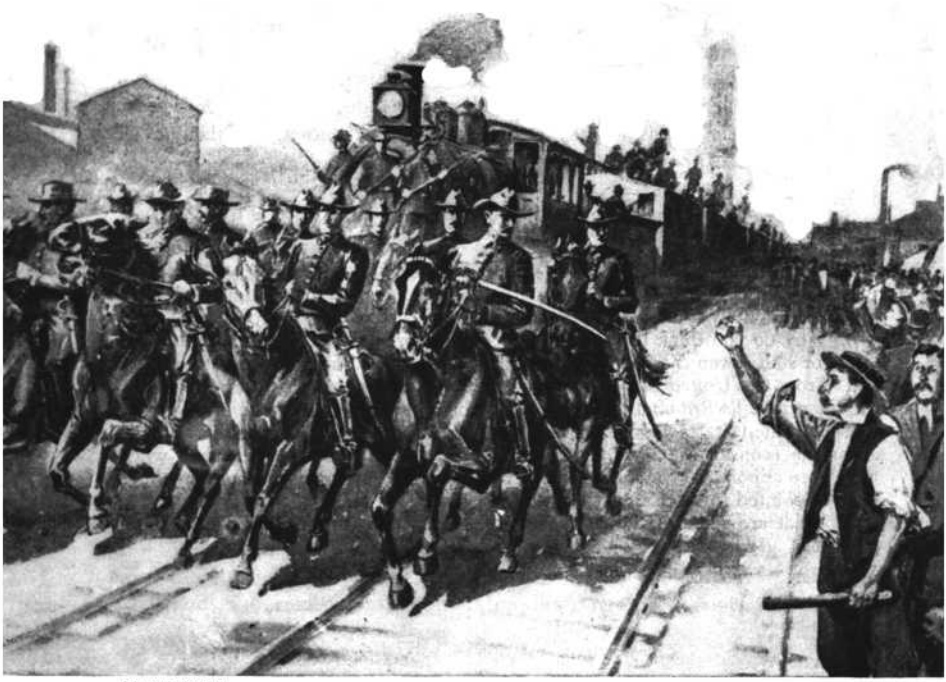
21. Executive Powers of the President



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THE executive powers of the President may be defined as the powers that enable the President to carry out the policies—as stated in laws—that have been framed by Congress. Presumably, then, in using his executive powers the President is adhering to policies established not by himself but by an outside force, Congress. Actually in exercising these powers the President frequently reveals and even emphasizes his own policies, particularly in the case of laws that oppose his ideas.

The executive powers of the President are many and varied. The President is charged by the Constitution with supervising the execution of the laws. He appoints thousands of administrative leaders. He can remove many administrative leaders from their posts. He is the managing director of the vast administrative machinery of the United States, to which he gives

direction by executive orders and other types of oral and written commands. He is in a sense also the business manager of the national government; the national budget is prepared in the Bureau of the Budget, which is in the Executive Office of the President. He is the Commander in Chief of the armed forces of the United States. He is the principal representative of the United States to the other nations of the world. Indeed, in his executive functions alone the President may be regarded as filling many political roles. For making bare, initial comparisons, the clauses treating of the executive power from several constitutions of the modern world are presented on page 316.

The subject matter of this chapter includes only four of the presidential executive powers listed above: the execution of the laws, the appointment of administrative chiefs and of judges, the removal of administrative chiefs, and the supervision of the national administration. The other executive powers of the President will be dealt with in subsequent chapters where they may be more appropriately treated as phases of the functioning of the government.

THE EXECUTION OF THE LAWS

The Constitution provides that the President ". . . shall take care that the laws be faithfully executed. . . ." (Art. II, sec. 3.) This clause establishes the President as the chief executive officer of the United States. It contains the assumption that the President himself is not to execute the laws but to supervise those who do. It is sometimes overlooked that laws are not self-executing; legislation by Congress is meaningless until executed, or carried out, by the President's subordinates. Hence, the execution of federal law involves in one way or another all of the more than two million civil service employees, and, in time of need, the armed forces of the United States. Only a small part of the executing of the laws is composed of police work by such agencies as the Federal Bureau of Investigation; indeed, most police work falls in the province of the State and local governments. The federal executive branch is composed of people who carry out laws of many kinds, from collecting taxes to building electric power stations.

