter of Pacificus (June 29, 1793). Reprinted in GOLDSMITH, William. *The Growth of Presidential Power: A Documented History*. New York: Chelsea House Publishers, 1974, p. 398, 401.

<sup>37</sup> MADISON, James. First Letter of Helvidius. Reprinted in GOLDSMITH, William. *The Growth of Presidential Power: A Documented History*. New York: Chelsea House Publishers, 1974, p. 405.

<sup>38</sup> Although this argument would not prove to be very convincing, since as I have demonstrated in subchapter 2.2, even this wording was not as limiting as it may appear.

<sup>39</sup> Certainly in the Czech Republic.

an office, official, parliament etc. may do only that which the law expressly allows them to. With this knowledge, I cannot help but feel at least a little discomfort at the thought that the Constitution might grant the President powers not listed therein whatsoever and that he might usurp these, to vulgarize it, as he pleases. On the other hand, it is reasonable to equip the President with some powers which are not expressly stated in the Constitution but are necessary in order for him to carry out the ones listed therein. Needless to say, it was long overdue when the Supreme Court finally addressed the centuries old debate in a complex fashion in the widely cited *Youngstown Sheet & Tube Co. v. Sawyer* case.<sup>40</sup>

In the beginning of the year 1952, when the war in Korea was in full swing,<sup>41</sup> the United Steelworkers Union announced a planned strike which was to be the result of a labor-management dispute. Obviously, as the USA was fully involved in an armed conflict abroad, its interest in protecting the smooth operation of the steel industry<sup>42</sup> was great. President Harry Truman decided to resolve the issue by issuing Executive Order 10340<sup>43</sup> by means of which he directed the Secretary of Commerce<sup>44</sup> to take possession of and operate the steel mills of a significant number of relevant companies. The plaintiff challenged the seizure with a lawsuit brought against the Secretary of Commerce which ended up before the Supreme Court.

While the decision had a huge precedential value and touched on multiple issues that arose within the case, in this part of my thesis I will focus on the insight it shed onto the previously mentioned question of inherent powers of the president. Although the Supreme Court ruled the seizure unconstitutional by a 6-3 margin, even the majority Justices found themselves holding varying views as to the reasons for declaring the seizure unconstitutional. The opinions hinged on the question of whether, and if so, with what limits the President had inherent powers not expressly granted by the constitution. Chemerinsky summed up the four identified approaches as follows:

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<sup>40</sup> United States Supreme Court Decision *supra* note 20.

<sup>41</sup> The armed conflict lasted from June 25<sup>th</sup> 1950 until the final armistice agreement was signed on July 27<sup>th</sup> 1953.

<sup>42</sup> Steel being a material indispensable for nearly all weapons.

<sup>43</sup> Executive Order 10340, issued on April 8<sup>th</sup> 1952.

<sup>44</sup> At the time a Mr. Charles W. Sawyer – hence the name of the defendant in the action.



- 1) *“There is no inherent presidential power; the president may act only if there is express constitutional or statutory authority.*
- 2) *The president has inherent authority unless the president interferes with the functioning of another branch of government or usurps the powers of another branch.*
- 3) *The president may exercise powers not mentioned in the Constitution so long as the president does not violate a statute or the Constitution.*
- 4) *The president has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated.’<sup>45</sup>*

It would appear that the first approach would best resonate with my above-proclaimed discomfort at the notion of inherent presidential powers. After all, why codify the president’s powers at all if there are additional inherent ones which may far surpass that which is laid down by the Constitution? This approach would probably suffice in order for the president to be able to carry out the legislative powers delegating onto him by Congress, however, I still cannot reconcile with the notion that Congress may single-handedly give the President the power to issue legal acts and the issuance of such I would deem part of inherent powers too. Regardless, the notion of only allowing the President to rely on express delegation seems to be disproven by the test of time and the nature of the acts issued by the President. Executive orders are a perfect example of these inherent powers of the President as they are certainly not mentioned in the Constitution and serve as a tool to carry out the powers vested in the executive by the Constitution.<sup>46</sup> Should the President always rely on a Congressional delegation of authority to issue one, an entire important reason for use of this tool – a response to emergencies<sup>47</sup> – would therefore be rendered obsolete. The argument that the President must have at least some level of inherent powers is further supported by the courts’

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<sup>45</sup> CHEMERINSKY, Erwin. *Constitutional Law Principles and Policies*. 1. ed. New York: Aspen Publishers, 1997, p.245.

<sup>46</sup> The detailed nature of these tools will be analyzed in the following chapter. Although there are other ways of putting forth legislature by the President by means of inherent powers, I deliberately only mention executive orders as they are the topic of this thesis and are most binding.

<sup>47</sup> COOPER, Phillip. *By Order of the President: the Use and Abuse of Executive Direct Action*. Lawrence: University Press of Kansas, 2002, p. 39.

reluctance to pronounce executive orders unconstitutional even in the absence of a statutory authorization by Congress.<sup>48</sup>

I find myself identifying with both the second and third approach and in my opinion, the two should be jointly applied. Since the whole purpose of the checks and balances system is so that one branch does not usurp the powers of another – it seems only natural that should the President be acknowledged to have inherent powers not mentioned in statutes or the Constitution that these cannot overreach and claim the role of the judiciary or the legislature. After all, “*no complex society can have its center of power not “offset against each other as checks” and [thus] resist tyranny*”.<sup>49</sup> There might, of course, be situations when the President’s conduct may not overstep into the powers of another branch – it may however breach a statute or the Constitution itself. While conduct of the President breaching the Constitution is quite universally accepted to be - quite literally –unconstitutional, the question of e.g. an executive order coming into conflict with a statute is a more complex topic which I will further explore in subchapter 4.3.3 of this thesis.

The fourth approach, represented by the dissenting opinion of Justice Vinson, in my opinion may have been swayed by the terrors of the war which preceded the date of this decision and the need for a strong President to nurse the country back to health. Nowadays, however, it sounds frightening at best. Taking into account the few paragraphs the Constitution dedicated to the President’s powers and their limitations, the notion that the “*executive as subject only to the people, and under the Constitution, [is] bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service*”<sup>50</sup> poses monumental threats to a misuse of the presidential power. I can only hope that the courts will favor the remaining approaches and the system of checks and balances will continue to be upheld.

As is clearly demonstrated, even the nine justices deciding a particular case at a particular time could not agree on an approach to adapt when addressing the nuances of

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<sup>48</sup> See for example United States Court of Appeals for the District of Columbia Circuit Decision from July 10<sup>th</sup> 2012, *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), wherein the Court decided to uphold the executive order in question although President Clinton issued it under the vaguest authority of all “by the authority vested in me as President by the Constitution and the laws of the United States of America” with no particular statute able to be identified.

<sup>49</sup> TRIBE, *supra* note 9, p. 22.

<sup>50</sup> United States Supreme Court Decision *supra* note 20, Justice Vinson dissenting.

inherent presidential powers. What is more, even the majority justices differed in their reasons for finding the seizure of the steel mills unconstitutional.<sup>51</sup> As no one Supreme Court case definitively made one of these approaches correct and the others wrong,<sup>52</sup> the evaluation is still being made anytime the courts come to deal with this issue. However, I cannot help but feel a general leaning towards the lower end of the numbered approaches after analyzing many Supreme Court decisions, as will be further demonstrated in this thesis.

### 2.3.3 Presidential Veto

Another crucial area in which the President is able to become somewhat of a lawmaker (or rather lawbreaker) is through the power of the presidential veto. The presidential veto being an absolutely fundamental manifestation of the scheme of separation of powers, its importance was cleverly summarized by Professor Charles Black: “[I] ask[ed] myself, ‘To what state could Congress, without violating the Constitution, reduce the President?’ I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail; that is here one appropriations bill could put him, at the beginning of a new term. I saw this man as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with those countries where Congress would pay for an embassy. But he was still vetoing bills.”<sup>53</sup>

Mostly everyone familiar with constitutional law at nearly any level is familiar with the concept of the presidential veto. The Constitution, too, expressly remembered to include the qualified veto<sup>54</sup> of the President in the provisions of its Article I § 7, thus allowing the President to disapprove of proposed legislation by vetoing it and returning it to Congress for it to reconsider. Though it is undeniably an important tool in the scheme of checks and balances, personally I never thought of the veto “as much” due to the fact that if there is sufficient will, Congress will override the bill by two thirds of each House regardless of the President’s disapproval.

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<sup>51</sup> United States Supreme Court Decision supra note 20, Justice Douglas took the second approach and found that it was the Congress which was authorized to pay compensation for a seizure and it was the only body able to authorize one. On the other hand, Justice Frankfurter found the reason to find the seizure unconstitutional to be the clear intent of the Congress to withhold the power to seize industries through the Taft-Hartley act of 1947.

<sup>52</sup> TRIBE, supra note 9, p. 248.

<sup>53</sup> BLACK, supra note 18. p. 89.

<sup>54</sup> The delegates made a conscious move not to make the veto absolute, realizing the dangers this posed. See FARRAND, Supra note 23, p. 53.

What is more interesting, however, is the concept of the “pocket veto”. After a bill is presented to him, the Constitution allows the President ten days to consider it. If he approves, he simply signs the bill entering it into force. Should he disapprove, he would veto said bill and return it to Congress within those ten days. The “pièce de résistance” comes in when the President fails to do either of the above-mentioned – he neither signs, nor vetoes. Normally, this would mean a silent approval making the proposed bill become a law despite the President’s failure to sign. However, due to the fact that Congress is in charge of its own calendar, the possible danger of obstructing the President’s ability to return vetoed legislation was considered in establishing the Constitution. Since Congress could (not necessarily lawfully,<sup>55</sup> but could nonetheless) adjourn for the ten days the President has to consider and return the bill, thus preventing him from being able to successfully present the vetoed bill to Congress for reconsideration, the delegates decided to include a provision of the Constitution regulating the matter. As a result, a bill neither signed nor vetoed by the President becomes a law, “*unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.*”<sup>56</sup> It is not unthinkable that a President may take advantage of such adjournment and by means of his inaction effectively completely “veto” legislation without the threat of having it overridden.<sup>57</sup>

Having now summed up the scope of legislative power and the ways in which it may end up in the hands of the executive, in particular the President, I believe that I am not alone in feeling that the notion that the President may in fact become somewhat of a lawmaker seems at the very least somewhat alarming and poses risks to the separation of powers scheme. It is for this reason that I will focus on judicial review of executive lawmaking – first, however, I find it necessary to define and delineate the specifics of the tool used most prominently to put forth “executive legislature” and most often reviewed by the courts, the executive order.

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<sup>55</sup> See U.S. Constitution, art. I § 5, cl. 4

<sup>56</sup> U.S. Constitution, art. I, § 7, last sentence of cl. 2.

<sup>57</sup> The courts have, of course posed limits on this possibility, see for example the initial ruling in United States Supreme Court Decision from May 27<sup>th</sup> 1929, *Bands of the State of Washington v. United States*, 279 U.S. 655 (1929) and its subsequent moderation in United States Supreme Court Decision from January 17<sup>th</sup> 1938, *Wright v. United States*, 302 U.S. 583 (1938).

### 3 Executive Orders

The aim of this chapter is to provide a comprehensive understanding of what executive orders are. First, to build on the issues set out in the first chapter, I will delve into the concept of executive orders as being part of the presidential powers, followed by the manners in which they operate and the situations which may call for their use. Lastly, I will delineate the process prescribed for the issuance of these acts.

#### 3.1 Executive Orders as Presidential Power

Article II of the Constitution of the United States of America in its article 1 of the first section states “*The executive Power shall be vested in a President of the United States of America...*” This one single line is the sole constitutional basis for the existence of the President’s power to issue any form of direct action, let alone executive orders in particular. At present there has been no amendment to the Constitution or law which would attempt to bring clarity to what the executive power vested in a President shall encompass. No codification has been passed which would enlighten us as to the President’s entitlement to issue binding documents, if any, or what those might be called and what might be the requirements for their content.

The most commonly cited<sup>58</sup> definition of executive orders stems from a 1957 study on executive orders done for the House Committee on Government Operations which was able to ascertain that “[i]n the narrower sense Executive orders are written documents denominated as such... Executive Orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.”<sup>59</sup> Although not significantly helpful and obviously careful in its uses of the adverbs “generally” and “usually”, the House Committee’s definition is, obviously, far more elaborate than the single all-encompassing line the Constitution provides us with. I cannot help but feel a giant leap from a Constitution making no mention of the President being able to issue legislation to a would-be definition of executive orders.

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<sup>58</sup> See for example COOPER, *supra* note 47, p. 16.

<sup>59</sup> U.S House of Representatives, Committee on Government Operations, *Executive Orders and Proclamations: A Study of the Use of Presidential Power*, Washington: United States Government Printing Office, p. 1.

The reason for this seeming inconsistency lies in the interpretation of the Constitution described subchapter 2.3.2 of this thesis. As I have stated previously, the courts have acknowledged the President to have powers not expressly mentioned in the Constitution and have continuously upheld<sup>60</sup> his right to exercise these inherent powers. As I believe I have sufficiently covered this topic in the previous chapter, having concluded the source of the President's power to issue executive orders and their definition, I will now proceed to demonstrate the binding effect of these instruments.

### 3.2 Binding Effect of Executive Orders

The binding effect executive orders inherently must have can be derived from a simple grammatical interpretation of their very name. An order which is not binding is not an order at all but might rather be defined as a recommendation or request. This notion was logically upheld by the courts but more significantly, executive orders were not only pronounced to be binding but also acknowledged to have "the force and effect of the law".<sup>61</sup> Most often, executive orders are the subject of litigation due to the fact that a party feels affected or injured by an executive order which this party views as lacking authority or invalid for other reasons. While most of the existing case law and the cases discussed in this thesis will be of the type specified in the previous sentence, there are instances when a litigant may seek for the government to "stick to its word" and ask for a third party or the President himself to obey the regulations set down by his own executive orders. Unfortunately, these types of actions are predestined to fail.

The Courts have consistently upheld the non-justiciability of executive orders, especially those issued under Article II of the Constitution. The rationale for this is three-fold. First, the courts have claimed that they have no jurisdiction over a party seeking for another party to abide by an executive order due to the fact that executive orders do not fall under any of the authorities under which an action might arise - those being the Constitution, laws or treaties of the United States.<sup>62</sup> Second, courts have refused to judicially enforce rights

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<sup>60</sup> Though not absolutely, as will be demonstrated in the following chapter.

<sup>61</sup> United States Court of Appeals for the District of Columbia Circuit Decision *supra* note 1.

<sup>62</sup> United States Court of Appeals for the District of Columbia Circuit Decision from July 16<sup>th</sup> 2010, *MICEI INTERN. v. Department of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010).

arising from executive orders due to an alleged alternative to judicial review – an appeal to the President (though we may imagine how successful that might be) and third, courts have cited separation of powers as a reason for their hands-off approach and reluctance to interfere.<sup>63</sup>

Even executive orders issued pursuant to statutory delegation have largely been found not to be judicially enforceable even though they are often associated with statutes which provide for private rights of action. The court's reluctance to find even these orders to be justiciable stems from a reading into the President's intent – whether the President intended to create justiciable rights through a particular executive order. Not surprisingly, the answer is usually no. It is worth noting that, interestingly, the courts look to presidential and not congressional intent since these orders derive their authority from statutory delegation of power.

It needs to be kept in mind when reading the remainder of this thesis that even though there is a multitude of contexts in which courts review executive orders, the one where they contemplate the possibility of orders creating justiciable rights will not be a topic of exploration. As will be demonstrated, it is possible to undermine the authority behind the issuance of an order, it is possible to have it proclaimed invalid in face of a conflicting statute. It may even be possible for an order to be deemed unconstitutional for violating fundamental rights. However, should a potential plaintiff actually *agree* with an order and want for it to be enforced and enjoy the rights it gives him, he is left empty-handed. This topic of judicial review will be a matter of further consideration later in this thesis, but it cannot be analyzed without having a clear understanding of what executive orders actually are and the purposes they are able to serve.

### 3.3 Manners of Use of Executive Orders

It follows from the previously stated that executive orders are written documents denominated as such, falling within the scope of inherent presidential powers, by means of which the President generally directs government officials and agencies, which usually affect

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<sup>63</sup> United States Court of Appeals District of Columbia Circuit Decision from July 29th 1965, *Manhattan-Bronx Postal Union v. A Gronouski*, 350 F.2d 451 (D.C. Cir. 1965).

private individuals only indirectly, and which have the force and effect of the law. In order to more fully understand the nature of this tool, however, I believe it necessary to demonstrate the key purposes which they tend to serve. While the following list is not exhaustive, I consider it sufficient to demonstrate the basic ways in which executive orders are used.

*a) Tools for issuing binding orders to units of the executive branch*

The first and foremost intended purpose of executive orders is to regulate the actions of the President's subordinates, i.e. the particular officials and agencies in the executive branch. Regulation of subordinates may be done through a variety of ways; the appeal of executive orders lies in their authoritativeness and their long-lasting nature.<sup>64</sup> An area often regulated by executive orders directed towards government employees is the question of ethical conduct. On April 12<sup>th</sup> 1989, President George Bush issued Executive Order 12674 titled Principles of Ethical Conduct for Government Officers and Employees. President Trump issued "his own", no. 13770 on January 28<sup>th</sup> 2017 titled Ethics Commitments by Executive Branch Appointees which focuses on keeping executive branch employees from becoming lobbyists for five years after the termination of their employment.

*b) Means of making policy in fields generally conceded to the President*

It comes as no surprise that when an act concedes a particular area of law to him, the President is happy to take this over and issue regulation by means of executive orders. The most prominent example of this use is the area of classification. Although the question of what materials to classify and what not to was regulated through executive orders long before this power was officially conceded to the President,<sup>65</sup> the official concession of power to the head of state came by means of an amendment to the National Security Act of 1947 which the presidents have taken advantage of ever since.

*c) Device to delegate authority to other agencies or officers*

As was established in describing the previous use of executive orders, this tool may be used to make policy or otherwise act in areas conceded to the President by law. What happens, however, when the President is "personally" entrusted with responsibilities under

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<sup>64</sup> COOPER, supra note 47, p. 21.

