

ANALYSIS OF
H.R. 2655 – “THE SEPARATION OF POWERS RESTORATION ACT”

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HR 2655, the **Separation of Powers Restoration Act**, if enacted, would restore substantially the separation of powers between the Congress and the President as set forth in the Constitution, by, among other things, removing the President’s power to declare **National Emergencies** which give him broad emergency powers, and by restricting the President’s power to issue **Executive Orders** and thereby check his repeated misappropriation of power in legislating by decree.¹

**I. THE CONSTITUTIONAL PLAN FOR
SEPARATION OF POWERS IS NOT FUNCTIONING**

The powers delegated to the national government by the Constitution are distributed to three separate branches of government: the **legislative**, the **executive**, and the **judicial**. These are coequal branches of government. Each branch has unique and limited powers and each has a coequal duty to uphold and sustain the Constitution of the United States. Whenever one branch exercises powers properly belonging to another branch (*e.g.*, if the president were to legislate) it constitutes a **usurpation** of the powers of that branch as established by the Constitution.

This separation of powers was of great concern to the founding fathers. For example, **James Madison**, quoting **Montesquieu**, stated in Federalist 47, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Supreme Court Justice **Louis Brandeis** observed that “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

¹ For additional information on executive orders, see www.executiveorders.org, sponsored by the Liberty Studies Committee.

However, in the 20th century, most presidents (beginning with Theodore Roosevelt) have usurped legislative authority using “presidential orders” — executive orders, proclamations, etc.² President Clinton has made usurpation of legislative power by executive order an art form.

- President Clinton issued an executive order (later struck down by the courts) seeking to prohibit federal contractors from hiring **permanent striker replacements** after Congress had repeatedly considered and rejected related legislation.
- President Clinton also established a 1.7 million acre national monument in Utah (**Grand Staircase-Escalante**) by proclamation (when legislation was pending regarding the future status of the affected parcels of land).
- President Clinton has appropriated funds for pet projects, such as the **American Heritage Rivers Initiative**, which have not received appropriations from Congress.
- President Clinton has also conducted war against the Federal Republic of Yugoslavia without a Congressional declaration (or even passage of a concurrent resolution in support).

HR 2655 is designed to prevent further presidential usurpations of legislative powers.

II. CONGRESS CAN AND SHOULD ADDRESS PRESIDENTIAL USURPATIONS BY STATUTE

It may seem odd to enact a statute to protect or promote a constitutional principle. In the first place, since the Constitution is of greater authority than any statute, it may seem counter-intuitive that a statute can accomplish something that the Constitution cannot do standing alone. Further, the current view is that the judiciary is viewed as the exclusive guardian (some say the expositor) of the Constitution. Some may ask: would this bill, seeking to prevent violations of the separation of powers, itself constitute a violation of the separation of powers if enacted? Should not the judiciary be trusted to restrain presidential usurpations of legislative function?

The judiciary cannot be relied upon to defend the prerogatives of the Congress -- as it has struck down only two executive orders in the history of the country — one under President Truman and one under President Clinton.

² The practice of issuing executive orders began with George Washington, but significant abuses began with Abraham Lincoln. *See*, William J. Olson and Alan Woll “Executive Orders and National Emergencies: How Presidents Have Come To ‘Run the Country’ by Usurping Legislative Power” (CATO Institute: Washington, DC, 1999) available at www.wjopc.com.

The founding fathers clearly expected that each branch of government (including Congress) would defend its prerogatives from encroachment by the other branches, setting power against power. *See, e.g.*, Federalist 48 (Madison). Congress has occasionally acted to protect its legislative powers — the **War Powers Resolution**, the **National Emergencies Act**, and the **International Emergency Economic Powers Act**, enacted in the 1970s, all sought the restoration of the constitutional separation of powers. Likewise, the **Tenure of Office Act** was enacted in the 1860s in an effort to reduce the excessive presidential powers assumed during the Civil War.