There is no formal means for compelling the President to execute the laws. Owing to the principle of the separation of powers, Congress can only legislate. Hence in the execution of the laws a President may often display policies that differ widely from those of Congress. For example, President Truman frequently refused to invoke certain clauses of the Labor-Management Relations (Taft-Hartley) Act of 1947 even though the Act had been passed by an extraordinary majority over his veto, showing great

Troops Escorting a Train Past Railroad Strikers, Chicago, July 10, 1894. President Cleveland, over the protests of Governor Altgeld and Mayor Hopkins of Chicago, ordered a regiment of federal troops to enforce a federal court injunction against the Pullman Company workers and the American Railway Union. The strike was broken after bloody rioting.

LOCATION OF THE SEAT OF EXECUTIVE POWER ACCORDING TO VARIOUS CONSTITUTIONS AND ORGANIC LAWS

Argentina: "The executive power of the Nation shall be vested in a citizen with the title of 'President of the Argentine Nation'." (art. 75)

Brazil: "The executive power is exercised by the President of the Republic." (art. 78)

Ceylon: "The executive power of the island shall continue vested in His Majesty [the British monarch] and may be exercised, on behalf of His Majesty, by the Governor-General in accordance with the provisions of this Order and of any other law for the time being in force." (art. 45)

Communist China: "The State Council of the People's Republic of China, that is, the Central People's Government, is the executive of the highest organ of state power; it is the highest administrative organ of state." (art. 47)

Greece: "The executive power belongs to the King, and is exercised by the responsible ministers appointed by him." (art. 27)

Japan: "Executive power shall be vested in the Cabinet." (art. 89)

Luxembourg: "The Grand Duke alone exercises the executive power." (art. 33)

The Netherlands: "The executive power shall be vested in the King." (art. 56)

The State of New York: "The executive power shall be vested in the governor. . . ." (Art. IV, sec. 1)

Saudi Arabia (The Hejaz): "The entire administration of the Kingdom of the Hejaz is in the hands of His Majesty Abdel Aziz I ibn Abdel Rahman Al Faisal Al Séoud." (art. 1)

Switzerland: "The supreme directing and executive authority of the Confederation is exercised by a federal council composed of seven members." (art. 95)

Syria: "The executive power shall be entrusted to the President of the Republic, by whom it shall be exercised, with the assistance of the ministers, under the conditions laid down in the present Constitution." (art. 31)

Thailand: "The King exercises the executive power through the Council of Ministers." (art. 9)

Turkey: "The Grand National Assembly exercises its executive authority through the person of the President of the Republic elected by it, and a council of ministers chosen by the President." (art. 7)

The Union of Soviet Socialist Republics: "The highest executive and administrative organ of the state power of the Union of Soviet Socialist Republics is the Council of Ministers of the U.S.S.R." (art. 64)

The United States of America: "The executive power shall be vested in a President of the United States of America." (Art. II, sec. 1, cl. 1)

Vatican City: "The Sovereign Pontiff, sovereign of the City of the Vatican, has full legislative, executive, and judicial powers.

"During a vacancy in the pontifical see, these same powers belong to the Holy College [the College of Cardinals]. . . ." (art. 1)

The Commonwealth of Virginia: "The chief executive power of the State shall be vested in a Governor." (sec. 69)

congressional enthusiasm for the law; for President Truman was deeply indebted politically to those labor union leaders against whom he would be using the Act. The Sherman Antitrust Act was passed in 1890; however, during its first decade it was rarely invoked, since Presidents Benjamin Harrison, Grover Cleveland, and William McKinley felt scant desire to regulate corporations and were in fact assisted by certain large corporations in their campaigns for office. However, after 1901 Presidents Theodore Roosevelt and William H. Taft enforced the Sherman Act vigorously since certain other interests had brought strong pressure on them to do so.

Whereas there may be no formal means for compelling the President to execute the law, there quite decidedly are informal, political compulsions. One of the President's greatest duties is to uphold his party; even though he may be in his second term and is consequently ineligible for another term, he must so conduct himself as not to weaken his party for the coming elections. In the same way the President is obligated to those who supported him for office, and who expect some sort of compensation for their support. An obstinate refusal to execute the laws may cost him and his party the following of some of the public, and will perhaps be unrewarding for those who aided his campaign. Indeed, the majority of the twentieth-century American public would not long tolerate a President who did not act. In the long run, then, the President's decision to execute or not to execute a given law must be modified by political as well as by conscientious considerations.