<sup>65</sup> See for example Executive Order 8381, issued on March 22nd 1940 , Executive Order 10104, issued on February 1st 1950 or Executive Order 10501, issued on November 5th 1953



thousands<sup>66</sup> of statutes? While it was clear from the early days that no President could be personally asked to carry out all the various duties imposed on him himself, there was a fear of a *“possible loss of accountability that could result if authority drifted out of the very visible office of the president and down into the bureaucracy”*. This issue was resolved by § 301 of Title 3 of the United States Code through which the President is officially able to delegate responsibilities to other agencies or officers but only pursuant to the fact that these are confirmed by the legislature and the President’s ultimate responsibility is ensured.

*d) Tool to create or reorganize agencies or eliminate existing ones*

While the practice of Presidents interfering with the existence of agencies (especially creating ones) has been long in use, it remains one of the more disputed uses of executive orders. During the New Deal era, President Roosevelt did not seem at all shy to implore his inherent powers and create government agencies. In fact, there was so much agency-creating going on that senator Richard Russell pushed to have legislation passed that would stop the President from using executive orders to create agencies so excessively and he even went as far as to say that he *“never believed that the President of the United States was vested with one scintilla of authority to create by an Executive Order an action agency of Government without the approval of the Congress of the United States”*.<sup>67</sup> However unpopular this tendency may be with Senator Russell or his successors, it remains true that this tool has been used to set up agencies throughout history. Just to name a few: President Kennedy created the Peace Corps in 1961<sup>68</sup>, the Reagan administration, among others, created the Vice President’s Task Force on Regulatory Relief<sup>69</sup> – a body put over the Office of Information and regulatory Affairs set up by the Carter administration and still in operation today, President Clinton created the National Economic Council<sup>70</sup> and President George W. Bush set up a cabinet-level Office of Homeland Security

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<sup>66</sup> Already by the late 1940s, there were around 1100 statutes delegating responsibilities to the President according to FISHER, Louis. *Constitutional Conflicts Between Congress and the President*, 4<sup>th</sup> ed., rev. Lawrence: University Press of Kansas, 1997, p. 97.

<sup>67</sup> FISHER, Louis. *The Politics of Shared Power: Congress and the Executive*. 4<sup>th</sup> ed. College Station: Texas A&M University Press, 1998, p. 35 quoting Senator Richard Russell.

<sup>68</sup> Created by Executive Order 10924, issued on March 1<sup>st</sup> 1961.

<sup>69</sup> Created by Executive Order 12291, issued on February 17<sup>th</sup> 1981.

<sup>70</sup> Created by Executive Order 12835, issued on January 25<sup>th</sup> 1993.

in his response to the September 11 terrorist attack<sup>71</sup> - a textbook example of an executive order used in response to emergencies.

*e) Instrument of foreign policy*

Foreign policy remains a relatively undisputed area of the President's exclusive powers. As the Supreme Court ruled, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation...".<sup>72</sup> The President's authority to act "on his own" when it comes to foreign matters is especially strong in times of emergencies which are most often connected to foreign policy issues such as wars. His unwavering authority in this area of power was further supported when the Supreme Court "forced" Congress to amend the National Emergencies Act. The previously effective legislative veto which enabled Congress to terminate an emergency was changed to a veto by joint resolution – quite amusingly, this must go to the President for signature.<sup>73</sup>

*f) Device for initiating or directing regulation*

I purposely left the most controversial use of executive order for last – the use which is most often a subject of judicial review and which will be analyzed in more detail in the following chapters of this thesis. While executive orders were defined by the House Committee on Government Relations to be aimed at government agencies and officials and said to affect private individuals only directly, this is not always respected and not always true. It can hardly be passed as affecting private individuals only indirectly when President Truman famously order the Secretary of Commerce so seize chosen steel mills – privately owned corporations. The effect on private individuals was as direct as can be, despite the attempt to "mask" the action as an order to a government official. In more recent history, President Nixon imposed a wage-price freeze by means of an executive order.<sup>74</sup> While he did establish an agency through which he was directing the intended regulation, he went as far as to address the public directly in the text of the order.

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<sup>71</sup> Created by Executive Order 13228, issued on October 8th 2001.

<sup>72</sup> United States Supreme Court Decision from December 21<sup>st</sup> 1936, United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).

<sup>73</sup> United States Supreme Court Decision from May 27<sup>th</sup> 1935, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

<sup>74</sup> Executive Order 11615, issued on August 15<sup>th</sup>, 1971.

### 3.4 Reasons for Use of Executive Orders

While I consider the above stated uses of the executive orders sufficient to illustrate the manner in which they are used, I also deem it appropriate to illustrate the reasons for their use and the situations that call for them. For the purposes of this thesis, I chose four most commonly known reasons for their use to explore.

*a) Desire for a quick, simple way to launch policy initiatives*

Executive orders most often seem to be used due to a combination of the reasons that they are procedure-wise very simple to issue (as will be closer demonstrated in the following subchapter) and another one accompanying it. The speed at which they are able to exit the White House is a characteristic which makes them popular to reach for at the start of a new administration. At the beginning of nearly all modern presidencies, the same tendency can be identified – a swift issuance of a number of executive orders. *“These messages are sent to reassure an administration’s supporters that the issue positions for which the campaigned are going to be acted upon.”*<sup>75</sup>

*b) Change of course from a previous administration*

Another reason why newly elected Presidents like to issue executive orders in the early days of their presidency is to set a new sense of direction for the upcoming term. Since the Constitution gives a generally wide scope of executive power and even rules of logic require Presidents to not be bound by the actions of their predecessors, new Presidents are often quick to revoke existing executive orders as their “first line of work”. It would be impossible and useless to cite all instances in which this approach was taken, the Reagan administration is, however quite note-worthy. President Reagan was applauded for choosing a rather systematic approach in revoking existing executive orders put in place by his predecessor Carter. Being elected into office in the beginning of the year 1981, the Reagan administration issued some thirty-nine orders by the end of the year. This provided the President a “clean slate” making way for new policies to be put in place.

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<sup>75</sup> COOPER, super note 47, p. 69.

*c) Response to emergencies*

The fact that executive orders are much easier to issue than Congress-approved legislature makes them a great tool to employ when responding to emergencies. Undoubtedly, one of the most widely known reasons for use of executive orders and perhaps the most easily justifiable is to respond in times of unexpected duress. While some of these are certainly emergencies in the truest sense of the word (e.g. such as when President Wilson issued orders to deal with the challenges of World War I<sup>76</sup>), on the other hand, “*most Americans would be surprised to know that the nation operated under a continuous state of emergency from 1933 until 1976, and the majority of those years certainly were not periods of declared war.*”<sup>77</sup> The term “emergency” is certainly up to interpretation and it is not difficult to imagine how easily misused this reasoning might be.

*d) Need to strike hard in foreign policy matters*

While statutory regulations can hide behind the veil of the Congress and the President may very well distance himself from passed legislature, executive orders are, on the other hand, publicly very closely tied to the President personally. This is an attractive attribute especially when it comes to foreign policy issues, making executive orders an often relied-upon diplomatic technique.

I consider the above-stated elaboration on the manners and reasons for use of executive orders helpful in shedding more light on what purposes these instruments are able to serve and why an administration might reach for them to resolve certain issues. The following subchapter will briefly summarize the process prescribed for a President to issue executive orders.

### **3.5 Issuance Procedure of Executive Orders**

Since executive orders are in no way regulated by the Constitution directly, it would be highly unlikely to expect to find within it guidelines for their issuance procedure. Not surprisingly, the U.S. Constitution is silent on this matter. This is not to say that this lack of the constitutional regulation of this issue is somehow inappropriate or scorn-worthy. Surely,

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<sup>76</sup> See for example Executive Order 2012, issued on August 5<sup>th</sup> 1914.

<sup>77</sup> COOPER, *supra* note 47, p. 39.

constitutions are not meant to regulate the utmost details of the actions of the branches of government, but to set down the basic principles of their operation.

What I do find reasonable, however, is to look for the procedure set out for issuing binding acts in a statute. Especially since executive orders are acts issued solely by the President and as such pose a considerable risk for misuse,<sup>78</sup> I would expect to find a codified set of rules setting out boundaries for the President to follow when issuing executive orders. After all, Congress being the body which would issue such a law has quite an interest in regulating at least the technicalities of the President's lawmaking power. Alarming enough, as follows from the wording of the preceding sentences; no such law is in effect or ever has been.<sup>79</sup> While the passing of the Administrative Procedure Act<sup>80</sup> may have brought on a certain level of hope, the Supreme Court effectively shut that down in 1992 when it ruled that the term "agency" was not to include the President, thus not applicable to his lawmaking.<sup>81</sup> Surely, the fact that the procedure for issuing executive orders lacks statutory regulation must be a little alarming since one reason for proclaiming them unlawful is automatically eliminated. For example, if Congress were to disregard the principle of presenting bills passed by both Houses to the President for his approval and passed a bill into a law without even considering him, the law would undoubtedly be considered void and ineffective.

This lack of statutory regulation is the result of a natural development of the way executive orders have been issued over time. *"The earlier Executive Orders sometimes took the form of hastily scribbled Presidential endorsements on legal briefs or upon the margins of maps. Presidents wrote 'Approved', 'Let it be done,' or other short comments and these jottings sufficed to stamp a proposal with the authority of the Presidential imprimatur."*<sup>82</sup> Interestingly enough, Presidents themselves saw a need to establish a uniformity of style of executive orders beginning with President Ulysses S.

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<sup>78</sup> Since they are not acts approved by a body of officials but enacted by one single person.

<sup>79</sup> The only requirement for executive orders stems from the Federal Register and Code of Federal Regulations Act, 44 U.S.C., which in its § 1501 et seq. mandates publication of most executive pronouncements, including executive orders.

<sup>80</sup> Administrative Procedure Act, 5 U.S.C.

<sup>81</sup> United States Supreme Court Decision from June 26<sup>th</sup> 1992, *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

<sup>82</sup> U.S. Senate, Report of the Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Orders in Times of War and National Emergency*, 93<sup>rd</sup> Congress, 2<sup>nd</sup> sess., Washington: U.S. Government Printing Office, 1974, p. 2.

Grant's effort in 1873.<sup>83</sup> The trend continued and a number of succeeding Presidents made their own amendments to the process set out by President Grant. Nowadays, the basic standard for the issuance of executive orders is laid out by President Kennedy's executive order,<sup>84</sup> which has since been slightly amended during the succeeding administrations. Nowadays, the result of this codification is that *"proposed executive orders, originating outside the White House, [are to] be submitted to the director of the Office of Management and Budget (OMB). If approved by the OMB, the proposed order goes to the attorney general for consideration of its legality and to the Office of the Federal Register for a review as to form. If these steps are cleared, the proposed order or proclamation goes to the president for signature."*<sup>85</sup> Let us not forget that the above-mentioned is applied for orders originating outside the White House and this "strenuous" process does not apply to executive orders theoretically thought up by the President himself.

I have put the word "strenuous" in inverted commas due to the fact that even this process ordained by executive order is far simpler than the arduous effort required for Congress to pass a bill. For one, there is no requirement for notice and public participation, the political back and forth is eliminated altogether and the time required to pass an executive order may represent mere minutes,<sup>86</sup> while during the 113<sup>th</sup> Congress, on average, it took nearly 264 days for a bill to become law<sup>87</sup>.

The appeal of executive orders is not difficult to grasp. While sometimes the argument for use of executive order may lie in Congress' inability to pass legislation when it, in fact, should,<sup>88</sup> it is not a far leap to image an administration issuing executive orders for the mere simplicity of the process that accompanies them rather than attempting to pass a bill on the same matter through Congress. Surely, executive orders are attractive to administrations and even the least sceptic ones of us will admit that this poses risks allowing for their misuse. It

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<sup>83</sup> COOPER, supra note 47, p. 17.

<sup>84</sup> Executive Order 11030, issued on June 19th 1962.

<sup>85</sup> COOPER, supra note 47, p. 17.

<sup>86</sup> If we were to simplify the matter and view executive orders as the already stated scribble on the edge of a map.

<sup>87</sup> Data pulled from an advanced search on [www.congress.gov](http://www.congress.gov) with the criteria "113<sup>th</sup> Congress > billStatus:"Became Law" > Sort by "Date of Introduction-Oldest to Newest".

<sup>88</sup> In President Clinton's words: "I am taking this action today because Congress has failed to act and because a few years ago Congress explicitly gave me the authority to step in if they were unable to deal with this issue.... Two months ago, their deadline expired. After 3 full years there wasn't a bill passed in either Chamber." Weekly Compilation of Presidential Documents vol. 35, no. 43, 1999.

is for this reason that the following chapter and the remainder of this thesis will be dedicated to the one constant which should serve to check the President's transgressions – judicial review.





## 4 Judicial Review

In the previous chapters I have delineated the role of the executive within the separation of powers scheme in the U.S. and focused on how the President may become a lawmaker. As this thesis is focused on a particular type of the President's legislative power – the executive order – the previous chapter dealt with the essence of this tool and the manner in which it can be used. With the foregoing information serving the purpose of a necessary background in order to fully grasp the topic of this thesis, let me now proceed to its core. First I will define the source of the court's authority to rule in the matter at hand including a look into the boundary which most affects jurisdiction concerning acts of the President. Next I will consider the ways in which the court might find itself faced with an executive order. Lastly I shall identify the criteria the courts consider when evaluating executive orders thus creating a guideline for a judge in such a position to follow.

### 4.1 Authority for Judicial Review

At this point it most likely does not come as a surprise that the Constitution does not provide answers as to the particular types of cases to be decided by the Supreme Court or by others. Just as broadly as it vests legislative power in a Congress<sup>89</sup> and executive power in a President,<sup>90</sup> the judicial power is vested in one Supreme Court and courts inferior to it.<sup>91</sup> The Constitution went a little farther than just that and in its following section specified that the courts are to decide all cases and controversies “*arising under this Constitution, [and] the Laws of the United States...*”<sup>92</sup> while specifying some of the more nuanced types of subjects over which the courts are to have jurisdiction. Realizing the period in which the Constitution was drafted and the fact that it meant to serve as the basic law of the land, it does not strike me as inappropriate that it fails to enumerate all the different types of proceedings which might take place, for example, before the Supreme Court. Of course the U.S. being part of the

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<sup>89</sup> U.S. Constitution, art. I, § 1.

<sup>90</sup> U.S. Constitution, art. II, § 1, cl. 1.

<sup>91</sup> U.S. Constitution, art. III, § 1.

<sup>92</sup> U.S. Constitution, art. III, § 2, cl. 1.

common law system, a lot of this was already “codified by custom”. What I do find unfortunate, however, is the lack of mention of the courts’ possibility or lack thereof to check the other branches of government. In contrast, the Czech Constitution expressly grants its Constitutional Court the power to abolish laws or other legal acts which contradict the constitutional order.<sup>93</sup> As I stated, the American Constitution makes no such mention and, ironically enough, it was the court who ruled on its own jurisdiction.

The absolutely landmark case of *Marbury v. Madison*<sup>94</sup> which came just over a decade after the signing of the Constitution was a decision of particular brilliance displaying the profound insight of the Chief Justice into the political situation at that time. The case arose from the dramatic election of 1800. While two of the candidates – Jefferson and Burr were tied after the popular and electoral votes, Adams clearly was not to enter into his second term as President of the United States. Grasping at the last opportunities to keep the Republican Jefferson from taking control of the Supreme Court, legislation was put in place and steps were taken to appoint as many judge nominees of President Adams’ choosing as he could manage. First he appointed his Secretary of State as Chief Justice of the Supreme Court, followed by 42 other justices of the peace. Nominations were made, Senate voted to approve and Secretary of State (and Chief Justice) Marshall signed the commissions for all of them and handed them to his brother in order to deliver them to their respective addressees. As all of this took place just days before Jefferson’s inauguration, not all of the commissions were delivered in time. Once Jefferson took office, he instructed his Secretary of State, James Madison, to withhold the undelivered commissions. One of these judges who was not appointed as a result of these facts was William Marbury, who filed suit before the Supreme Court seeking a writ of a mandamus<sup>95</sup> to compel Madison to deliver the commission.

The Court began by analyzing whether Marbury had a right to the commission, whether the laws afford him a remedy and whether the Supreme Court was authorized to issue this remedy – the mandamus. To all these questions the Court replied in the affirmative.

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<sup>93</sup> § 87, cl. 1, let. a of act no. 1/1993 Coll. Constitution of the Czech Republic, as amended.

<sup>94</sup> United States Supreme Court Decision *supra* note 19.

<sup>95</sup> An order issued by a superior court a lower court, government official, office, or corporation, commanding that a specified thing be done. In this case Marbury sought for the Supreme Court to order Madison to deliver his commission.

Interestingly enough, it was after evaluating these questions that the Court considered the matter of jurisdiction. While the Court agreed that section 13 of the Judiciary Act of 1789 gave the Supreme Court original jurisdiction in the matter at hand, the issue lay in the constitutionality of this provision. The Court concluded that the Constitution very clearly enumerated the matters in which the Supreme Court was to have original jurisdiction and that Congress was not authorized to add to this list seeking a writ of mandamus. Chief Justice Marshall stated “[i]f it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.”<sup>96</sup> Proclaiming the provision as unconstitutional was not that simple, however. Until this case, there had been no decision and certainly no provision granting the Supreme Court the power to review the constitutionality of the acts enacted by other branches of government. Chief Justice Marshall saw this case as the ample opportunity to ascertain the Supreme Court’s authority for constitutional judicial review.

The Court’s findings can be summed up as “*an act of the legislature, repugnant to the constitution, is void... It is, emphatically, the province and duty of the judicial department, to say what the law is.*”<sup>97</sup> Not only the acts of the legislature, however, “*Marbury then establishes the power of the judiciary to review the constitutionality of executive actions... where the executive has a legal duty to act or refrain from acting, the federal judiciary can provide a remedy.*”<sup>98</sup> Chief Justice Marshall gave several arguments why. First, the Court argued that the Constitution places limits on government powers and these limits are meaningless without the judiciary’s power to enforce them. Next, as the Constitution states that it alone, followed by all other types of binding acts, is to be the supreme law of the land,<sup>99</sup> the Court saw it as inherent to the judicial role to rule on the constitutionality of the laws it applies since only the laws made in pursuance of the Constitution are to be binding. The Court also argued that judges take an oath of office to uphold the Constitution and they would violate this oath if they were to apply laws which contradict the Constitution. While there are many arguments why these conclusions are not

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<sup>96</sup> United States Supreme Court Decision *supra* note 19.