The courts can and do resolve cases and controversies which arise from a separation of powers issue. However, under the “**political question**” doctrine, the courts ordinarily do not intervene in disputes which are perceived as strictly between the legislative and executive branch. Thus, when the recent census cases Clinton v. Glavin and Department of Commerce v. House of Representatives, ___ U.S. ___ (1999) were argued jointly before the U.S. Supreme Court, the Court’s decision resolved the questions at issue in reference to the Glavin case, mooting the issue whether the House of Representatives had standing to bring its suit. Earlier, in Raines v. Byrd, 521 U.S. 811 (1997), the Court found that **individual Members of Congress lacked standing** to litigate the injuries which had been incurred through the line item veto to the powers of Congress as an institution.

More recently, Reps. Helen Chenoweth (R-ID), Bob Schaffer (R-CO), Don Young (R-AK), and Richard Pombo (R-CA) filed suit in federal court seeking (1) a declaration that the creation of the **American Heritage Rivers Initiative** by executive order was unlawful as well as (2) an injunction against its implementation. They argued that the initiative violated several statutes, as well as the Constitution. The U.S. District Court for the District of Columbia dismissed the suit, stating that the injury the Representatives claimed to have suffered was “too abstract and not sufficiently specific to support a finding of standing.” The Representatives appealed to the **U.S. Court of Appeals for the District of Columbia Circuit**, which affirmed the lower court’s decision in July 1999.

III. THE REMEDIES PROVIDED BY HR 2655

A. Repeal of the War Powers Resolution (Section 3(a))

The War Powers Resolution, enacted in 1973, requires the president to **notify Congressional leaders** when he is sending troops into combat or potential combat where there is no declaration of war. **Without Congressional action** (*i.e.*, a declaration of war, or an extension of the time American troops may continue to participate in combat), the president must then **withdraw the troops within 60 days** of his notification to Congress.

The ineffectiveness of the War Powers Resolution has been exposed during the Clinton administration’s war in Kosovo. The Congress did not declare war or extend the 60 days within which American troops could be used for combat, yet their participation in combat continued.

When Members of Congress, led by Rep. Tom Campbell (R-CA), attempted to sue in the United States District Court for the District of Columbia to enforce the War Powers Resolution, the federal courts refused to hear the suit. The War Powers Resolution has failed to constrain the unilateral conduct of wars by the president, has been counter-productive, and would be repealed by HR 2655.

B. Presidential Declaration of States of National Emergency (Section 3(b))

One major source of presidential powers abused by presidents of both parties has been the exercise of **emergency powers** in peacetime. Starting with the inauguration of Franklin Roosevelt in March 1933, the United States has been under a **constant state of national emergency** — except for a brief 14 month period between September 14, 1978 and November 14, 1979. The concept of presidents having additional powers only in war time has been lost, and presidents enjoy almost all powers in peacetime as well. In 1973, the Senate’s Special Committee on the Termination of the National Emergency, chaired by Sens. Frank Church (D-ID) and Charles Mathias, Jr. (R-MD), determined that **470 provisions of Federal law gave special powers to the executive branch when a national emergency had been proclaimed.**³ We are currently under **13 concurrent states of national emergency**. If emergency powers are delegated, however unwisely, it would not technically constitute a usurpation of a legislative function.

Congress has terminated the exercise of emergency powers pursuant to declarations of national emergencies in the past; the **National Emergencies Act** terminated all such emergency powers as of September 14, 1978. However, Congress left the power to declare subsequent states of national emergency with the president — a power exercised by President Jimmy Carter on November 14, 1979, after the seizure of the U.S. Embassy in Iran.

Under HR 2655, the powers and authorities possessed by the president, executive agencies, or federal officers and employees, that are derived from the currently existing states of national emergency would once again be terminated. However, learning from past mistakes, this bill would vest the authority to declare future national emergencies in Congress alone.