THE APPOINTMENT OF EXECUTIVE OFFICERS AND OF JUDGES

One of the weightiest presidential powers is that of appointing executive officers and judges. The Constitution states that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments" (Art. II, sec. 2, cl. 2). Thus every member of the executive branch of the national government except the President and the Vice President—more than two million people—is either directly or indirectly appointed by the President. In keeping with this constitutional authorization, the appointment of most of these persons, including all those under the merit system in the Civil Service save postmasters, has been vested in the heads of Departments. The direct presidential appointees number about 20,000, approximately one per cent of the total.

Following the Constitution, the process of appointment would appear to take a path wherein the President nominates, the Senate consents, and the President then officially appoints. In the case of Cabinet members, federal judges, diplomatic officials, and military commissions, this is roughly the path to appointment. The Senate rarely fails to confirm a Cabinet

nomination since it regards these officers as belonging to the presidential family and such close advisers of the President that he should have virtually unlimited discretion in his choice. The Senate is less ready to accept the presidential choices for judges and diplomatic officers. For example, there were major disputes over the confirmation of Associate Justice Hugo Black and of Charles Bohlen as Ambassador to the Soviet Union.

In the case of some thousands of other appointive offices, however, although the process formally adheres to the text of the Constitution, in practice it might almost be said to reverse the Constitution, so that the Senate actually nominates and the President confirms. In the case of a federal appointive officer such as a United States marshal, the President consults with the senior Senator of his party from the State in which the office is located. Should there be no senior Senator of his party from the State, the President may confer with a Representative or even with State party leaders. From these advisers he can receive the name of a competent person for the post whom the adviser may well wish to reward for some past political favor. The President may then proceed to nominate the individual suggested; presumably the Senate will consent to the nomination, and the President can then make the appointment official.

With the bulk of presidential appointments being effected through recommendations from the Senate, there has developed a practice termed "senatorial courtesy." This practice is aimed at curbing the independence of the President when making appointments. If the President should make an appointment without consulting his party's Senator or Senators from the State concerned to a post whose incumbent is normally recommended by the Senators from the State, and if the individual whom the President has nominated is in some way undesirable to one or both of those Senators, they may state on the floor of the Senate that the presidential nominee is "personally obnoxious" to them. Indeed, since most appointments are first referred to the relevant Senate standing committee, the Senators may make the declaration of opposition at a committee hearing. Under the operation of senatorial courtesy, the Senate will refuse to consent to the appointment of the presidential nominee. The working of senatorial courtesy is not inevitable; but it is so nearly so that a President will not often attempt an appointment without prior assurance from the Senate that his nomination will be confirmed. Senatorial courtesy is, of course, a device whereby the Senators strengthen their influence on the party organizations in their own States and prevent the national party organization, which may be hostile to the local group although of the same party, from invading the Senators' realm.

Through his power to appoint the chief administrative officers of the federal government, the President may go far in the execution of his own policies. For example, with the election of a Republican President and Congress in 1952, it was expected in some circles that certain federal regulatory bodies, such as the Federal Trade Commission, might have their powers shorn in behalf of the interests that opposed federal controls over

business and industry. Actually, little if any legislative change was made in the structure or functioning of these regulatory bodies. However, whenever a vacancy appeared on one of these groups, President Eisenhower tended to name to the post an individual known to dislike strong federal restraints on the national economy. By these appointments President Eisenhower accomplished about the same results that would have been attained by legislative change; his appointees in general exercised only a fraction of the regulatory powers with which they were endowed.

Likewise, in his function of selecting federal judges, the President may have great influence over policy. This principle has been recognized in the federal government for many years; the first real "court-packing plan" was that of the Federalists in 1800 and 1801. After they had lost the election of 1800 to the Republicans, but before they had left office, the Federalists in Congress passed the Judiciary Act of 1801, which created a number of new federal judgeships; retiring President John Adams quickly filled them with Federalists. This project met an early defeat, for one of the first acts of the Republicans was to repeal the law, thus doing away with the new judicial posts. However, the Republicans could not unseat John Marshall, whom Adams had lately chosen as Chief Justice. For three decades afterward, the decisions of the Supreme Court bore the imprint of the Federalist point of view although the Federalist Party never won another national election.