<sup>97</sup> *Ibid.*

<sup>98</sup> CHEMERINSKY, *supra* note 45, p. 40.

<sup>99</sup> U.S. Constitution, art. VI, cl. 2.

necessarily inevitable and there are many perhaps even more plausible answers than those given by the Court,<sup>100</sup> it remains fact that the genius<sup>101</sup> Marbury v. Madison decision is to this day the basis of the Supreme Court's authority to evaluate the constitutionality of laws and acts made by the President.

Notwithstanding that since Marbury Supreme Court undoubtedly has jurisdiction to rule on the constitutionality of laws and acts of the executive as well, there is one hurdle, especially in the case of executive orders – the “case or controversy” clause. The framers of the Constitution chose to limit the jurisdiction of the courts to cases or controversies. While it may sound as just a meaningless phrase the framers used to ascertain the obvious, that the courts were to decide cases and not carry out another function, it is, in fact, much more than that. The case or controversy doctrine is one which does not allow for advisory opinions, requires ripeness and lack of mootness of the controversy and also asks that the plaintiff has standing. I will briefly describe these requirements as they have great effect on possible suits brought “against” executive orders and they considerably limit the courts' jurisdiction over them.

The ban on advisory opinions is supported by the need to maintain the constitutional separation of powers and as well as by the character of the judicial function. When no “controversy” has arisen, no party has been directly affected by legislation, the case may not be adjudicated. *“Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.”*<sup>102</sup>

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<sup>100</sup> For such arguments see VAN ALSTYNE, William W. A Critical Guide to Marbury v. Madison. Duke Law Journal. 1969, vol. 18, no. 1, p. 1-47.

<sup>101</sup> The ingenuity of Chief Marshall's decision lay in the political aspect of the decision. Realizing fully the fact that the Jefferson administration would not respect the mandamus if the Court were to issue one, it at least gave Marbury the moral victory in recognizing that he had been wronged. To save his own position due to the impeachment proceedings of justice taking place at that time, Marshall saw it essential to rule in favor of the newly inaugurated president. Nonetheless, Marshall took the opportunity to lay down jurisdiction over even the acts of the President and no one had any issue with it since, prima facie, Marshall ruled in favor of the president.

<sup>102</sup> United States Supreme Court Decision from February 20<sup>th</sup> 1961, United States v. Freuhauf, 365 U.S. 146 (1961).

The requirement of ripeness is one of time. It requires for the case brought before the court to be viewed retrospectively, allowing for a finding that the process or events which led for the case to end up before the court make the case justiciable. The courts refuse jurisdiction on the grounds of lack of ripeness when *“the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”*<sup>103</sup>

The next question the courts consider as part of the case or controversy doctrine is one of mootness. Standing at the opposite of the time spectrum to ripeness, mootness prevents a case from being adjudicated if the passage of time has caused it completely to lose *“its character as a present, live controversy of the kind that must exist if [the Court] is to avoid advisory opinions on abstract propositions of law.”*<sup>104</sup> This may be due to a change in legislation,<sup>105</sup> the nature of the condition being of limited duration,<sup>106</sup> or the end of an event entirely, such as a war.<sup>107</sup>

The last issue to resolve when deciding whether a matter before the court falls under the case or controversy clause stipulated by the Constitution is not one of time but of the plaintiff – the issue of standing. This is a particularly relevant matter when discussing the judicial review of executive orders, or any legal acts for that matter. The American system of constitutional judicial review requires for the subject to be personally affected and have suffered injury as a result of the unlawful conduct (or act) of the defendant, for the injury to be fairly traced to the challenged action and for the injury to be likely to be redressed by a favorable decision.<sup>108</sup> This is in stark contrast to, for example, the Hungarian system wherein *“there are virtually no standing barriers to the filing of constitutional complaints. In Hungary, any person who claims that the state has violated one or more of his or her rights under the Constitution may file a complaint in the Constitutional Court.”*<sup>109</sup> While this has, of course flooded the Hungarian

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<sup>103</sup> WRIGHT, Charles; MILLER, Arthur; COOPER, Edward. Federal Practice and Procedure: Jurisdiction. 4<sup>th</sup> ed. St. Paul: West Publishing Company, 1984, p. 112.

<sup>104</sup> United States Supreme Court Decision from November 24<sup>th</sup> 1969, Hall v. Beals 396 U.S. 45 (1969).

<sup>105</sup> In Ibid., the originally contested voter residency requirement of six months was later reduced to two months thus making it moot.

<sup>106</sup> Such as when a prisoner is released from custody as it as in the case at the core of the United States Supreme Court Decision from March 23<sup>rd</sup> 1982, Lane v. Williams, 455 U.S. 624 (1982).

<sup>107</sup> The end of a war mooting the legality of restraints on an individual's previous desire to protest it as was the case in United States Supreme Court Decision from March 19<sup>th</sup> 1974, Steffel v. Thompson, 415 U.S. 452 (1974).

<sup>108</sup> United States Supreme Court Decision from January 12<sup>th</sup> 1982, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

<sup>109</sup> DORSEN et al., supra note 13 p. 170.

Constitutional Court and may not have been the most fortunate solution, the Czech system strikes me as quite reasonable in, for example, allowing a group of parliament deputies to bring an action to have a law pronounced as unconstitutional before the Constitutional Court of the Czech Republic.<sup>110</sup> I believe that a similar solution would be beneficial to the judicial review of executive orders as the courts have been quite strict in ascertaining standing and certainly, executive orders may seem as inherently wrong and unconstitutional without a party being yet injured as a result of the provisions therein. Unfortunately, this is not to be at the present moment.

Let us assume that in a particular case of judicial review of, say, an executive order, all of the above have been fulfilled. That is, the case is concrete enough and does not seek only an advisory opinion, the matter is ripe and is not contingent on unsure circumstances, the case is not moot and very much relevant and the plaintiff has standing. Let us say that the court then, after evaluating all aspects of the case finds the executive order unconstitutional. What are the legal effects of such a proclamation however? Unlike in France or the Czech Republic, the courts lack authority to abolish laws or executive orders, the decision declaring either one unconstitutional simply results in its subsequent nonenforcement. If the court reverses its stance on the statute or executive order after some time, the invalidated law can be used again without a need for its reenactment.<sup>111</sup>

After laying down the source of the Supreme Court's authority for constitutional judicial review and explaining the case or controversy doctrine which very much affects judicial review of executive orders, I will now proceed to identify the ways in which executive orders may become the subject of said judicial review.

## 4.2 Contexts of Review of Executive Orders

Having now established that courts in the United States have proclaimed their own authority to review acts of the legislative and the executive branch, I will now proceed to the ways in

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<sup>110</sup> § 64, cl. 1, let. a of act no. 182/1993 Coll. on the Constitutional Court, as amended.

<sup>111</sup> DORSEN et al., *supra* note 13, p. 173.

which courts<sup>112</sup> might find themselves faced with considering the validity or lawfulness of executive orders in particular. Not all the contexts in which the courts consider executive order are relevant to determining the requirements for their acceptance by the judicial branch, this is why this subchapter is not meant to be an entirely in-depth exploration of all the nuances of each context of review. Given that this is, to my knowledge, one of the few works providing a comprehensive overview of the judicial review of executive orders, I deem it appropriate to at least mention most of the contexts in which this review takes place. The following subchapter will then explore the principles and requirements adapted from the courts dealing with the issues relevant to synthesizing a doctrine of the validity of executive orders.

A reasonably sound approach to first trying to demarcate the ways in which courts find themselves eventually ruling on the fate of executive orders is to deal with the different reasons plaintiffs might have for filing suit. Before doing so, however, I feel it necessary to address that the courts spend a considerable time evaluating question of “the plaintiff” itself. Due to the case or controversy doctrine defined in the previous subchapter, it may become quite difficult to be deemed to have standing and at the same meet all the other requirements set down by the doctrine. Take the “surveillance dragnet” order,<sup>113</sup> for example. The above-specified requirement of standing would be almost impossible to achieve when trying to combat the legality of this executive order. Especially with possible intrusion into one’s fundamental rights such as the right to privacy which was very much endangered by the order, the law’s request for the plaintiff to be personally injured or aggrieved by the contested provision seems particularly backwards in this case. Since the intrusion into privacy is finalized once the data is collected and the information is made available to authorities or even the public, the subsequent pronouncement of the provision which authorized this activity unconstitutional seems to offer little solace to the, now, actually injured. I think that there is great value in ruling even at the mere threat of intrusion into one’s fundamental rights and if

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<sup>112</sup> I will, for the most part, be using the general term “courts” when talking about those who have the authority to review executive orders, though this generally means the federal courts and the United States Supreme Court.

<sup>113</sup> Executive Order supra note 146, an executive order which significantly broadened the legal authority of the respective agencies for data collection activities. For example, it allowed for one of these agencies to collect data flowing through information centers of search engine giants like Yahoo and Google.

not granting a subject standing before actually becoming injured, I have to say again that I would at least expect the law to allow for a group of congressmen or senators to be able to file suit citing unconstitutionality of a provision before its effects are felt by individuals.

Assuming, however, that the requirements of the case or controversy doctrine are met, there are four basic types of claims brought in relation to executive orders.<sup>114</sup> The first type represents the concept of a private person or entity filing suit on the grounds that their injury suffered was caused directly by, or by acts taken under the authority of, an executive order which the plaintiff believes to be in violation of constitutional rights, without statutory authorization or even with statutory preclusion or lacking independent authority under Article II of the Constitution, thus seeking to prevent enforcement of such order.<sup>115</sup> On the opposite end of the spectrum, significantly lower in frequency of occurrence and in success rate,<sup>116</sup> stand actions which seek to enforce the rights concerned in executive orders. Naturally, the plaintiffs in such actions represent different fractions of the federal government, but are not limited to such.<sup>117</sup> The third category of plaintiffs who initiate proceedings in connection to executive orders seek neither to enforce an order nor prevent it from being enforced, but were otherwise related to an executive order – usually a case of interpretation of the order in question. The fourth group of plaintiffs brought actions in which they did not at all intend to challenge or “support” an executive order but the relevance of one came to light over the course of the proceedings.<sup>118</sup>

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<sup>114</sup> These findings adapted from NEWLAND, Erica. Executive Orders in Court. The Yale Law Journal [online]. 2015, vol. 124, no. 6, p. 2091. [cit. 10. 3. 2018]. This study being one of the very few materials dedicated to the topic of judicial review of executive orders served as an excellent source of information. Since at the time of conducting the study, the author sorted through all of the 700 cases decided by the Supreme Court and the D.C. Circuit Court (for reasoning reference the note) which mentioned executive orders and from those pulled the relevant ones – trying to conduct a study as profound as this with my limited time and resources would be a sorry attempt in comparison with the cited one.

<sup>115</sup> See for example United States Supreme Court Decision from July 2nd 1981, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) wherein the plaintiffs sought to prevent the enforceability of Executive Order no. 12170 citing, among others, lack of statutory for the President to issue one of the provisions therein.

<sup>116</sup> Courts are hesitant to hold the President to his executive orders and tend not to “order” him to obey by his own rules, as was previously stated.

<sup>117</sup> In United States Supreme Court Decision from May 11<sup>th</sup> 1942, *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942) the plaintiff in the action was, obviously, an Indian Tribe which asked to court to enforce orders made by the President in 1875 and 1876.

<sup>118</sup> Such was the case in the proceedings resulting in the United States Court of Appeals for the District of Columbia Circuit from October 5<sup>th</sup> 1978, *Jalil v. Campbell*, 590 F.2d 1120 (D.C. Cir. 1978).



Having now determined how executive orders might find their way before the judge's bench by means of the actions brought by plaintiffs asking the types of questions or seeking the types of results specified above, it is now appropriate to consider in what contexts the judges themselves consider them. While the plaintiff certainly has a huge possibility to sway the course of the proceedings by the arguments proposed in his suit, it is ultimately up to the judges to identify in what context the executive order must be considered and from that then identify the opposing right, provision or institution against which the provision of the order is to be compared. For example, should the court find that a particular order might be in conflict with a constitutional right, it would then have to subject the provision of the executive order and the constitutional right to the "scrutiny test."<sup>119</sup> The following contexts<sup>120</sup> in which the courts consider executive orders are not mutually exclusive – naturally, more than one of these areas will often merge into one case<sup>121</sup> thus making for a more complex consideration. For the purposes of categorization, however, I have decided to tend to each separately.

The majority of cases decided in connection with executive orders have to do with the separation of powers and the interbranch dialogue present when dealing with executive orders. To keep the order set down by the Constitution, the first context in which courts consider executive orders is one related to Article I, the legislative branch. As statutory delegation is the main source of the President's power to issue executive orders in a certain matter – this is therefore the first area of consideration having to do with the legislative branch. Although "judicial review of executive orders" certainly seems to be a review aimed at the executive's conduct and lawmaking, this is not always the case. As will be further demonstrated, since courts are not generally ready to rule "against" the executive, they tend to "shift the blame" towards the legislature and examine the question of whether, notwithstanding the fact that the President acted pursuant to a statutory provision enabling him to issue a particular order, Congress was authorized to delegate legislative power onto

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<sup>119</sup> The American courts' "version" of the proportionality test applied by many courts from all over the world.

<sup>120</sup> These findings adapted from NEWLAND, *supra* note 114, p. 2039, figure 2.

<sup>121</sup> To state the most obvious, anytime the court might try to find whether the President had sufficient authority to issue an order, it must interpret its text first.

him in the first place.<sup>122</sup> On the other hand, another topic of frequent discussion by the courts in relation to executive orders is one of the President's authority to issue an order. As I have mentioned previously in this thesis, Presidents often cite their authority vested in them by the Constitution and the laws of the United States in general without citing a particular source of authorization. The courts tend to search for statutory sources of authorization and try to synthesize the President's will to rely on them *ex post*.<sup>123</sup> Leaving the topic of authorization behind, another key area the courts consider in relation to the interaction of executive orders and the legislative branch is the interbranch conflict. What I mean by this is the situation in which an executive order and a statute perhaps even entirely independently of one another regulate the same issue in different manners. A conflict might arise between an order and a statute and thus the court must decide which one to follow based on its content or underlying authorization, or the court might find itself considering whether one issued at a later date than the other was meant to supersede it.<sup>124</sup> Least common of all, courts also might look to an executive order in trying to interpret a statute<sup>125</sup> – this is not an area of much interest in evaluating the review of executive orders, though it does provide insight into the importance of these acts.

The second article of the Constitution is dedicated to the executive branch. While at face value it may seem illogical to write about the interactions of the executive branch with its own self, there are a number of contexts in which the courts consider executive orders which do not raise issues as to the separation of powers and the interaction with the remaining branches is rather “peaceful”. Such cases deal with executive orders issued pursuant to the powers given exclusively to the President and thus relying on the Constitution as the main source of authority to issue orders. The least contested area, by the courts and generally, of the President's exclusively powers is the one of foreign policy. As I

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<sup>122</sup> The courts considered this, for example in United States Supreme Court Decision from June 2<sup>nd</sup> 1919, *Dakota Central Tel. Co. v. South Dakota*, 250 U.S. 163 (1919).

<sup>123</sup> As it did in United States Supreme Court Decision *supra* note 115, wherein the President relied on express provisions of a particular statute to promulgate certain parts of his executive order, however the Court could find no support for other parts. Nonetheless, the Court looked at the legislature's intent and found the President's authority in that way.

<sup>124</sup> The courts consider this in D.C. Circuit Court Decision cited *supra* note 48.

<sup>125</sup> The Court did so in United States Supreme Court Decision from March 7<sup>th</sup> 1949, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

have mentioned in a foregoing part of this thesis, “[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”<sup>126</sup> nonetheless the courts have a difficult task ahead of them even in examining orders issued in an area almost entirely exclusive to the President. Another area which at first might sound as equally uncontested due to the foreign element nearly always involved in it is the President’s authority as Commander-in-Chief – it is not so, however. Due to the fact that Congress alone may declare war and raise and support armies and the navy,<sup>127</sup> courts are much more careful in expanding the powers of the President acting under this authority compared to foreign policy in general.<sup>128</sup> Executive orders are also the subject of judicial review when considering the actions of the President as the supervisor of the entire executive branch.<sup>129</sup> Last but not least interestingly, the fact that Presidents often cite the broad authority of the all the executive power being vested in them by the Constitution for promulgation of an order is also a topic of judicial review. As will be later explained, courts often try to “excuse” the President’s actions by coming to the statutory source of authority by means of a broad judicial interpretation of the intent of Congress. That is not always possible, however, and the courts find themselves considering the validity of the so-called “vesting clause”<sup>130</sup> and the “take care”<sup>131</sup> clause as a sufficient basis for the authority to issue an executive order in a particular case.

Moving on to the next article of the Constitution, another topic of the courts’ consideration when it comes to executive orders is one of their interaction with the judicial branch. As I have established, the Supreme Court has already promulgated its own jurisdiction in examining acts of the President in *Marbury*. Another topic which the courts find themselves considering is one of enforceability. While executive orders should “affect private individuals only indirectly”,<sup>132</sup> very often this is not the case and orders are used to

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<sup>126</sup> United States Supreme Court Decision *supra* note 72.

<sup>127</sup> U.S. Constitution, Art. I, § 8, cl. 11-13.

<sup>128</sup> United States Supreme Court Decision *supra* note 20.

<sup>129</sup> Such as in the United States Court of Appeals District of Columbia Circuit Decision from July 12<sup>th</sup> 2002, *Building and Construction Trades Department, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002).

<sup>130</sup> Referring to U.S. Constitution, Art. II., § 1, cl. 1.

<sup>131</sup> Referring to U.S. Constitution, Art. II, § 3.

