

## **WHAT'S WITH EXECUTIVE ORDERS?**

**Stephen L. Bakke – December 19, 2010**

As soon as the Senate's health care reform was passed by the House, we began hearing about some of the pro-life democrats agreeing to the objectionable Senate language regarding abortion funding.

The President agreed to sign an "executive order" stipulating that there would be no change from the existing law which prohibits federal funds being used for abortion. This was described by those pro-life democrats who changed their vote, as carrying the strength of law and would satisfy their concerns and that the order would "trump" the new law if it provided, as they believed it did, any possibility for federal funds to be used for abortions. The more liberal pro-choice democrats described it a bit differently. They said it was merely adding an "underscore" to their opinion that the Senate bill did not change existing law (the Hyde Amendment). Then the Republicans chimed in declaring the executive order "isn't worth the paper it's printed on!" How can sincere persons come to three very different opinions?

I decided to research the topic of "executive orders" and share that information in this report. There's not much original here except for some interpretation of what I read. I just looked at a couple books and searched the internet – and learned at least a little bit.

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### **What is this Thing Called "Executive Order"?**

An executive order is an order issued and signed by the President as head of the executive branch. It simply states that "this is the way it is" until proven differently. The first order occurred in 1789. Often these orders are pursuant to a piece of legislation which specifically delegates to the President certain discretion as relates to that legislation in order to facilitate executing and managing the requirements of the legislation.

Also, it appears that powers specifically granted to the President by the Constitution can be employed and enforced through the use of executive orders. It is when there is difference of opinion as to whether an order relates to that President's Constitutional powers that we have occasional conflicts. In the "abortion funding" case, it seems clear to me that the order was not pursuant to a Presidential Constitutional power or responsibility, but rather, he would argue he is attempting to properly implement the law that was passed by Congress.

That's plausible.

### **How Did Executive Orders Get Started?**

There is no Constitutional provision or statute that specifically provides for executive orders. However, the language in Article II, Section 1, Clause 1, vaguely grants

“executive power.” In addition, further wording in Article II, Section 3, Clause 4 of the Constitution has been interpreted as adding weight to the argument that the President has authority to make these orders if necessary to comply with the office’s sworn responsibility. The specific words for this authority are the declaration that the President must: “take Care that the Laws be faithfully executed.” I find nothing alarming with this interpretation. It seems to be a practical application of authority, but remember we still have separation of powers and the other two branches of government provide checks and balances to executive power and authority.

One justification for having executive orders is that a President can’t successfully comply with the legislative mandate of Congress to carry out and enforce laws without this power. I agree that often legislation is “necessarily vague” in order to satisfy all extremes in a congressional debate. Vagueness doesn’t lend itself to being administered and enforced. I understand this argument and don’t see any problem with it.

### **The Supreme Court Has Weighed In**

In 1952, The Supreme Court ruled (the case is inconsequential to this discussion) that one of Truman’s executive orders was invalid in that it attempted to make law, rather than clarify congressional legislation. As most presidents have done since then, President Obama seems to have acted prudently in the case of the “abortion funding” executive order in that he is stating or implying that his purpose is to clarify that this legislation does not contradict pre-existing legislation relative to abortion funding. The assertion seems reasonable to me – but that doesn’t mean he’s right!

There have been only two executive orders that have been overturned by the Supreme Court – one made by Truman and the other by Clinton. I won’t go into discussions of those!

### **Points to Consider**

I have tried to list a few general points that seem to be generally accepted as accurate. I didn’t find seriously conflicting information except in those three differing opinions I offered in above. Some of the following may include some interpretation by me of what I believe are fairly clear points made in the authoritative literature. Here they are:

- Executive orders carry the weight of law only to the extent they do not conflict with existing legislation.
- If the issue is not currently governed by law, the executive order can be enforced.
- If Congress passes new legislation that contradicts an executive order, the new law prevails as the law of the land.
- Any president can rescind any executive order still in force, no matter which president issued the original order.
- In the case of the abortion funding issue, if the legislation were changed to permit federal funding of abortions, or if the Supreme Court ruled that the current legislation (the Senate bill as passed by the House) does permit federal funds to be

used for abortion, directly or indirectly, then the Obama's executive order is null and void and his promise is not enforceable.

- Congress may overturn an executive order by passing legislation in conflict with it or by refusing to approve funding for its enforcement.
- Nevertheless, the President still has the power to veto any legislation which conflicts with his order. And then Congress has to override his veto with a two thirds majority – very tough to do.

Aren't checks and balances wonderful?!

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And that's all I know, or care to know, about that – at least for now!