C. Definition and Identification of Authority for Presidential Orders (Sections 4 & 5)

Where a presidential order is clearly authorized by the Constitution or by statute, it has the force of law. Armstrong v. United States, 80 U.S. 154 (1871). However, many presidential orders lack such authority. Executive Order 10422, issued by President Harry Truman on

³ For a discussion of some of the emergency powers given by Congress to the President, see William J. Olson and Alan Woll, “Memorandum for the President: Presidential Powers to Use the U.S. Armed Forces to Control Potential Civilian Disturbances” (Gun Owners of America: Springfield, VA , 1999) available at www.wjopc.com

January 3, 1953, cited the **United Nations Charter** as authority. Executive Orders 12276-85, issued by President Carter and Executive Order 12294, issued by President Ronald Reagan, were based on **executive agreements (i.e., unratified treaties)** with Iran. Commonly, presidential orders are issued under the intentionally vague authority of titles and responsibilities granted to the president, as when President Truman issued Executive Order 10340 “by virtue of the authority invested in [him] by the **Constitution and laws of the United States, and as President of the United States and Commander-In-Chief** of the armed forces of the United States.” Executive Order 10340 was challenged in court; the resulting decision, Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), found there was no constitutional authority for President Truman’s action.

HR 2655 would require that each presidential order identify the **specific statutory or constitutional provision** which empowers the president to take the action embodied in the presidential directive. The bill further states that any presidential directive derived from statutory authority which does not identify that statutory authority is invalid. HR 2655 would make it the law that any and all presidential orders lack the force of law and are limited in their application and effect to the executive branch, unless the directive constitutes (1) a constitutionally-authorized **reprieve or pardon** for an offense against the United States; (2) an **order** given to military personnel pursuant to duties specifically related to actions taken as **Commander-in-Chief** of the Armed Forces; or, as discussed above, (3) the presidential directive cites the **specific congressional enactment** relied upon for the authority exercised in such order, is issued pursuant to such authority, is commensurate with the limit imposed by the plain language of such authority, and is not issued pursuant to a ratified or unratified treaty or bilateral or multilateral agreement which either violates the ninth or tenth amendments to the Constitution or delegates power to a foreign government or international body when no such delegating authority exists under the Constitution.

Under this bill, any alleged basis for the presidential order must be evident. Further, the bill would define what is a constitutional power which may be exercised by presidential order.

D. Clarification of Standing to Challenge Executive Actions (Section 6)

As noted above, the U.S. Supreme Court, in Raines v. Byrd, held that individual Members of Congress have very limited access to the federal courts where presidential actions cause institutional injury to Congress. One Supreme Court case found that a **majority** of legislators must approve bringing the case for the Members of Congress to have standing. This requirement offers no protection to the rights of minorities. HR 2655 seeks to **remove the barriers to access to the federal courts**.

Specifically, HR 2655 provides that the following persons may bring an action in an appropriate United States court to challenge the validity of any presidential order which exceeds the power granted to the president by the relevant authorizing statute or the Constitution:

- The House of Representatives, the Senate, any Senator, and any Representative, if the challenged presidential directive
 - infringes on any power of Congress;
 - exceeds any power granted by a congressional enactment; or
 - does not state the statutory authority which in fact grants the President the power claimed for the action taken in such Presidential order.
- The highest governmental official of any State, commonwealth, district, territory, or possession of the United States, or any political subdivision thereof, or the designee of such person, if the challenged presidential directive infringes on the powers afforded to the States under the Constitution.
- Any person aggrieved in a liberty or property interest adversely affected directly by the challenged presidential directive.

Currently most presidential usurpations are not subject to judicial redress due to the standing limitations established by the U.S. Supreme Court. If HR 2655 is enacted, the Court will at least be forced to re-examine its standing precedents, if not to accede to the will of Congress.

E. A Definition of Presidential Order (Section 7)

Currently, there is no constitutional or statutory definition of “proclamation,” “executive order,” or any other form of presidential order. The limited statutory requirements that do govern presidential orders, such as the requirement that executive orders and proclamations be published in the *Federal Register*, are easily circumvented by changing the nomenclature used. HR 2655 would remove that loophole.

HR 2655 would provide a statutory definition of a presidential directive: any Executive order, Presidential proclamation, or Presidential directive; and any other Presidential or Executive action by whatever name described purporting to have normative effect outside the executive branch which is issued under the authority of the President or any other officer or employee of the executive branch.

IV. CONCLUSION

If we wish to pass on the liberty enjoyed by our forefathers to our children and grandchildren, then the constitutional separation of powers must be given effect. The President’s

usurpation of legislative power and war-making power must be stopped. HR 2655 offers an essential step towards the restoration of constitutional government.