<sup>132</sup> U.S House of Representatives, Committee on Government Operations *supra* note 70, p. 1.

grant very specific rights to their addressees<sup>133</sup> or even the executive branch vis-à-vis third parties.<sup>134</sup> The courts then have to consider whether executive orders are able to grant its issuer – the executive branch rights or responsibilities and whether they are able to grant these to private individuals or other third parties. The other contexts in which courts have to evaluate executive orders involve, for the most part, the case or controversy doctrine,<sup>135</sup> the components of which were already explained. Similarly to the case or controversy doctrine, the courts are also faced with considering the appropriateness of judicial review against other means of protection the plaintiff has at his disposal, thus considering the issue of exhaustion,<sup>136</sup> which requires for the plaintiff to have exhausted administrative avenues of remedy available to him before turning to judicial review.

The fourth category of questions the courts examine in relation to executive orders is one of interpretation. Of course, the courts must interpret an order almost<sup>137</sup> every time they are to rule on one. To name the particular and more specific questions of interpretation however: the courts might battle with what type of interpretation to go with in order to best understand a particular executive order,<sup>138</sup> how to interpret the construction of an executive order and its possible severability<sup>139</sup> etc.

Lastly, courts may in examining executive orders identify a possible collision with a constitutionally guaranteed right or one not resulting from the Constitution, but existing

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<sup>133</sup> For example, Executive Order 12968, issued on August 2nd 1995 expressly granted federal government employees the access to classified information and set down various rules connected therewith, including procedures for granting or denying access.

<sup>134</sup> The courts consider the question whether Executive Order 11246 granted the U.S. government a right of action against labor organizations in the case which ended with United States Court of Appeals Fifth Circuit Decision from July 28<sup>th</sup> 1969, *United States v. Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC*, 416 F.2d 980 (5<sup>th</sup> Cir. 1969) which upheld the previous decision and affirmed the notion that this right was, in fact, granted to the government by said executive order.

<sup>135</sup> In such cases the courts evaluate whether the suit before them meets the case or controversy requirement and might find that, for example due to mootness– the case is not fit for judicial review as it was United States Court of Appeals District of Columbia Circuit Decision from September 21<sup>st</sup> 1982, *Halkin v. Helms*, 690 F.2d 977.

<sup>136</sup> The requirement for exhaustion of available administrative remedies was found not to have been met in United States Court of Appeals District of Columbia Circuit Decision from July 14<sup>th</sup> 1955, *National Lawyers Guild v. Brownell*, 225 F.2d 552 (D.C. Cir. 1955).

<sup>137</sup> Sometimes it does not get to that if the plaintiff is not found to have standing, for example.

<sup>138</sup> As the Court did in United States Court of Appeals District of Columbia Circuit Decision from May 27<sup>th</sup> 1938, *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938).

<sup>139</sup> As it was in United States Supreme Court Decision from March 24<sup>th</sup> 1999, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

prior to the executive order. While this surely seems to some like the most interesting context in which executive orders are considered, only a small fraction<sup>140</sup> of cases dealing with executive orders decide whether one violated an individual's constitutional or other rights. However insignificant in number, this context of judicial review of executive orders on the basis of conflict with constitutional rights will be a matter further explored in this thesis.

I believe the above-stated description of the different contexts of judicial review provides a useful insight into the various questions which might arise in connection to executive orders. Since case law doctrine has formed in a considerable extent on some of these contexts of review but not much on others, I decided to provide an overview of all the different contexts of consideration of executive orders while going in on detail on the ones laid out in the following subchapter.

### 4.3 Determining the Validity of Executive Orders

One of the biggest issues I have identified in researching the way courts review executive orders is the lack of uniformity or order. As Newland articulated it: *"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. 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."*<sup>141</sup> While my thesis cannot replace this void in American jurisprudence, I thought that my contribution could lie in a truly comprehensive overview of the role of executive orders in the American legal system and of the way courts review these acts.

As a practical outcome can hardly be reached without a thorough theoretical background, all the points made and knowledge covered prior to this subchapter will now come together. In order to do justice to the, perhaps, daunting name of this thesis' topic, I thought I would create a "judge's handbook" that would serve as a guide to how the courts, in my opinion, should approach judicial review of executive orders. I tried to cover all points

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<sup>140</sup> In the thorough study carried out by Erica Newland, only 13 % of cases were identified which dealt with this issue, see NEWLAND, supra note 114, p. 2038.

<sup>141</sup> NEWLAND, supra note 114, p. 2035.

relevant to this thesis starting from the very first questions to be asked when a suit lands on a judge's desk. I have identified three main areas of the judicial review of executive orders: the part I have chosen to call preliminary questions, then the matter of authority and finally the content of a particular executive order.

### 4.3.1 Preliminary Questions

The first question any judge should ask himself when considering entertaining a case is one of jurisdiction.<sup>142</sup> This is a question where any thought of even considering to decide a case should begin or end – the question of whether the court tasked with evaluating an executive order is the appropriate one. While the question of relevance of jurisdiction in the United States well surpasses the scope of this thesis, I still chose to briefly mention this matter as even this seemingly bulletproof notion of considering jurisdiction first was at times overcome. *Marbury v. Madison*<sup>143</sup> did two things for American review of executive action: it proclaimed jurisdiction and at the same time a sort of ignorance for the consideration of its existence. In this decision, Chief Justice Marshall claimed jurisdiction to review the constitutionality of statutes and other executive action by proclaiming unconstitutional a statute which granted the Court jurisdiction in the matter. Critics of the *Marbury v. Madison* decision, in my opinion rightly, contest the fact that Chief Justice Marshall should have considered only the question of jurisdiction and none other. This is far from the truth, however, as Marshall also expressed his disagreement with the Jefferson administration's refusal to deliver *Marbury* his commission. In doing so, I believe that Marshall overstepped and perhaps breached the case or controversy doctrine in providing sort of an advisory, moral opinion. All was forgiven, however, since Marshall chose to proclaim jurisdiction for review of constitutionality by limiting the scope of the judicial power in the President's favor, an endeavor which can be only characterized as a "*masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.*"<sup>144</sup>

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<sup>142</sup> United States Supreme Court Decision from December 1<sup>st</sup> 1868, *Ex parte McCordle*, 74 U.S. 506 (1868).

<sup>143</sup> United States Supreme Court Decision *supra* note 19.

<sup>144</sup> McCLOSKEY, Robert. *The American Supreme Court*. 5<sup>th</sup> ed. Chicago: The University of Chicago Press, 2010, p. 25.

Having mentioned the case or controversy doctrine, this brings me to the next point of consideration that the judge must give thought to. In order for an action to be successful, the plaintiff must be found to have met all the requirements of the doctrine cumulatively, that is have standing, the issue be ripe and not yet moot and for the opinion sought not to be only advisory. I have explained these requirements in sufficient detail above, but it is at this point that the judge should evaluate each one. Should he find that all these requirements are met, I would then suggest looking at the executive order itself – first at the authority behind its issuance.

### 4.3.2 Authority

From studying literature and especially from the analysis of numerous decisions, both of which were necessary in order to research this topic, I have been able to identify quite a strong reluctance of the courts to “attack” the President’s conduct,<sup>145</sup> in fact they seem to attempt to avoid controversy in dealing with the head of the executive anytime possible. The courts therefore welcome an instance when an otherwise contestable order does not become the subject of judicial review due to lack of jurisdiction or failure to meet the requirements in order for the issue to become a case or controversy. If that all that is met, however, the next aspect of the executive order which the courts consider without having to really analyze its content per se is one of authority.

The first step in determining the authority behind the issuance of a particular executive order is to look at its own wording. The very first sentence of an order in almost all the ones I have come across outlines the authority the President perceives to have to issue said order. These proclamations of authority sometimes list the exact provisions enabling it,<sup>146</sup> sometimes in much less detail list the act providing authority as a whole<sup>147</sup> and other times

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<sup>145</sup> The statistic of the success-rate of the federal government shown in NEWLAND, supra note 114, p. 2040, Figure 4 speaks for itself

<sup>146</sup> President Obama was quite diligent in naming the sources of his authority to issue Executive Order 13662, issued on March 20<sup>th</sup> 2014 wherein he proclaimed “By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,…”

<sup>147</sup> As in Executive Order 12333 supra note 146, wherein President Reagan cited „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”.

only list the vaguest authority there is, citing the Constitution and laws in general.<sup>148</sup> While the President's own view of his authority to promulgate an order is certainly a good place to start, judges would probably receive a considerable deal of criticism were they to accept the President's assertions blindly without conducting their own assessment. The results of this analysis and the implications they posed on the level of scrutiny to be applied to the relevant executive order were summed up by Justice Jackson's concurring opinion in *Youngstown*<sup>149</sup> and is still widely used by courts when determining the validity of the authority behind executive orders and presidential acts in general. I will first outline Jackson's three-part test and subsequently explore the individual tiers and the ways court have dealt with findings of each.

Justice Jackson begins with the source of authority providing for the strongest position of the President – statutory delegation. “*When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate... If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. [An action] executed by the president pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden or persuasion would rest heavily upon any who might attack it.*”<sup>150</sup> This nearly invincible position is, of course, under the supposition that the delegation of power was constitutional in the first place.

The second zone of Presidential authority is one most difficult by courts to analyze, the so-called “zone of twilight”. The President in this situation “*acts in absence of either a congressional grant or denial of authority, [therefore] he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain... In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.*”<sup>151</sup>

Moving on from an uncertain position of the President's powers represented by zone of twilight acts, the final category of presidential action which enjoys the least amount of

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<sup>148</sup> President Clinton cited „by the authority vested in me as President by the Constitution and the laws of the United States of America” in his Executive Order 12968, issued on August 7<sup>th</sup> 1995.

<sup>149</sup> United States Supreme Court Decision *supra* note 20.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*



protection is most easily contested. In such a case *“the President takes measures incompatible with the expressed or implied will of Congress, his power is [thus] at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power... must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”*<sup>152</sup>

In its basic form, Jackson’s test seems relatively easy to perform and to arrive at a conclusion. After all, it would seem that a statute authorizing the President to issue an order either is issued or is not, the will of Congress either is expressed or is not. There are, however, nuanced aspects of each zone of Presidential authority to analyze.

Starting with the first zone of authority, it may sometimes be difficult to ascertain whether a particular act was meant to authorize the President to issue an order – the express language specifically empowering the President to regulate an issue is not always present. In this matter, the courts have established a nexus doctrine in which they search for congressional intent even when the President himself does not cite a specific statute as the source of his authority. President Johnson enjoyed this approach when he only cited the broadest of authorities<sup>153</sup> as the basis for his Executive Order 11246, but the courts aided him in finding a sufficient link between the anti-discrimination provision of his order and an act regulating federal property.<sup>154</sup> The tendency to try and synthesize congressional intent to assume a delegation of authority to the President is clear. Since, as Jackson said, the President’s power is at its maximum when he acts pursuant to a statute, should the court find that a particular executive order was issued upon Congress’ statutory delegation which authorized the President to act in the matter,<sup>155</sup> the President is, so to speak, in the clear. Regardless of its content, there can be no questions raised as to his authority to issue said

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<sup>152</sup> Ibid.

<sup>153</sup> The authority vested in him by the Constitution and the laws of the United States of America.

<sup>154</sup> In United States Court of Appeals for the Third Circuit Decision from April 22<sup>nd</sup> 1971, *Contractors Association v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971) the Court ruled: “No less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson’s first category: action pursuant to the express or implied authorization of Congress.”

<sup>155</sup> Regardless of whether expressly or by examination of congressional intent.

order.<sup>156</sup> What may, however, become an issue is if the President exceeds the authority granted under a particular statute. The provision may enable him to regulate a certain particular issue but he is not allowed to exceed the boundaries set by the statute itself. It is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.”<sup>157</sup> The court here expressly acknowledged that boundaries to the President’s authority must be set and should he exceed these, the aggrieved individuals may contest this in court. Another issue which can be questioned is the matter of delegation by Congress. The President may have been authorized to issue an order and may not have exceeded his powers but was Congress authorized to delegate such power onto the head of the executive in the first place?

The courts’ opinion on congressional delegation of power onto the President has evolved dramatically over the years. In the past, the courts were much more apprehensive in acknowledging the legislature’s ability to delegate certain lawmaking powers onto the President. In fact, in *Panama Refining Co. v. Ryan*, the Court declared that “Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested.”<sup>158</sup> This notion was further upheld in in the same year,<sup>159</sup> but as Chemerinsky summed it up, “[i]n the 60 years since... not a single federal law has been declared an impermissible delegation of legislative power. Although these decision have not been expressly overruled, they never have been followed either. All delegations, no matter how broad, have been upheld.”<sup>160</sup> It is therefore highly unlikely that with the still growing trend of expanding executive authority, a finding similar to that in *Panama* would come about. I find it safe to conclude that should the court find that the authority to issue an order falls under Jackson’s first category, it is virtually undisputable.

As Justice Jackson said in defining the second category of executive authority - the zone of twilight - the actual test of power needs to be carried out in each individual case and

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<sup>156</sup> The order may nonetheless be attacked due to some its provisions infringing on constitutionally guaranteed rights, for example, but that is not a matter of authority to issue said order.

<sup>157</sup> United States Supreme Court Decision from November 25<sup>th</sup> 1946, *American Power & Light CO. v. SEC*, 329 U.S. 90 (1946).

<sup>158</sup> United States Supreme Court Decision from January 7<sup>th</sup> 1935, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>159</sup> United States Supreme Court Decision supra note 73.

<sup>160</sup> CHEMERINSKY, supra note 45, p. 236.

no concise doctrine can be relied upon due to the complex nature of the interbranch dialogue.<sup>161</sup> However, a trend has emerged which tends to rule in favor of the President. One way the courts have tended to uphold the President's supremacy in the zone of twilight is again, either by means of congressional intent or by actual or deduced ex post delegation of authority. The former can be identified in *Dames & Moore v. Reagan*.<sup>162</sup> The Court was able to find express statutory delegation authorizing the President to issue some provisions of the order in question but failed to find the delegation background for others. By means of analyzing the intent of Congress in making the relevant statute, the Court was able to ascertain that "*Congress cannot anticipate and legislate with regard to every possible action the President may find necessary to take or every possible situation in which he might act. 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.*"<sup>163</sup> While in this case, the court tried to find congressional intent to agree with the provisions of an executive order retrospectively in the statute which authorized other actions, most often the attempt to find congressional approval is looked for in the actions or lack thereof taken by Congress ex post.

Courts have identified two ways in which Congress may ex post approve executive action which may otherwise be deemed excessive to the President's Article II authority. The first way is an active one in the form of ratification and the second takes the form of a passive acquiescence. Since the issue of zone of twilight executive orders lies in the fact that the executive may have usurped powers which could have been more of the legislature's domain, express statutory ratification of executive orders done ex post by the legislature rather lacks controversy. The courts have consistently upheld this notion in stating: "*[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 taken.*"<sup>164</sup> The more controversial approach to ex post approval of executive action lies in the passive form of acquiescence. It seems to me that nearly anytime there is even a slight chance of interpreting the action or inaction of

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<sup>161</sup> United States Supreme Court Decision supra note 20.

<sup>162</sup> United States Supreme Court Decision supra note 115.

<sup>163</sup> Ibid.

<sup>164</sup> United States Supreme Court Decision from March 1<sup>st</sup> 1937, *Swayne & Hoyt v. United States*, 300 U.S. 297 (1937) citing United States Supreme Court Decision from 1878, *Mattingly v. District of Columbia*, 97 U.S. 687 (1878).

Congress as such ex post approval, the courts jump at it. The reasons for courts finding congress to have acquiesced to executive orders include Congress knowing about the order and failing to “*repudiate the power claimed*”,<sup>165</sup> even general knowledge of an order’s existence,<sup>166</sup> third party reliance on a particular order<sup>167</sup> and they even went so far as to find acquiescence “*from nothing more than silence in the face of an administrative policy.*”<sup>168</sup> To vulgarize it, the only time courts have refused to find implicit approval of executive orders is when they seem to want to dodge dealing with the question of constitutionality of its contents.<sup>169</sup> Again, the trend to uphold executive authority at the expense of the legislature is apparent.

In the final category provided by Justice Jackson, the President issues an order contradictory to an express or implied will of congress. This action taken by President Truman was the reason for finding his infamous seizure of the steel mills unconstitutional. In face of all the broadenings of executive power demonstrated so far, some solace can be found in that a certain degree of logic still prevails. When the President acts in an area not included in his exclusive powers, Congress has promulgated its authority in the matter and the President issues legislation contrary to the statutory provision – the executive order cannot stand.<sup>170</sup>

### 4.3.3 Content

Although it rarely gets to this point, the courts sometimes acknowledge that they have jurisdiction, the plaintiff has met all the requirements of the case or controversy doctrine, the authority was duly given to the President or he acted within his independent powers within constitutional limits, yet the court still finds the executive order invalid. This is done by the examination of its content, its actual text and provisions which results in a finding either that

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<sup>165</sup>United States Supreme Court Decision from February 23<sup>rd</sup> 1915, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

<sup>166</sup> United States Court of Appeals, District of Columbia Decision from March 23<sup>rd</sup> 1967, *Rose v. McNamara*, 375 F.2d 924 (D.C. Cir. 1967).

<sup>167</sup> United States Supreme Court Decision *supra* note 165.

<sup>168</sup> United States Supreme Court Decision from June 29<sup>th</sup> 1981, *Haig v. Agee*, 453 U.S. 280 (1981) citing United States Supreme Court Decision from May 3<sup>rd</sup> 1965, *Zemel v. Rusk*, 381 U.S. 1 (1965).

<sup>169</sup> The Court refused to find congressional approval in United States Supreme Court Decision from December 18<sup>th</sup> 1944, *Ex parte Endo*, 323 U.S. 283 (1944) in face of questions of constitutional rights.

<sup>170</sup> United States Supreme Court Decision *supra* note 20.

the order was not compatible with a statute based on their contradicting contents or that the order violated a party's constitutional rights.

The more frequently debated and dealt with of the two – the conflict between a statute and an executive order – follows a general underlying premise that shapes the way courts consider disputes between executive orders and statutes. This premise is one promulgated in a judicial decision which acknowledged executive orders to have the force and effect of the law.<sup>171</sup> This is a particularly crucial point that needs to be made for were it not so, this debate would never have originated in the first place. Had the courts deemed executive orders to be inferior to statutes passed by Congress, the situation would have been similar to that of the interaction between federal and state laws. The courts have consistently upheld the federal preemption doctrine<sup>172</sup> which gives supremacy to federal laws over state statutes – a notion stemming from the Constitution's supremacy clause which puts federal laws before state laws. This doctrine then basically dictates that when a federal law is passed which conflicts state laws, the federal statute automatically preempts the state regulation. As I already stated, this is not the case with statutes and executive orders, however.