THE REMOVAL OF EXECUTIVE OFFICERS

Another major presidential executive power, closely associated with the appointive function, is that of removing executive officers. The Constitution provides means whereby executive officers may be removed by Congress through impeachment; however, this is a long process, and can be used only in the case of "treason, bribery, and other high crimes and misdemeanors." Congress has been unable to expand this process so as, for partisan reasons, to be able to remove presidential appointees. In 1805 the Republican Congress impeached an associate justice of the Supreme Court, Samuel Chase, who had made himself notorious for his unbridled public utterances of Federalist principles. However, the Senate refused to vote for conviction, thereby establishing the precedent that the impeachment process cannot be used for partisan causes. Success in this impeachment effort would probably have brought prompt impeachment and conviction of all other Federalist justices, and ultimately the subordination of all presidential appointees to the majority party in Congress.

It was evident at the outset, however, that the President must have means available for removing those officers who do not share his policies. This, of course, refers strictly to events that may occur during the President's term of office. Normally cabinet members and other high executive officers will tender their resignations whenever a new President is elected, even though the same party is in power; they are apt to do so when a Vice President succeeds to the presidency. Hence the problem of removal almost

invariably concerns some officer whom the President himself has named. The chief dispute over the means of removal came to revolve about the question of whether the President alone might dismiss an officer who had received his post through presidential nomination and senatorial confirmation, or whether the Senate must confirm the removal. Until the Reconstruction Era (1865–1877) it was generally admitted that the Senate should take no part in removals, and that the President should have a free hand.

However, during the contest between the Radical Republicans in Congress and President Andrew Johnson, Congress in 1867 enacted the Tenure of Office Act, requiring the consent of the Senate for the removal of any officer whose appointment had been confirmed by that body. The purpose of Congress at this time was to ensure that the President would remove no officer who appeared to obey congressional rather than presidential guidance. Johnson and his supporters argued that the Act was unconstitutional, in that it denied the President the right to surround himself with aides who would follow his directives; hence in 1868 the President removed Secretary of War Edward M. Stanton without consulting the Senate. Shortly thereafter Congress impeached the President, in part for the alleged violation of the Tenure of Office Act; however, the Senate failed by one vote to convict Johnson. Eventually the Act was repealed.

However, there can be and are limitations imposed upon the presidential power of removal. The President has no power to remove federal judges; for the Constitution declares that they shall hold office "during good behavior" (Art. III, sec. 1). The aim of this provision is clearly that of assuring the independence of the federal judiciary. Moreover, the President may not remove the members of federal bodies that are partly administrative, partly legislative, and partly judicial, such as the Interstate Commerce Commission, whose terms of office have been fixed by the congressional act establishing the body.

This point was settled by a case in the 1930's. In 1933 President F. D. Roosevelt removed William E. Humphrey from his post on the Federal Trade Commission. Humphrey, a Republican who had been appointed by President Coolidge, evidently committed no offense other than that of opposing Roosevelt's policies. Humphrey shortly afterward died, but the executor of his estate brought suit in federal court for Humphrey's salary from the time of his dismissal until his death. It was pointed out that the law creating the Federal Trade Commission had set its members' terms at seven years, and that it had permitted their removal only for reasons of "inefficiency, neglect of duty, or malfeasance in office," all of which were non-partisan. Finally, in 1935, in the case of Rathbun [Humphrey's executor] *versus* United States, the Supreme Court ruled that Humphrey's dismissal had been wrongful. Evidently such bodies as the Federal Trade Commission are to be regarded as nonpartisan—it is true that Congress generally requires that their members be almost equally divided between the two major parties—and that they are not responsible to the President alone, but to Congress as well.