Since the courts have assigned executive orders and statutes the same position of power and have also applied to them the same interpretation techniques used for statutes,<sup>173</sup> the preferred solution for a collision of these two types of lawmaking tools is one of harmonization of statutory interpretation which dictates 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.”*<sup>174</sup> The Court adapted this approach in *Rattigan v. Holder*.<sup>175</sup> Rattigan, an FBI agent, had made allegations of discriminatory behavior supposedly perpetrated by his superiors. Subsequently, a security investigation of his person was launched, which he deemed to have been retaliation for his speaking up against the alleged discriminatory behavior. Rattigan then brought suit under Title VII of the Civil Rights Act against alleged

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<sup>171</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 1.

<sup>172</sup> For example in United States Supreme Court Decision from April 327<sup>th</sup> 2011, *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

<sup>173</sup> For example in United States Supreme Court Decisions supra notes 139, 169.

<sup>174</sup> United States Supreme Court Decision from December 10<sup>th</sup> 2001, *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001).

<sup>175</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 48.

unlawful retaliation against discrimination claims. The Court seemed to struggle with the racially sensitive aspect of the case not wanting to give way to discrimination while at the same time seeming reluctant to invalidate the executive order allowing for such security investigation. Thus the Court decided to uphold the executive order and the right to Title VII suits when such security investigations were conducted based on “knowingly false” reports made pursuant to the order in question. This decision is particularly worrisome to Congress’ position when it comes to zone of twilight executive orders. This is because in this decision, *“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, intended to preclude “zone of twilight” executive orders of this nature. This case thereby illustrates one means through which courts interpret executive orders to deprive Congress—and its statutes—of their due power.”*<sup>176</sup>

While the tendency to uphold zone of twilight executive orders even in face of seemingly conflicting statutes is clear, there have been a few cases which found conflict between a statute and executive order and struck down the executive order, giving supremacy to the statute. One such case discussed an executive order which expressly banned government contractors from contracting with employers who permanently replace lawfully striking employees, while the Court found by interpretation that the National Labor Relations Act<sup>177</sup> clearly allows contractors to do exactly that. The Court upheld the statutory regulation and struck down the conflicting executive order – unfortunately not for reasons which would at least begin to form a new doctrine of discerning the orders conflicting statutes from those which could be harmonized. The reasons for Congress’ success in this case was simply an extensive body of doctrine specific to the National Labor Relations Act, through analysis of which the court was able to apply the preemption doctrine already formulated to the case at hand. This decision represents one of the few in which the Court expressly favored a statute over an executive order – the trend continues to be very much pro-executive.

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<sup>176</sup> NEWLAND, *supra* note 114, p. 2065-2066.

<sup>177</sup>§ 151-169 of the National Labor Relations Act; 29 U.S.C.

Personally I find the strong favoring of the executive troublesome. No matter how much distrust one may have in the government and perhaps even Congress in particular, I can more easily reconcile with the thought of a substantial body of delegates like Congress representing the will of the nation rather than one single official. If I were a judge tasked with evaluating (especially a zone of twilight) executive order, I would certainly try to analyze the legislature's intent in making the statute, news reports documenting congressional disapproval of the executive order at hand etc. I have to admit that even without indications as to Congress' intent and stance on a particular executive order, I would favor the will of Congress over the President.<sup>178</sup>

Besides coming into conflict with statutes, executive orders can also contradict constitutional rights. Courts, however, seem to be very much reluctant to delve into the often controversial matter of analyzing the constitutionality of executive orders with respect to individual rights and try to avoid this issue altogether by trying to find the reason for striking down an order elsewhere. In *Ex parte Endo*, the Court actually concluded that it went with the fact that Congress failed to ratify the order as the reason for its invalidity so it could avoid "*stir[ring] the constitutional issues which have been argued at the bar.*"<sup>179</sup> As a result, these types of cases form a minute percentage of the cases decided in relation to executive orders, nonetheless a few decisions<sup>180</sup> have been made in which the courts considered whether provisions of an executive order were in violation of constitutionally guaranteed rights. The mere possibility of such a finding sets a hope-invoking precedent that although everything else about an order might be in compliance with the law, the fact that it is in conflict with constitutional rights might invalidate it. While the courts have considered the possible conflict of provisions of an executive order with constitutional rights, I have been able to identify that the closest it came to finding an order unconstitutional was in *Ex parte Endo*,<sup>181</sup>

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<sup>178</sup> Since the both Houses have to reach an agreement in order to pass a law, I find it more difficult to put forth "bad" legislature when so many persons go into deciding whether to make it a law, not forgetting the strenuous process Congress has to go through in order to make a bill an act. There are significantly fewer constraint placed on the executive and the potential of misuse of power is, in my opinion, greater.

<sup>179</sup> United States Supreme Court Decision supra note 169.

<sup>180</sup> For example, the Court considered constitutionality of excluding a particular type of organization from participating in a federal charity drive in United States Supreme Court Decision from July 2<sup>nd</sup> 1985, *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788 (1985), as well as in United States Supreme Court Decision supra note 2. In both these cases, no violation of the Constitution was found, however.

<sup>181</sup> United States Supreme Court Decision supra note 169.

the same decision in which the Court basically refused to rule on the constitutionality per se due to finding lack of congressional approval sufficient for proclaiming the order invalid in that case. Nonetheless I believe that even had the Court found congressional acquiescence, it would have had to find the provisions of the executive order setting up detention camps for Japanese Americans unconstitutional – this conclusion can be reached by analyzing the concurring opinion of Justice Roberts who said “*I conclude, therefore, that the court is squarely faced with a serious constitutional question -- whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution, and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution, she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.*”<sup>182</sup> or Justice Murphy concurring “*I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive, but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.*”<sup>183</sup>

Although obviously highly unlikely and rare, how would a judge arrive at the decision that a particular order violated a party’s constitutional rights? Were executive orders subject to judicial review by the Czech courts and was I the judge tasked with deciding whether an order was constitutional in this respect, I would use the proportionality test and by means of such would either find that the restrictions on constitutional rights imposed by an executive order were proportionate to the underlying public interest or I would arrive at the conclusion that the imposed restrictions were not reasonable and the desired goal could have been achieved by a provision representing a lesser intrusion into constitutional rights. The judges in the United States do not, however, apply the proportionality test, rather they apply the three “levels of scrutiny”.

The lowest level of scrutiny applied when reviewing the constitutionality of a governmental act, including executive orders, is called the “rational basis test”. Under this level of scrutiny, the burden of proof lies on the challenger of said act and he must prove

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<sup>182</sup> Ibid.

<sup>183</sup> Ibid.



that the contested act fails to be rationally related to a legitimate government purpose.<sup>184</sup> This level of scrutiny is applied to acts which may inflict on most constitutional rights with the stricter levels of scrutiny applied to chosen, “more fundamental” ones.

The middle tier of scrutiny to be applied to “more important” rights<sup>185</sup> is one called intermediate scrutiny. In these cases, the burden of proof shifts onto the government which must prove that the questioned regulation is “*substantially related to an important government purpose.*”<sup>186</sup> Stricter standards are applied to both the purpose sought by the regulation as well as the relation of the regulation to such purpose must be substantial.

The third, most intensive type of scrutiny is one of strict scrutiny. When strict scrutiny is applied, the government must show that the regulation is *necessary* to achieve a compelling government purpose. More often than not, when strict scrutiny is applied, due to the nature of the violated rights,<sup>187</sup> the regulations are pronounced unconstitutional. These three levels of scrutiny are therefore not just means of evaluating the constitutionality of an infringing regulation – the level of scrutiny applied, to a large degree, decides the outcome of the case. If I were to be a judge in the position to rule on the possible conflict between an executive order and a constitutional right, I would first identify the right threatened and then apply the respective level of scrutiny to reach a decision.

The analysis of the ways courts may review the actual content and provisions of executive orders concludes the list of options at the courts’ disposal to potentially strike down an executive order. As was demonstrated, most often the reasons for finding an order invalid lie in the very authority behind its issuance and the challenges this poses on the separation of powers, there might however be a smaller number of cases where orders are found void due to other reasons. The reasons for finding an executive order invalid can be summed as follows: lack of authority, conflict with statute or conflict with constitutional right. It is through this lens and by applying the above characterized steps that I will now

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<sup>184</sup> United States Supreme Court Decision from February 24<sup>th</sup> 1988, *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

<sup>185</sup> Including rights not to be discriminated on the basis of gender, non-marital children, the right to free commercial speech or speech in public forums.

<sup>186</sup> United States Supreme Court Decision from December 20<sup>th</sup> 1976, *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>187</sup> Such as right not to be discriminated based on race, national origin, alien status, right to vote, travel, right to privacy, freedom of speech etc.

analyze chosen cases related to executive orders and how I feel they should (have been) decided.

## 5 Case Law Analysis

After laying out all the theoretical background necessary to grasp the essence of executive orders, their place in the separation of powers scheme and the nature of their judicial review, I will now proceed to analyze chosen cases which involve executive orders. The reasoning for choosing the “travel ban” case lies in its current nature and yet unresolved state. I will pay the closest attention to analyzing this case for these reasons and will attempt to formulate a thorough opinion on the legality of the executive orders in question while trying to put my personal bias aside. The next case I chose for its incredibly deep intrusion into fundamental rights is one which involves an executive order which augmented the factors which warrant the death penalty. The third case I decided to analyze is not one decided by the Supreme Court but nonetheless one which has a profound impact on the justiciability of executive order cases.

### 5.1 President Trump’s Travel Ban

I believe that a rather insignificant portion of the American public had much understanding or insight into executive orders. Any particularly controversial ones had been long forgotten and the more recent ones that might spark controversy seemed to generate little interest in contrast to the international upheaval brought on by President Trump’s travel ban orders. In order to analyze the legal issues of the case, I first present its facts.

#### 5.1.1 Facts of the case

On January 27<sup>th</sup> 2017, President Donald Trump signed Executive Order 13769 titled “Protecting the Nation from Foreign Terrorist Entry into the United States”. The President based his authority to issue this order in a provision of the Immigration and Nationality Act<sup>188</sup> and section 301 of title 3 of the United States Code and its aim was to protect the country from possible national security risks by prohibiting foreign nationals with terrorist ties from entering the United States. Among other directives, the order temporarily, for a period of 90 days, suspended entry of foreign nationals<sup>189</sup> from seven predominantly Muslim

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<sup>188</sup> § 1101 et seq . of the Immigration and Nationality Act, 8 U.S.C.

<sup>189</sup> § 3(c) of Executive Order 13769, issued on January 27<sup>th</sup> 2017.

countries,<sup>190</sup> another provision<sup>191</sup> suspended the operation of the United States Refugee Admissions Program for 120 days and reduced the number of refugees admissible within the fiscal year 2017 by over one half, to 50 000.<sup>192</sup> In less than two weeks since its issuance, the order was challenged in court, a restraining order was issued blocking its enforcement<sup>193</sup> and this was upheld on appeal.<sup>194</sup>

Rather than fighting this judicial battle, the administration chose to issue Executive Order 13780 at the beginning of March.<sup>195</sup> The second order, often referred to as EO-2, augmented its list of “undesirable” countries by eliminating Iraq, specifically omitted green card holders from being affected and removed some of the references to religion. However, this order was struck down by before it even went into effect. Two federal courts<sup>196</sup> issued injunctions barring enforcement of the provisions banning foreign nationals from entry into the United States, both on the grounds that upon finding that the order was discriminatory against largely Islamic countries, the order violated the First Amendment Establishment Clause which prohibits the passing of laws prohibiting the free exercise of religion – both of which were upheld on appeal.<sup>197</sup> Subsequently, the Supreme Court agreed to hear the case and for the time being removed parts of the lower court injunctions “*with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States.*”<sup>198</sup> The Supreme Court thus kept the injunctions in place in the extent that persons with bona fide ties to

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<sup>190</sup> These countries being Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

<sup>191</sup> § 5(a) of Executive Order 13769, issued on January 27<sup>th</sup> 2017.

<sup>192</sup> § 5(d) of Executive Order 13769, issued on January 27<sup>th</sup> 2017

<sup>193</sup> United States District Court Western District of Washington Decision from February 3<sup>rd</sup> 2017, *Washington v. Trump*, No. C17-0141JLR, 2017, WL 462040 (WD Wash. Feb. 3, 2017).

<sup>194</sup> United States Court of Appeals for the Ninth Circuit from February 9<sup>th</sup> 2017, *Washington v. Trump* 847 F. 3d 1151 (9<sup>th</sup> Cir. 2017).

<sup>195</sup> Executive Order 13780, issued on March 6<sup>th</sup> 2017.

<sup>196</sup> United States District Court for the District of Maryland Decision from March 16<sup>th</sup> 2017, *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) and United States District Court for the District of Hawaii Decision from March 29<sup>th</sup> 2017, *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)

<sup>197</sup> United States Court of Appeals for the Fourth Circuit Decision from May 25<sup>th</sup> 2017, *International Refugee Assistance Project v. Trump*. 857 F. 3d 554 (4<sup>th</sup> Cir. 2017) upholding the Maryland decision and United States Court of Appeals for the Ninth Circuit Decision from June 12<sup>th</sup> 2017, *Hawaii v. Trump*, 859 F. 3d 741 (9<sup>th</sup> Cir. 2017) upholding the Hawaii decision.

<sup>198</sup> United States Supreme Court Decision from June 26<sup>th</sup> 2017, 582 U.S. \_\_\_, *Trump, et al. v. International Refugee Assistance Project, et al. and Trump, et al. v. Hawaii, et al.*, Nos. 16-1436 and 16-1540.

American persons or entities were exempt from the enforcement of the order but stayed the injunctions with respect to persons lacking such bona fide.

In September of 2017, yet another travel ban<sup>199</sup> was put in place, this time by means of presidential proclamation.<sup>200</sup> In the third travel ban, the list of countries whose nationals were barred from entering the United States was augmented once more,<sup>201</sup> this time based on a report submitted by the Secretary of Homeland Security. In contrast to the first and second executive orders, this travel ban put no time limitations on the prohibition of entry of nationals from selected countries, it did, however, expressly exclude persons with bona fide relationships. Even after being altered once more, the third travel ban was again challenged in court which resulted in two court of appeals decisions,<sup>202</sup> both of which mostly upheld lower court injunctions. A very significant difference occurred this time around, however, when the Supreme Court stayed the injunctions in full and provided that this order would terminate after this Court enters its judgement if a petition of certiorari is sought and granted.<sup>203</sup> Naturally, the Government filed such petition thus making the order staying the relevant injunctions valid until the Supreme Court definitely rules in the matter. This resulted in a full enforcement of the travel ban which is still taking place. The Supreme Court has agreed to hear oral arguments concerning the legality of the third travel ban on April 25<sup>th</sup> 2018 and again, until it rules in the matter, the travel ban can be fully enforced.

### 5.1.2 Analysis

The task standing before the Supreme Court is not a simple one. The Court must analyze all the facts of the case, weigh the parties' interests against one another while also keeping in mind the public interest, look into the constitutional aspects of the case all the while realizing the delicate nature of examining the President's actions and the separation of powers issues

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<sup>199</sup> I will be using the term „travel ban“ to refer to the policies in general, with the one effective currently being the one set down by the Presidential Proclamation.

<sup>200</sup> Presidential Proclamation 9645, issued on September 24th 2017.

<sup>201</sup> Now these countries included Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.

<sup>202</sup> United States Court of Appeals for the Fourth Circuit Decision from February 15th 2018, *International Refugee Assistance Project v. Trump*. No. 17-2231 upholding the Maryland decision and United States Court of Appeals for the Ninth Circuit Decision from December 22th 2017, *Hawaii v. Trump*, 17-17168 (9<sup>th</sup> Cir. 2017) upholding the Hawaii decision.

<sup>203</sup> United States Supreme Court Order in Pending Case from December 4<sup>th</sup> 2017, *Trump, et al. v. International Refugee Assistance Project*, 583 U.S. \_\_\_\_, 17A560 and United States Supreme Court Order in Pending Case from December 4<sup>th</sup> 2017, *Trump, et al. v. Hawaii, et al.*, 583 U.S. \_\_\_\_, 17A550.

which inherently accompany any such review. I will now try to analyze the case from the standpoint of a Supreme Court Justice, following the guideline I have delineated in the foregoing chapter.

The first question any court must ask itself before delving into any case is one of jurisdiction. Before establishing jurisdiction over a matter, the court should not even begin to evaluate the standing of the plaintiffs, much less the merits of the case. The basic jurisdiction to review presidential acts is established thanks to *Marbury v. Madison*,<sup>204</sup> the Court has done so many times in the past and it is certainly not a novel idea that the Supreme Court is authorized to review the legality of executive orders.<sup>205</sup> The Supreme Court also undoubtedly has jurisdiction to review decision of the federal appeals courts by means of granting petitions for writs of certiorari, so jurisdiction is also established in this aspect. In fact, jurisdiction was nearly undisputed by the federal government, they did however raise one issue and that is the doctrine of consular nonreviewability. Under this doctrine established by the courts, *“it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”*<sup>206</sup> While it can be understood that the government attempted to have the case “thrown out” on any grounds accepted by the court, this attempt was quite a feeble one. Its fault lies in the fact that the consular nonreviewability doctrine applies to individual acts of government officials to deny visas to a *given* alien. The travel ban obviously has far-reaching effects and may potentially affect around 200 million foreign nationals and their relatives in the United States. Such a sweeping policy cannot be equated to a single decision to exclude a particular alien. After all, should the court not have jurisdiction over such a significant policy instated by a presidential act, the balance of powers would be severely offset and this idea *“runs contrary to the fundamental structure of our constitutional democracy.”*<sup>207</sup> It is for all these reasons that I would be greatly surprised if the Supreme Court found that it did not have jurisdiction in this matter and it is my strong opinion that it does.

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<sup>204</sup> United States Supreme Court Decision supra note 19.

<sup>205</sup> When I refer to executive orders in this subchapter I also mean to include the presidential proclamation instituting the third travel ban as they have the same binding effect and the same conditions for review.

<sup>206</sup> United States Supreme Court Decision from January 16th 1950, *Kanuff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>207</sup> United States Court of Appeals for the Ninth Circuit Decision supra note 202.

After having found that the Court has jurisdiction to rule in the case, the requirements of the case or controversy doctrine must be analyzed. The first of the criteria a matter must meet in order to be deemed a justiciable case or controversy is that the opinion sought is not merely advisory. In order to avoid seeking an advisory opinion, there must be an actual dispute between adverse litigants who have opposing interests, a requirement which is undoubtedly, satisfied in the travel ban litigations. The other requirement is that there must be a substantial likelihood that a federal court decision will have some effect or remedy the situation. This is certainly the case in the travel ban disputes. Due to the fact that the Supreme Court has stayed all injunctions until it resolves the issue, the possibility of the Supreme Court's ruling that the travel ban was illegal and thus unenforceable would bring significant change and remedy to the original plaintiffs' situations. A finding that the dispute does not qualify as a case or controversy due to it seeking only an advisory opinion is thus, in my view, not a possibility.

The second requirement is one of ripeness which requires for the case presented to be fit for review in terms of not seeking a premature decision and the harm suffered cannot be based on contingent future events which may or may not take place. A lack of ripeness cannot reasonably be argued with respect to foreign nationals lacking bona fide relationships with persons or entities in the U.S. – the enforcement of the travel ban immediately causes harm with no future action necessary. Notwithstanding that, a lack of ripeness was argued by the government with respect to persons with potential bona fide relationships. The argument lay in the allegation that since the travel ban provided for a waiver that could be issued to persons who are successful in proving bona fide, the claim of harm caused is contingent on the future uncertain event of possibly denying to grant such a waiver and thus is not ripe for review. I do not think that this argument will hold up, however. If part of the harm caused is seen in the impossibility of reunification of family members or the delay of such, the prospect of a waiver being granted presents an additional hurdle that would further delay the reunification. This notion has a jurisdictional basis wherein the courts found that a particular claim was ripe where *“assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then*

*the additional hurdle itself is illegal whether or not it might have been surmounted*".<sup>208</sup> Therefore I believe that the claims, even with respect to foreign nationals with bona fide ties, will be found ripe.

Another requirement formulated by the case or controversy doctrine is for the claim not to be moot due to the passage of time which in some cases renders the claim void and not justiciable. The Supreme Court actually considered the possibility of the case being dismissed as moot in its June 2017 decision to partially stay the injunctions.<sup>209</sup> Therein it expressed the idea that if the time limitation for the first two travel bans had expired, the case would have no longer been subject to judicial review for it would have been mooted by the passage of time. This possible defect was remedied by a Presidential memorandum from June 14 2017 which extended the time periods for the second travel ban until the injunctions were lifted or stayed with respect to the relevant provision. In the current case which is to be decided by the Supreme Court, the claim cannot be found moot since the most recent travel ban suspended the entry of the designated foreign nationals indefinitely with no time period after which the ban would expire.

Lastly and perhaps most importantly under the case or controversy doctrine, the court must find that the original plaintiffs had standing to bring the respective suits in the first place. Since all actions included multiple plaintiffs, it must first be stated that it is sufficient for only one plaintiff to prove he has standing and thus render the action justiciable.<sup>210</sup> In order to establish standing in a case, the plaintiffs of the original actions must first prove that they were personally affected and suffered injury by an unlawful conduct of the government, this time the allegedly unlawful executive orders, resp. presidential proclamation instating the travel ban. The original plaintiffs ranged from individuals, to Islamic associations, organizations helping refugees, universities and even States. As I said, if any of these subjects is found to have standing, it is sufficient to render the case justiciable. Therefore, I believe that it is sufficient to explore the standing of subjects that are most likely to be found to have it and in this case, the most likely subjects seem to be the individuals rather than organizations. Their standing can be analyzed from two points of view, one is the denial of

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<sup>208</sup> United States Court of Appeals for the Eleventh Circuit Decision from June 8<sup>th</sup> 1994, Jackson v. Okaloosa Cty., 21 F.3d 1531 (11<sup>th</sup> Cir. 1994).

<sup>209</sup> United States Supreme Court Decision supra note 198.

<sup>210</sup> See for example United States Court of Appeals for the Fourth Circuit Decision from July 28<sup>th</sup> 2014, Bostic v. Schaefer, 760 F. 3d 352.



entry of a plaintiff's family member thus preventing the family from being reunited or also standing might be analyzed with relation to the religiously discriminatory language of the travel bans and especially other statements by their author thus finding an official condemnation of the plaintiff's religious view by their government. In the original "Hawaii" case, one of the plaintiffs was Dr. Elshikh who asserted that his personal injury lay in the travel ban preventing his brother-in-law from being reunited with his family and also in the travel ban being, in his opinion, targeted at Muslims thus making their association with people of other faiths less free. The anonymous plaintiffs in the original "Maryland" action named John Doe 1 and 2 asserted essentially the same claims for standing, the separation from their son-in-law and mother, respectively. The first claim of standing to analyze is one asserting that an American national suffers immediate harm by his family member being denied entry into the United States thus preventing reunification of the family. The government, naturally, disputed this claim arguing that for one, foreign nationals have no right of entry in to the United States and furthermore, an American national as an alien's relative has no right to participate in visa proceedings. This contradicts the federal courts' and Supreme Court's ruling wherein they reviewed the merits of cases where the claimant's standing was based on having an interest in the outcome of visa proceedings of a relative wanting to enter the United States,<sup>211</sup> the courts even found that claimants had standing to challenge the denials of visas of persons invited to attend meetings or speak before audiences.<sup>212</sup> I think it is obvious that the courts have clearly expressed that a relative or even other form of associate of an alien who was denied visa has standing to challenge such a denial – what is more, a policy preventing the issuance of visas to all relatives from the designated countries. In my opinion this finding would suffice in order to conclude that the original plaintiffs have standing in the case, nonetheless I will also explore standing on the basis of possible infringement on constitutional rights. A crucial question in evaluating the

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<sup>211</sup> See for example United States Supreme Court Decision from June 15<sup>th</sup> 2015, *Kerry v. Din*, 576 U.S. \_\_\_\_, 13-1402 or United States Court of Appeals for the Ninth Circuit Decision from June 21<sup>st</sup> 2016, *Cardenas v. United States*, 826 F. 3d 1164 (9<sup>th</sup> Cir. 2016).

<sup>212</sup> See for example United States Supreme Court Decision from June 29<sup>th</sup> 1972, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) or United States Court of Appeals for the District of Columbia Circuit Decision from March 11<sup>th</sup> 1986, *Abourezk v. Reagan*, 785 F. 2d 1043, affirmed by an equally divided court by United States Supreme Court Decision from October 19<sup>th</sup>, 1987, *Reagan v. Abourezk* 484 U.S. 1 (1987).

travel ban is whether to analyze the text of the proclamation alone and the motivations expressed therein or whether a larger context must be taken into view, meaning an analysis of the President's public statements in office, while running for office or on twitter. This is not a question which needs to be answered when determining standing, however. After all, "*Standing is not about who wins the lawsuit; it is about who is allowed to have their case heard in court*"<sup>213</sup>. At this stage, the court need not find that a violation of a constitutional right or provision actually occurred and that the travel ban was discriminatory on the basis of religion, all it needs to conclude is that if the violation is found, it infringes on constitutional rights of the plaintiff. I would, again, rely on case law which has already established standing in finding that a concrete injury can be found "*produced by government condemnation of one's own religion or endorsement of another's in one's own community.*"<sup>214</sup> The first requirement of standing – having personally suffered an injury is thus satisfied. Should the court find a condemnation of the claimants' religious beliefs, they would be found to have suffered a concrete injury. This brings me to the second requirement – one which requires for the injury to be related to the defendant's, in this case the government's, allegedly unlawful conduct.<sup>215</sup> In this matter I would, again, argue by using already established case law, the best applicable one stemming from a 1978 Supreme Court decision.<sup>216</sup> In this case, the court examined whether plaintiffs had standing to challenge the constitutionality of an act which provided for the construction of a nuclear reactor and which also limited the liability of utility companies in the event of an accident. The court's conclusion was that causation was found and the injury suffered was traceable to the challenged act due to the fact that *but for* the act and *but for* the limitation of liability, the power plants would not be built or operated.<sup>217</sup> I think the same rationale can certainly be applied to the travel ban case. Were it not for the proclamation instituting the travel ban, and *but for* this proclamation, the injuries would not have incurred at all –the harm is clearly traceable to the allegedly unlawful conduct. Lastly, as I have established in the

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<sup>213</sup> United States Court of Appeals for the Ninth Circuit Decision from October 22<sup>nd</sup> 2010, Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F. 3d 1043 (9<sup>th</sup> Cir. 2010).

<sup>214</sup> Ibid.

<sup>215</sup> This requirement is often titled "causation".

<sup>216</sup> United States Supreme Court Decision from June 26<sup>th</sup> 1978, Duke Power Co. v. Caroline Environmental Study Group, 438 U.S. 59 (1978).

<sup>217</sup> Ibid. The plaintiffs were found to have standing even though the act in question was determined to be constitutional.

foregoing chapter, in order for standing to be established, the harm must be likely to be redressed by the requested relief.<sup>218</sup> I am of the opinion that the matter of redressability is very much clear in this case. Should the Supreme Court find that the proclamation was unlawful, unconstitutional, lacking authority or invalid due to any other reason, it would thus render the relevant provisions barring the aliens' entry invalid and remove the barrier and harm entirely. I believe that especially the individual plaintiffs in the original actions clearly have standing in meeting all three requirements of the "standing test" and since only one plaintiff's standing is sufficient, the action is justiciable and the court may move on to examining the actual merits of the case.

Once the court has concluded that it has jurisdiction and all requirements of the case or controversy doctrine have been met, it should now, according to the foregoing chapter and the steps I have delineated there, consider the authority to issue the order or proclamation in the first place. As I established, the first place I believe a judge should look at when examining authority is the act itself. Most often the act begins by stating the authority to issue it. While it takes the Proclamation a little longer than most executive orders, it does state "*Now, therefore, I, Donald J. Trump, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that...*"<sup>219</sup> Out of those provisions, the one most relied upon to justify the previous orders and now the Proclamation is provision § 1182(f) of the Immigration and Nationality Act which provides "*Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*" Facially, this provision of a statute duly passed by Congress seems to authorize the President's actions. At first glance it appears as though he did suspend a class of aliens allegedly due to the fact that their entry into the country would be detrimental to it and he did so, at least originally, for a period he deemed necessary. When applying Justice Jackson's test to determine the

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<sup>218</sup> This requirement is often referred to as "redressability".

<sup>219</sup> Presidential Proclamation supra note 200.

source of authority and the level of scrutiny which should be applied to it, it would seem that the category most in compliance with the above-stated would be the first one, concluding that the President acted pursuant to an express statutory delegation and that his authority is thus at its strongest. Even though I do not harbor much positive sentiment towards the current President of the United States, I believe that he, or his team rather, has quite skillfully crafted the proclamation. The administration learned from the ongoing actions what the gravest issues were and I believe it cleverly adapted the new proclamation to suit the findings in those cases. The list of countries went on to include non-Islamic countries like Venezuela and North Korea making it harder to claim a religious motivation, this list was claimed to have been the result of an extensive report on the security standards of these countries conducted by multiple government agencies, persons with bona fide ties were expressly excluded, etc. I do not think it is inconceivable that the Court would deem the President to have acted within the statutory delegation stated above. I, however, disagree with such a categorization.

Logically, the first category defined by Justice Jackson cannot include situations when the President exceeds his authority pursuant to the statutory delegation. Were it so, the President could very easily become an authoritarian ruler augmenting and exceeding the boundaries of statutory delegations at his will. In this case, I believe such an overreach of authority took place. This conclusion can be reached upon analyzing multiple factors and aspects of the case but I will go into the most important ones. First of all, I believe two things which the President failed to respect follow from a simple reading of the delegation provision. First, that he is authorized to *suspend* the entry of particular aliens into the country and second, that he is to do so for a time *period* he deems necessary. By the most recent Proclamation, Donald Trump did not suspend the entry of foreign nationals from the chosen countries – he prohibited them from entering entirely. Why? Because he failed to impose a time period during which this regulations was to be effective. Congress seemed particularly careful in crafting the text of this provision, saying that the suspension may be only for a time period and a time period *necessary* at that. The government argues that the lack of time limitation and overall text of the Proclamation serves the purpose of incentivizing the affected countries to better their sharing of information and cooperation with the American government, eliminate the risk criteria identified etc. The “time period necessary”

thus must be articulated to be indefinite since there is no way of knowing when these countries will institute the expected changes. The issue with this approach, however, lies in the fact that there is no way of knowing whether this regulation will actually lead the selected countries to implement such changes – the proclamation may then become perpetual and indefinite in time. It is for all these reasons that I believe the Proclamations should be categorized under the first tier of Justice Jackson’s test.

The second reasoning for finding an abuse of the authority pursuant to the statutory delegation lies in identifying the overall authority to make regulation in the area of immigration, the expressed will of Congress in the matter and the related case law. In few areas of regulation have the courts been as clear as they have with respect to immigration. The fact that “*the formulation of ... policies [pertaining to the entry of aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government... We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens.*”<sup>220</sup> Likewise, the Supreme Court “*has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.*”<sup>221</sup> It follows from these very strong words and from the sweeping regulations contained in the Immigration and Nationality Act that Congress very unlikely intended to delegate *such* a large scope of power as the President has usurped – and even if it did, I believe it may have been qualified as an unlawful delegation of power to the executive. Of course, little dispute can be raised over the fact that certain aspects of immigration policies may be left for the executive to decide. But to let it indefinitely suspend the entry of 200 million potential family members and associates of American nationals seems excessive at best. To further solidify this point, the Proclamation claims that its aim is to prevent terrorists from entering the United States and to enhance vetting capabilities to achieve this goal. The issue with this notion is that Congress has actually acted in the matter, in the very own Immigration and Nationality Act

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<sup>220</sup> United States Supreme Court Decision from May 24<sup>th</sup> 1954, *Galvan v. Press*, 347 U.S. 522 (1954).

<sup>221</sup> United States Supreme Court Decision from April 26<sup>th</sup> 1977, *Fiallo v. Bell*, 430 U.S. 787 (1977) citing United States Supreme Court Decision from June 1<sup>st</sup> 1909, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

the President relies on by deeming any alien related to terrorist activities inadmissible<sup>222</sup> as well as creating numerous other inadmissibility grounds<sup>223</sup> and addressing vetting capabilities by an amendment as recent as 2015.<sup>224</sup> It is due to this fact that Congress has clearly expressed a will to regulate these issues and regulate them differently that I do not believe the Proclamation is capable of falling within Justice Jackson's second category, the so-called zone of twilight regulation. My view that the President actually acted contradictory to an expressed will of Congress is upheld by § 1152(a)(1)(A) of the Immigration and Nationality Act which prohibits nationality-based discrimination of aliens – a provision clearly contradicted by the Proclamation. The Proclamation thus, in my opinion, meets the criteria to be placed under Jackson's third, weakest source of authority and should be subjected to the highest scrutiny.

Having said all that and being quite convinced of my stance, I still cannot with confidence (as I did with respect to mootness, for example) ascertain that the Supreme Court will agree with me. It must be stated that the Courts have been very adamant in upholding presidential action in the area of foreign policy and national security especially. As the courts have recognized "*the generally accepted view that foreign policy was the province and responsibility of the Executive*",<sup>225</sup> they are consistently very much reluctant to interfere with the Executive's authority in the military and national security affairs.<sup>226</sup> Referring to this practice and the now facially neutral language of the Proclamations, I worry that the Court is quite likely to find that due to the subject matter, it is willing to overlook deficiencies which may otherwise be key and uphold the President's "authority". It is for this reason of uncertainty that I will also move on to the next step of my guideline and explore the possible infringement on constitutional rights though to the displeasure of the Supreme Court,<sup>227</sup> even though I believe that the lack of authority alone is enough to vacate the travel ban.

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<sup>222</sup> § 1182(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C.

<sup>223</sup> For example § 1182(a)(2)(A), § 1182(a)(2)(B) or § 1182(a)(3) of the Immigration and Nationality Act, 8 U.S.C.

<sup>224</sup> §1187 of the Immigration and Nationality Act, 8 U.S.C

<sup>225</sup> United States Supreme Court Decision *supra* note 168.

<sup>226</sup> See for example United States Supreme Court Decision from March 9th 1953, *Orloff v. Willoughby*, 345 U.S. 83 (1953), United States Supreme Court Decision from June 21st 1973, *Giligan v. Morgan*, 413 U.S. 1 (1973) or United Supreme Court Decision from June 13th 1983, *Chappell v. Wallace*, 462 U.S. 296 (1983).

<sup>227</sup> Since the Supreme Court expressed in its Decision from April 18th, 1989, *American Foreign Svc. Ass'n v. Grafinkel*, 490 U.S. 153 (1989) "Particularly where, as here, a case implicates the fundamental relationship between the Branches, the courts should be extremely careful not to issue unnecessary constitutional rulings."

While I find it quite unlikely that the Supreme Court will consider the constitutionality of the original plaintiffs' claims, if it were to do so, the first matter which I believe it would have to resolve is one of interpretation. The government understandably argues that courts should look only into the wording and text in the Proclamation and evaluate it as such. The other position holds the view that the Proclamation should be evaluated in context with other acts made by the President, whether in his campaign for office, his statements after being inaugurated as well as his Twitter posts. I am of the opinion that a strict keeping to the text of the Proclamation while ignoring the slew of anti-Islamic statements<sup>228</sup> made by President Trump would defy logic. The analysis of the related context will provide crucial insight into the motivation behind issuing a travel ban directed at the countries it was directed at and I believe there will remain little doubt as to the motivation after reading a plethora of statements like when the President "*called for a total and complete shutdown of Muslims entering the United States*"<sup>229</sup> or the President's advisor claiming that the first executive order was meant to deliver on Trump's promise to "*ban Muslim immigration to the United States*".<sup>230</sup> Not only would an analysis of the accompanying context and statements provide significant clues to the actual motivation behind the ban, this approach is in fact approved and recommended by the Supreme Court. It held that "*the court should not confine itself to examining a particular statutory provision in isolation*", instead it should "*place the provision in context*" and "*be guided to a degree by common sense*."<sup>231</sup> The Court was even more articulate in a very similar case with action arising from an animus towards Islam in asserting that "*[t]he ... argument that purpose in a case like this should be inferred only from the latest in a series of governmental actions, however close they may all be in time and subject, bucks common sense. Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'*"<sup>232</sup>

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<sup>228</sup> The 4th Circuit Court in its nearly 300 page Decision supra note 202 undertook the painstaking task of listing nearly all of the religiously discriminatory statements against Islam so I see no purpose in repeated them in the text of this thesis.

<sup>229</sup> United States Court of Appeals for the Fourth Circuit Decision supra note 202.

<sup>230</sup> Ibid.

<sup>231</sup> United States Supreme Court Decision from March 21<sup>st</sup> 2000, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>232</sup> United States Supreme Court Decision from June 27<sup>th</sup> 2005 *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), quoting United States Supreme Court Decision from June 19<sup>th</sup> 2000, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

After rightfully analyzing the Proclamation while keeping in mind the anti-Islamic statements made, it is now appropriate to evaluate whether the Establishment Clause was violated by such Proclamation. Of course this clause prohibits a law establishing a religion or banning a free exercise of one,<sup>233</sup> but its violation can be found in more subtle forms than the two foregoing extremes, since “[f]eelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion that they are outsiders, not full members of the political community.”<sup>234</sup> The original plaintiffs certainly claimed such feelings of marginalization and feelings of being excluded on the basis of their religion by their own government, resp. President. Should the court find, and I believe it should, that the travel ban was born out of an animus for Islam, I believe it only logical to assert a violation of the Establishment Clause on the above-stated grounds. Not only did the plaintiffs assert deep emotional distress at feeling outed due to their religion, they also found constitutional-based injury in the fact that they the separation from their family members was prolonged due to the travel ban. If the court found that the provisions of the Proclamation were unconstitutional due to the religious discrimination and violation of the Establishment clause, the travel ban would be rendered invalid and the court would need look no further. I, however, believe that there is still another level on which the travel ban is unconstitutional and that is due to failing the strict scrutiny test.

Without considering the religious context, it is quite easily ascertained that the travel ban is discriminatory against nationals from the selected countries being in a position of aliens with regard to the United States. The ban prohibits these individuals of specific nationality from entering the United States while allowing others to enter freely. While the government might claim that the discrimination is acceptable with regard to the public’s interest in keeping terrorist out of the country, in order to prove this claim it must pass the strict scrutiny test.<sup>235</sup> As I have already explained, under the strict scrutiny test, the burden of

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<sup>233</sup> U.S. Constitution, 1<sup>st</sup> Amendment.

<sup>234</sup> United States Court of Appeals for the Fourth Circuit Decision from June 28<sup>th</sup> 2012, *Moss v. Spartanburg County School Dist. Seven*, 683 F.3d 599 (4<sup>th</sup> Cir. 2012), internal citation omitted.

<sup>235</sup> United States Supreme Court Decision from July 1<sup>st</sup> 1985, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) asserting that “the general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that



proof lies on the government which must prove that the regulation is necessary to accomplish a compelling government purpose. I have no doubt that the government would be able to argue that national security and the need to protect the country from terrorist attacks is a compelling government purpose. I do however raise objection to the other requirement – that the regulation is *necessary* to accomplish such a goal. In my view, there are multiple other measures which could have been put in place by means of amendments to the Immigration and National Act. Besides the provisions already in place and effective, the statute (or even a presidential act) could have put in place stricter requirements for issuing visas to risk-bearing individuals across the board and not just from designated countries. I could even reconcile with a regulation which would put tougher requirements on visa applicants from risk-bearing countries. Even without sufficient information and cooperation from countries that the government likes to refer to as the reason for the suspension of entry, the strictest of regulations could be put in place with respect to these countries – as if the government assumed that the outcome of the information provided was the worst possible one as regards risk criteria. However I look at it, I cannot find a reasonable, much less a necessary basis for the complete and indefinite ban of entry of foreign nationals into the country.

This point concludes my analysis of the travel ban case. I believe I have proven that the Proclamation instituting the travel ban would not stand on all fronts. The original plaintiffs had standing and met all other requirements of the case or controversy doctrine to seek the invalidation of the ban, the President lacked authority to issue it in such a sweeping fashion in the first place, the travel ban is in direct conflict with a Congress-enacted statute and it also violates constitutional rights on the basis of violating the Establishment Clause as well as discriminating against persons on the basis of nationality and alien status.

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laws grounded in such considerations are deemed to reflect prejudice and antipathy ... For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny“.

## 5.2 Loving v. United States

I chose this case to analyze due to the shocking nature of the facts of the executive order in question. I believe that much of contemporary continental Europe has a difficult time making peace with the existence of the death penalty in a majority of the United States<sup>236</sup> or anywhere in the world for that matter. The concept is now so foreign to European countries and certainly to myself that I thought that an analysis of a case permitting the President to play a vital role in the imposing of the death penalty would be at the very least interesting, but also would serve well to illustrate the power of the President, resp. executive orders in the United States.

### 5.2.1 Facts of the case

In the 1996 case<sup>237</sup>, the background of the facts lies in a crime committed by Army Private Dwight J. Loving. In the night of December 12<sup>th</sup> 1988, Loving decided to rob a group of taxi drivers. During the course of the robbery, Loving murdered two of the taxi drivers and attempted to murder a third but this driver was able to disarm his attacker and escape. Loving was arrested the following afternoon and he confessed to his crimes.

As an Army private, Loving stood trial before a military court, after the conclusion of which he was found guilty of premeditated murder and felony murder by an eight-member general court-martial and subsequently sentenced to death based on a unanimous decision. The judges agreed that three aggravating factors stipulated in the Rule for Courts-Martial were found to be present: first, that the premeditated murder of the second driver was committed during the course of a robbery,<sup>238</sup> that Loving was the triggerman in the felony murder of the first driver<sup>239</sup> and that Loving, having been found guilty of premeditated murder had also committed a second murder which was all proved at a single trial.<sup>240</sup>

The legal dispute in the case lay in the fact that these aggravating factors that enable the death penalty to be imposed were set by an executive order promulgating the manual for

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<sup>236</sup> The death penalty is currently legal in 31 states, the federal government and the military.

<sup>237</sup> United States Supreme Court Decision from June 3<sup>rd</sup> 1996, *Loving v. United States*, 517 U.S. 748 (1996).

<sup>238</sup> Rule for Courts-Martial 1004(c)(7)(B), part of the Manual for Courts-Martial

<sup>239</sup> Rule for the Courts-Martial 1004(c)(8), part of the Manual for Courts-Martial.

<sup>240</sup> Rule for the Courts-Martial 1004(c)(7)(J), part of the Manual for Courts-Martial,

courts-martial of 1984.<sup>241</sup> The provisions of the executive order determining the aggravating factors in death penalty considerations were based on the statutory delegation included in Article 56 of the Uniform Code of Military Justice which provides that “[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense”<sup>242</sup> and a provision which states that a court-martial “may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by the Code.”<sup>243</sup>

### 5.2.2 Analysis

As I have provided before, the Court must first analyze the question of jurisdiction in the matter. The case at hand found its way before the Supreme Court, as most cases do, by means of a petition for writ of certiorari to be granted. Since the first and appellate instances were military courts, the question of whether the Supreme Court has jurisdiction over such a decision may arise. The United States Code regulates the instances when the Supreme Court is authorized to review military court decision and among others, allows the Court to review cases in which a death sentence has been affirmed by the relevant Court of Criminal Appeals.<sup>244</sup> The Supreme Court thus has jurisdiction to hear this particular case as well as jurisdiction to potentially review the legality of the executive order in question.<sup>245</sup>

Next, it is necessary that the case qualifies as a case or controversy under the Constitution. This analysis needs to be much less extensive than in the previous case analyzed since I cannot think of any set of facts more fit for review as a case or controversy than one which concerns the possibility of the government essentially taking an individual’s life. A decision which could invalidate a criminal’s death sentence can under no circumstances be considered merely an advisory opinion – a clear dispute exists between the parties and the chances that a remedy which the Court may issue would affect or change the situation cannot even be characterized as a “likelihood”. Should the Court decide to vacate Loving’s death sentence, the change brought by the decision would mean a sparing of his life – I cannot

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<sup>241</sup> Executive Order 12473 – Manual for Courts Martial, issued on April 13<sup>th</sup> 1984.

<sup>242</sup> Article 56 of the Uniform Code of Military Justice, 10 U.S.C.

<sup>243</sup> Article 18 of the Uniform Code of Military Justice, 10 U.S.C.

<sup>244</sup> § 1259 of Judiciary and Juridical Procedure, 28 U.S.C.

<sup>245</sup> United States Supreme Court Decision supra note 19.

conceive a more significant effect a decision may bring. The requirement of ripeness is also wholly satisfied. The defendant has been sentenced to death, a sentence upheld by all courts of appeals and if the Supreme Court does not rule in his favor, the defendant may be executed at any given time.<sup>246</sup> Since on the main factors evaluated to render a case ripe is “*the hardship to the parties of withholding court consideration*”<sup>247</sup> and withholding a consideration by the court means enforcement of the death penalty, ripeness is entirely satisfied. Even if the argument was raised that not all death row inmates end up being executed and most die while awaiting execution, I believe that the fact that he was sentenced to death alone constitutes at least a psychological injury not contingent on any other future events. The case also certainly does not meet the criteria to be considered moot. Though a capital punishment case can be considered mooted by an abolishment of the death penalty under the relevant jurisdiction as was the case in numerous California convictions,<sup>248</sup> this is not the case with Loving. The death penalty was not abolished under the military justice system and can be fully enforced. The question whether Loving has standing need not even be asked, in my opinion, nonetheless I will briefly address the three criteria which make him a “model” petitioner with standing. The satisfaction of the requirement that the subject be personally affected and have suffered injury cannot be overstated. The subject’s life hangs in the balance and should his sentence prevail, though possibly constitutional, there is no personal harm comparable to that of potentially losing one’s life. Next, the injury can be clearly traceable to a government action. Was the military death penalty not reinstated by the 1984 Executive Order and were the aggravating factors not defined as they were, the defendant would be facing a sentence of life imprisonment at worst and not the death penalty. The question of the injury being likely redressed by a favorable decision was already mentioned – the injury would be wholly redressed without a shadow of a doubt by ruling the executive order unconstitutional and thus vacating the death penalty. Having now convincingly established that Loving has

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<sup>246</sup> Provided that the execution is approved by the President.

<sup>247</sup> United States Supreme Court Decision from May 22<sup>nd</sup> 1967, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

<sup>248</sup> For example the case ending in United States Supreme Court Decision from June 7<sup>th</sup> 1972, *Aikens v. California*, 406 U.S. 813 (1972) was rendered moot due to the fact that the Supreme Court of California abolished the state death penalty in its Decision argued on February 18<sup>th</sup> 1972, *People v. Anderson*, 493 P.2d 880, 6 Cal. 3d 628, though it was eventually overruled by a state constitutional amendment.

standing and has met all other requirements in order to deem his case a “case or controversy” as required by the Constitution, it is now appropriate to examine the authority the President had to issue the executive order in question.

As I have stated in the summary of the facts of the case, the Uniform Code of Military Justice expressly allows the President to prescribe limits of punishments to be imposed for particular offenses. The code provides for the death penalty to be imposed as punishment for expressly delineated offences and makes no prohibition on the President’s authority to prescribe limits of punishments even with respect to the death penalty. The President then did not seem to exceed this statutory delegation, he made no outrageous regulation which would allow the death penalty to be imposed in minor offences, he can be deemed to have acted within the boundaries set by the Uniform Code of Military Justice. What is more, in a certain sense, he can be said to have merely been following court orders. This claim stems from the 1983 Armed Forces Court of Appeals decision<sup>249</sup> which declared military capital punishment unconstitutional due to a lack of individualization of aggravating circumstances. Although abolishing military death sentences, the court at the same time ruled that either Congress or the President could remedy this lack by defining such aggravating circumstances and this could be applied retroactively. And so he did, effectively reinstating the military death penalty by means of executive order setting down the manual for courts-martial.

It must first be stated that the practice of the President issuing acts to enact manuals for courts-martial is a long-standing one.<sup>250</sup> These manuals set guidelines for courts-martial procedure, the composition of these courts, and even the aspects directly related to the criminal liability of perpetrators of crimes such as defining prosecutable offences or the possible punishments. The Court in the Loving case, or Loving himself, raised no issue of the President not being authorized to issue such regulations – I however do raise such an issue. The fact that I have studied law within the Czech legal system may have tainted my vision on this matter but I feel a great deal of discomfort at the thought that the President may by some form of proclamation or order define certain aspects of prosecutable crimes or the punishments to be set for them. The fact that the President alone may enact such

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<sup>249</sup> Armed Forces Court of Appeals Decision from 1983, *United States v. Matthews*, 16 M.J. 354.

<sup>250</sup> The President expressly stated his authority to issue one by means of executive order as early as November 29, 1927.

regulations, to me, seems in contrast to the “*nullum crimen / nulla poena sine lege*” principle. In the Czech system, this principle is taken quite literally in that only a statute – an actual law is able to set down the standards for a person to be persecuted and punished for committing a criminal act prohibited by law.<sup>251</sup> The regulation by law cannot be substituted by a cabinet regulation – the closest relative to executive orders in the Czech system. In America, on the other hand, the 1984 executive order claims that it is perfectly constitutional and permissible for an act by the executive to actually regulate even certain aspects of the death penalty – a concept I dare say unthinkable in the Czech Republic. I see no reason whatsoever why provisions directly affecting individuals – such as the aggravating factors in death penalty considerations – are not left to Congress to formulate and pass. Clearly, Congress has shown intent to legislate in the matter, and it has – the Uniform Code of Military Justice serves as a testament to that. I do not believe that Congress should delegate such legislative power onto the President. Persecution under criminal law is one of the most significant intrusions into personal freedoms (though perfectly justifiable and necessary to protect the society) and I believe that leaving its regulation solely in the hands of Congress would be a more reasonable route with less opportunity for abuse. As I have said before, Congress must pass a law through both Houses gaining the “trust” of a majority of the elected congressmen and senators, it must present the law to the President for approval, all the while following guidelines set down for this process – guidelines which the process for issuing executive orders lacks. No matter how I look at it, as a military officer, I would rather have Congress decide my fate in case I perpetrate a criminal offense than one single person – the President of the United States. However strongly I may disagree with the statutory delegation allowing the President to directly regulate criminal law, however, I would hardly find Supreme Court Justices who would agree with me.

The reason for giving the President such far-reaching powers in this matter is largely due to the fact that the topic discussed is one of military law. In this area of law, the President not only relies on statutory authority but also his powers as commander in chief.<sup>252</sup> The court has said that “[t]he President's duties as Commander in Chief ... require him to take responsible and

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<sup>251</sup> § 12 of act no. 40/2009 Coll. Criminal Code, as amended.

<sup>252</sup> U.S. Constitution, Art. II, § 2, cl. 1.

*continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'*"<sup>253</sup> I can understand the claim that the President as Commander in Chief needs to superintend the military, the courts included. I could reconcile with the President having the authority to provide for checking mechanisms of the courts-martial, the appointment of judges or even some the procedural aspects of a military criminal trial. Given the case law and the long-established practice, I might even have to accept the fact that the President is allowed to determine criminal offenses and their respective punishments. Accepting that the President is authorized to "single-handedly" set down requirements for the death penalty, however, seems like too much of a stretch, in my opinion. The *Youngstown* decision<sup>254</sup> did not find the Commander in Chief powers to cover a seizure of individuals' property – it does, however, cover a seizure of individuals' lives?

I think it is clear from the above stated that I find capital punishment repulsive as a whole, no matter the seriousness of the crime or the subject being a civilian or a military man.<sup>255</sup> I wholly agree with the opinion expressed in *Furman*, that the death penalty is incompatible with "*the evolving standards of decency that mark the progress of a maturing society*",<sup>256</sup> that "[we] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"<sup>257</sup> and that the death penalty is in fact a form of the prohibited cruel and unusual punishment. Unfortunately, these opinions did not prevail and in 1976, the death penalty was reinstated again.<sup>258</sup> At present I can only hope that "another *Furman*" will soon come about once more, resolving the issue for good. Until then, I must accept the constitutionality of the death penalty under American law. Even so, the

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<sup>253</sup> United States Supreme Court Decision *supra* note 235, quoting United States Supreme Court Decision from January 21<sup>st</sup> 1975, *United States v. Mazurie*, 419 U.S. 544 (1975).

<sup>254</sup> United States Supreme Court Decision *supra* note 20.

<sup>255</sup> This is largely due to the racial history of the United States and the fact that a racial bias can be clearly identified in the imposing and executing of death penalties, as the Court found in United States Supreme Court Decision from June 29<sup>th</sup> 1972, *Furman v. Georgia*, 408 U.S. 238 (1972). Though this decision was eventually overruled, reinstating the death penalty, the racial bias acknowledged by the Court cannot be overlooked.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> United States Supreme Court Decision from July 2<sup>nd</sup> 1976, *Gregg v. Georgia*, 428 U.S. 153 (1976).

mere fact that the Supreme Court has many times and continues to evaluate the death penalty as possibly constituting cruel and unusual punishment goes to show just how much of an intrusion the death penalty is into basic human rights. The death sentence is only imposed on criminals who have committed the most serious of offences and it should be the absolute ultima ratio punishment. The possibility of intrusion into individual rights even upon accepting the general premise of the death penalty as constitutional is so great that I believe the Uniform Code of Military Justice cannot be read to allow the President to regulate death penalty requirements and if it is, it cannot be deemed to have been authorized to delegate such power onto the President. It is for this reason that I believe the President lacked sufficient authority to promulgate the executive order, among other provisions, defining the aggravating factors for imposing the death penalty.

The last step which could be undertaken in this case as part of my “evaluating executive orders guideline” is the evaluation of the constitutionality of the death penalty or the particular provisions in question. I believe that I have clearly expressed my thoughts on this matter in the foregoing paragraph but also that the current fact of the matter is that the Supreme Court has upheld the death penalty as constitutional. Due to the enormity of the topic also the incredibly small likelihood that an American court would consider this issue,<sup>259</sup> I will not delve into the debate on the constitutionality of the death penalty. In my opinion it will suffice to conclude that I believe lack of presidential authority, resp. lack of Congress’ authority to delegate the legislative power at hand is a compelling enough reason to find the executive order invalid thus commute Loving’s death sentence and all others effected by the order to life imprisonment.<sup>260</sup>

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<sup>259</sup> See United States Supreme Court Decision supra note 169.

<sup>260</sup> Loving actually came out “victorious” when neither President George W. Bush nor President Barack Obama authorized his execution and, in fact, President Obama on January 17<sup>th</sup> 2017, three days before leaving office, commuted Loving’s sentence to life imprisonment without parole.



## 5.3 Chenoweth v. Clinton

The last case<sup>261</sup> I decided to analyze was chosen for a few varying reasons. First, I thought it would be appropriate to also analyze a case which never had its day before the Supreme Court – not only for variety’s sake but also because lower-instance federal courts are often referenced even by the Supreme Court in its decisions and certainly have precedential value, if not overridden by a later decision or the Supreme Court itself. Second, I found this case and decision particularly interesting due to the fact that it did not deal with executive orders in the context of separation of powers on an institutional level, rather it analyzed the impact of these tools on particular members of the government and their rights. The facts of the case are as follows.

### 5.3.1 Facts of the case

On February 4<sup>th</sup> 1997, President Clinton delivered his second term’s first State of the Union Address. Among other issues, the President announced his intention to create the American Heritage Rivers Initiative (AHRI) program, the aim of which was to provide support for local efforts to preserve chosen historically significant rivers and their adjacent communities. This intent to launch the AHRI did not generate agreement and approval of certain members of the House of Representatives<sup>262</sup> who responded by introducing a bill which sought to terminate the further development and implementation of this program. This bill, however, never came to a vote before either House.

President Clinton then took the matter into his own hands and in September 1997 issued an executive order<sup>263</sup> which effectively launched the American Heritage Rivers Initiative. This, as expected, was met with disapproval of the group of Representatives who sought to pass a bill which would block the initiative, resulting in a suit filed before the first instance district court seeking to have the executive order declared unlawful and seeking for an injunction to be issued against the implementation of AHRI. The plaintiffs argued that

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<sup>261</sup> United States Court of Appeals for the District of Columbia Circuit Decision from July 2<sup>nd</sup> 1999, *Chenoweth v. Clinton*, 181 F. 3d 112 (D.C. Cir. 1999).

<sup>262</sup> Namely the main plaintiff Helen Chenoweth, Bob Schaffer, Don Young and Richard W. Pombo in their official capacities.

<sup>263</sup> Executive Order 13061, issued on September 11<sup>th</sup> 1997.

the executive order violated provision of multiple acts<sup>264</sup> mostly connected to the fact that only Congress has the power to spend and allocate resources. Most importantly, however, the group of congressmen alleged that by issuing said executive order, the President “*deprived [them] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation*”.<sup>265</sup> The first instance district court granted the President’s motion to dismiss due to the fact that it found plaintiffs to not have proven standing.<sup>266</sup> The appellate district court affirmed<sup>267</sup> and the Supreme Court refused to grant petition for writ of certiorari.<sup>268</sup>

### 5.3.2 Analysis

As in the previous cases, I begin by briefly addressing jurisdiction. A federal appeals court’s jurisdiction to hear an appeal challenging its subordinate district court is a given – the whole purpose of appeals courts lies in hearing such appeals. Although neither decision really addressed the issue, I believe that there might be certain thought given to the possibility of the issue at hand presenting a political question thus rendering the case not justiciable. After all, the dispute between branches of government always has political implications and the courts have previously ruled certain such disputes nonreviewable due to a political question being present.<sup>269</sup> This is rarely the case, however, when individuals’ rights are endangered or when the constitutionality of an act is challenged. At least since *Marbury*, the courts have recognized that “[i]t is emphatically the province and duty of the judicial department to say what the law is”<sup>270</sup> and that the duty sometimes involves “[r]esolution of litigation challenging the constitutional authority of one of the three branches”<sup>271</sup> not avoidable merely “because the issues have political implications.”<sup>272</sup> The case at hand certainly has aspects which would seem to satisfy these propositions since the plaintiffs in this case alleged unlawfulness and unconstitutionality of

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<sup>264</sup> § 1301 et seq. of the Appropriations Act, 31 U.S.C., § 1701 et seq. of the Federal Land Policy and Management Act, 43 U.S.C., § 4321 et seq. of the National Environmental Policy Act, 42 U.S.C. as well as the Commerce, Property, and Spending Clauses of, and the Tenth Amendment to the Constitution.

<sup>265</sup> United States Court of Appeals for the District of Columbia Circuit Decision *supra* note 261.

<sup>266</sup> United States District Court for the District of Columbia Decision from March 2<sup>nd</sup> 1998, *Chenoweth v. Clinton*, 997 F. Supp. 36 (D.D.C. 1998).

<sup>267</sup> United States Court of Appeals for the District of Columbia Circuit Decision *supra* note 261.

<sup>268</sup> United States Supreme Court Order in Pending Case from March 6<sup>th</sup> 2000, *Chenoweth v. Clinton*, No. 99-944.

<sup>269</sup> United States Supreme Court Decision from March 26<sup>th</sup> 1962, *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>270</sup> United States Supreme Court Decision *supra* note 19.

<sup>271</sup> United States Supreme Court Decision from June 23<sup>rd</sup> 1983, *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>272</sup> *Ibid.*

the executive order and its implications on their personal rights. The issue I have with thus concluding this case to not be a political question is that an alternative resolution is possible, not requiring a judicial decision. The American system does not, especially after a President enacts an executive order not pursuant to an express and specific statutory delegation, prevent Congress from voting on the same issue and enacting legislation which would invalidate the executive order. This would surely constitute an express will of Congress to override the executive order. Congress would thus by its own action preclude the zone of twilight executive order by directly overruling it, which it is capable of doing under *Youngstown*.<sup>273</sup> Therefore I believe, even if the matter was deemed a case or controversy under the remaining requirements, the court would likely deny to review the case to avoid *“meddl[ing] in the internal affairs of the legislative branch.”*<sup>274</sup> The court did not, however dismiss the case as a political question because it found other deficiencies preventing it from deeming it justiciable.

The resolution of whether the dispute here is considered a case or controversy is absolutely key in this matter and the answers to whether the case meets all the requirements are, as will be proven, very much uncertain. Let me begin, as in the previous cases, by the requirement for the opinion sought not to be advisory. As was stated multiple times before, this point requires that an actual dispute exists between the parties and that a favorable decision would change the situation and not just provide a declaration not affecting the facts. It is reasonably safe to conclude that a dispute does exist between the parties – the congressmen allege that the another branch of government, the executive, has infringed on their rights to debate and vote on legislation by depriving them of this power and issuing a piece of legislature which might be otherwise decided by Congress. The question of whether a favorable decision would bring about a change is not as clear. As I stated before, the fact that the executive order was issued in the same matter the group of congressmen wanted to regulate otherwise does not prevent them from initiating regulation once more and Congress from voting on it. I therefore find it doubtful that the decision would be much more than advisory. Perhaps a favorable decision would provide satisfaction to the claimants with

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<sup>273</sup> United States Supreme Court Decision supra note 20.

<sup>274</sup> United States Court of Appeals for the District of Columbia Circuit Decision from May 4<sup>th</sup> 1984, *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984).

respect to their rights being infringed on and to a declaratory condemnation of the President's actions. This however, seems like very much an advisory opinion to me.

For similar reasons, I would also deem the case to lack ripeness. The sought decision seems not only unfit for review but entirely unnecessary since should the courts withhold considering the matter, not much hardship would be imposed on the allegedly injured. Again, the executive order does not prevent them from initiating legislation and voting on it. Mootness does not really be considered, if the need for a decision never existed in the first place, it can hardly be mooted further by succeeding events.

None of the above-stated reasons were, however, considered by the court as the reason for dismissing the matter as not qualifying as a case or controversy. The reason why the case was dismissed and the dismissal later affirmed was due to the fact that the claimants lacked standing. The Representatives asserted that they had standing because they had suffered harm in the form of being "*deprived ... of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation*"<sup>275</sup> which resulted from the President's alleged unlawful conduct found in bypassing of Congress and enacting legislation of his own. The claimants also claimed that a favorable decision would redress their injury but the reasoning for this assertion cannot be found in either of the courts' decisions. The claimants largely relied on three decisions which all found standing of the injured parties. The earliest case arose from an action brought by Kansas legislators who alleged that the Lieutenant Governor of Kansas acted unlawfully when he casted the tie-breaking vote in the favor of a constitutional amendment. The court held that the votes of the legislators who voted against the passage of the amendment were effectively nullified by the Governor's vote and it deprived them of their "*plain, direct and adequate interest in maintaining the effectiveness of their votes*".<sup>276</sup> Another case concerned an allegedly unlawful pocket veto of legislation that both Houses approved, finding that this pocket veto effected a "*diminution of congressional influence in the legislative process*".<sup>277</sup> The third, and most relied upon, case involved a dispute wherein a group of Representatives asserted that a particular act was unconstitutional because it originated in the

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<sup>275</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 261.

<sup>276</sup> United States Supreme Court Decision from June 5<sup>th</sup> 1939, *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>277</sup> United States Court of Appeals for the District of Columbia Circuit Decision from August 14<sup>th</sup> 1974, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

Senate and not the House, violating the Origination Clause<sup>278</sup> thus resulting in the court holding that an infringement of a legislator's "right[] to participate and vote on legislation in a manner defined by the Constitution"<sup>279</sup> constituted a sufficiently concrete and direct injury. While using these opinions to argue standing in the Chenoweth case, this effort was futile due to two reasons.

The first reason for this claim lies in the fact that the Supreme Court heard and decided the case of *Raines v. Byrd*.<sup>280</sup> This decision found that congressmen objecting the Line Item Veto Act enabling the President to "cancel" certain provisions of an act without vetoing it entirely did not have standing, that their injury was "wholly abstract and widely dispersed".<sup>281</sup> The court did not agree with the plaintiffs' claim that the contested act injured them by "... alter[ing] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, ... divest[ing] the [appellees] of their constitutional role in the repeal of legislation, and ... alter[ing] the constitutional balance of powers between the Legislative and Executive Branches."<sup>282</sup> Though not expressly overriding the previously mentioned cases, this decision asks for a logical derivation, "[i]f... a statute that allegedly "divests [congressmen] of their constitutional role" in the legislative process does not give them standing to sue,..., then neither does an Executive Order that allegedly deprives congressmen of their right[] to participate and vote on legislation in a manner defined by the Constitution."<sup>283</sup>

Even if it was not for the *Raines* decision, I still believe that the plaintiffs in *Chenoweth* should not be found to have standing. I base this claim in the fact that all three cases which did find standing of legislators with regard to their rights being violated had very different factual backgrounds. In all three cases, the measures or actions taken in some way or another actually prevented the legislators from partaking in the legislative process – whether by rendering their votes naught by an unlawful interference of a non-legislative subject,<sup>284</sup>

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<sup>278</sup> U.S. Constitution, art. I, § 7, cl. 1.

<sup>279</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 274.

<sup>280</sup> United States Supreme Court Decision from June 26<sup>th</sup> 1997, *Raines v. Byrd*, 521 U.S. 811 (1997).

<sup>281</sup> *Ibid*.

<sup>282</sup> *Ibid*.

<sup>283</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 261, internal citations omitted.

<sup>284</sup> United States Supreme Court Decision supra note 276.

nullifying them by an unlawful use of the pocket veto,<sup>285</sup> or unconstitutionally not allowing them to originate a bill.<sup>286</sup> In *Chenoweth*, the Representatives were in no way prevented from initiating a piece of legislation or from voting on it. Their votes were not nullified, in fact, they were not even cast at all. Nor did the executive order contain a provision which would bar Congress from eventually regulating the matter otherwise. Not only are the facts of the cases not applicable to the *Chenoweth* one, there is another hurdle expressed especially in *Moore*, and that is the matter of equitable discretion which brings me full circle to the fact that this case qualifies as a political question, making it non-justiciable. I fully agree with the opinion of the *Chenoweth* court in finding that “[i]t is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined. Because the parties’ dispute is therefore fully susceptible to political resolution, we would, applying *Moore*, dismiss the complaint to avoid ‘meddl[ing] in the internal affairs of the legislative branch.’”<sup>287</sup> Having concluded that the *Chenoweth* dispute does not qualify as a case or controversy for failing to meet nearly all requirements of the doctrine, there is no need to analyze the authority to issue the executive order in question or its implications on constitutional rights.

The impact of this case is, in my opinion, quite profound. Not only did the court affirm *Raines v. Byrd* and apply its findings to cases relating to executive orders and found no personal injury of congressmen when an executive order is issued in conflict with their personal will and opinion, it also reinforced the separation of powers aspect inherently connected to executive orders. Not only that, it expressly affirmed Congress’ power to overrule executive orders by regulating them in a different manner.

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<sup>285</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 277.

<sup>286</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 274.

<sup>287</sup> United States Court of Appeals for the District of Columbia Circuit Decision supra note 261, quoting United States Court of Appeals for the District of Columbia Circuit Decision supra note 274.

## 6 Conclusion

The overbearing aim of this thesis was satisfied by means of reaching the individual ones. In order to fulfill the first aim – to find out the extent of lawmaking power the executive has, I needed to first delineate the separation of powers system as well as the main premises set for the legislature in the United States. I was able to find that the American Constitution chose to divide the federal powers amongst three equal branches of government but made sure not to make these completely separate and independent of each other. To illustrate the way two branches are able to coexist in sharing legislative power in particular, I first needed to explore this power in a general sense. The scope of legislative power was described while paying closer attention to the “necessary and proper” clause. Having laid down the necessary basis, I was then able to proceed to analyze the ways in which the executive branch may become a sort of a lawmaker. Three particular ways were identified, the legislative veto, inherent powers of the President as well as delegation of power by Congress.

Having fulfilled the first particular goal of the thesis in ascertaining that the executive does, in fact, have a kind of legislative power, it was then appropriate and logically related to look closely at the tool used most of often to put forth such executive legislation - the executive order, thus meeting the next goal of this thesis. The specifics of executive orders were analyzed, first describing what these tools are, followed by finding that while they are binding towards the subjects they are intended at, they do not bind their issuer – the President – himself. In order to more completely understand the essence of executive orders, the manners of their use were analyzed followed by the situations in which presidents might reach for this legislative tool in particular. Lastly, the process prescribed in order to issue executive orders was a topic of analysis, finding that, in fact, no actual process was prescribed at all and that the President enjoys a great amount of freedom in this regard.

Once I had identified the nuances of executive legislative powers and executive orders as the most commonly used tool to issue such legislation, it was time to deal with how the courts resolve potential and inevitable conflicts and controversies these tools might bring about, not only in relation to the previously analyzed separation of powers scheme but also with regard to individuals’ rights. First it was essential to ascertain whether courts had the necessary authority to review executive acts in the first place. After having found that this

authority was proclaimed ever since the early days of the country, I also focused on another requirement the courts had to evaluate and find it met in order to review a case concerning a particular executive order – the case or controversy doctrine of justiciability. I looked closely at the aspects which make a case reviewable under this doctrine and found that the challenger to an executive order must prove that he does not seek an advisory opinion, his claim is ripe and not moot and, arguably most challengingly with regard to executive orders, prove he has standing. I was able to conclude that this plays an important role in determining whether a case concerning an executive order is fit for review, thus moving on to the contexts in which courts review these legal acts. I first identified the ways executive orders become the subject of judicial review, whether by a claimant seeking to have the order invalidated, upheld, proclaimed unconstitutional for infringing on his rights, etc. Next, I looked at the contexts of review of executive orders, finding that most often separation of powers is at its forefront with fewer cases dealing with constitutional rights. The following subchapter then tied all the foregoing ones together and accomplished a particularly practical goal which I had set out in the beginning – creating a step-by-step guide for a court tasked with reviewing the validity of an executive orders. By means of extensive analysis of relevant case law I was able to determine that first, the court should look at the question of its jurisdiction to review a case in the first place, followed by closely examining whether the requirements of the case or controversy are met, for if they are not, there is no need to look further and examine the remaining points of inquiry. The first of these being the authority to issue a particular order in the first place. I suggested for Justice Jackson's three tier test to be applied when examining the authority behind executive orders and after having found which tier applies, an analysis of relevant case law aided me to formulate the requirements and reasons for invalidation of orders in each particular category. After examining authority and finding that it was sufficient to issue a particular executive order, a court might then look at the very content and text of the order and might find it invalid due to a conflict with a statute or constitutional rights.

The last chapter of this thesis was the result of an initial struggle of not wanting this work to be a simple description of the state of the matter as regards executive orders with no added value. I do have to state that the value of my thesis can certainly be seen in the fact that, since such a publication is yet to be issued and the existing materials are chaotic at best, I was able to put together a comprehensive analysis of the executive's lawmaking power, the



tool used most often to realize this and the way the courts make sure that this all takes place within legal and constitutional bounds. Notwithstanding that, I also wanted to provide a more practical aspect to the thesis and I was able to achieve this by means of applying my formulated guideline to evaluate the validity of executive orders at the center of three chosen cases. Most importantly, I paid close attention to the recent and much discussed case of the travel ban, arriving at a conclusion which I hope to see the Supreme Court arrive at during the course of this upcoming year. The following cases have already been decided by their respective courts, nonetheless I saw it fit to review the executive orders at the forefront of those disputes by applying the promulgated guideline. Regardless of the specific conclusion I reached in each particular case, the analysis provided a valuable insight not only into the way separation of powers is considered when reviewing executive orders but also the question of infringement on constitutional rights.

By fulfilling all the individual above-stated goals, I was able to meet the aforementioned dominant aim of this thesis – to provide a general overview and understanding of the topic at hand. I believe I have successfully completed this goal and I hope this thesis will mark the beginning of further discussion on the topic of executive orders and the way courts review them. It is certainly a topic which generated many interesting questions and which deserves a great deal of attention and analysis, even in the Czech Republic and Europe as a whole.



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