However, in the case of executive officers responsible only to the Presi-

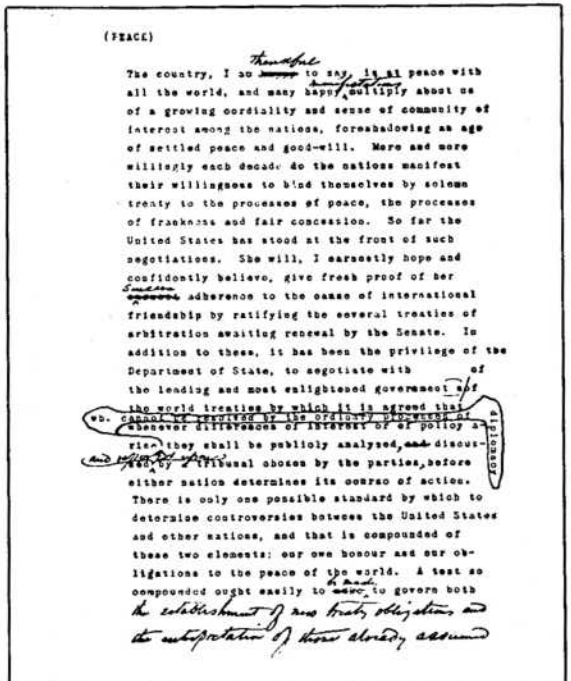
dent, such as the heads of the executive Departments, the presidential power of removal is not subject to limitations. Such was the ruling of the Supreme Court in the case of Myers *versus* United States (1926). Myers, a postmaster, had been dismissed by Wilson and could not regain his job by citing a congressional act giving him a longer term of office.

The power of the President to remove executive officers is always conditioned by political needs. It has been pointed out in the previous chapter that the President may make appointments in order to conciliate the different factions of his party, even though he may be at odds with them. Often the President and some other members of his party may have to tolerate a good deal of undesirable behavior from such officers for the sake of party unity.

SUPERVISION OF THE NATIONAL ADMINISTRATION

Another important executive power of the President is the supervision of the national administration, a function that makes the President in effect the managing director of the United States government. It must be remembered that Congress creates all parts of the national administration, gives a general description of their purposes, and endows them with the funds for their operation. However, Congress leaves to the President the task of determining the day-to-day obligations of the administration. First the President must decide what these obligations are to be; then he issues instructions to the relevant agency in any one of several forms. Very commonly these instructions are delivered orally, in person or over the telephone. They may be written, as memoranda or letters of command. The most formal type of instruction is the executive order; Congress usually establishes by law the conditions under which an executive order may be issued. Whatever their form, these instructions reach the Department heads, who transmit them to their assistants, and so on down the line to the individuals who actually perform the prescribed duties. Figure 39 contains facsimiles of different types of presidential papers.

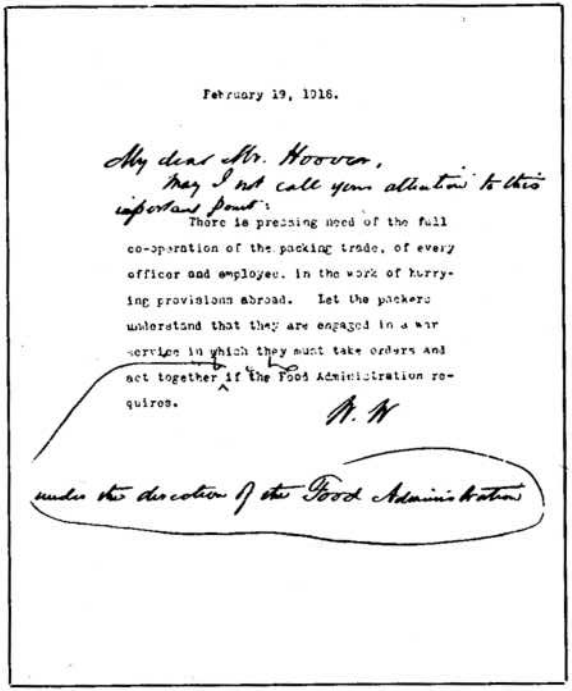
Many of the executive orders have the force of law. Congress in creating an administrative office or function may declare only in the broadest terms the general aims of the office or function; the essential details must be stated in one or more executive orders. For example, under the Reciprocal Trade Agreement Act of 1934 Congress fixed the principle of lowering tariff duties in order to encourage a revival of international trade. However, the decisions concerning which duties were to be lowered, and by how much, were left almost entirely to the President, to be based on the success he and his aides achieved in bargaining with foreign powers. In this way Congress may almost seem to delegate lawmaking powers to the President. Yet Congress must not surrender its legislative initiative to the President. One of the reasons for which the National Industrial Recovery Act was declared unconstitutional in 1935 was that through this Act, which was intended to assist industry to regain its normal levels of production, Congress was conferring legislative functions upon the Presi-



(PEACE)

The country, I am thankful to say, is at peace with all the world, and many happy auspices multiply about us of a growing cordiality and sense of community of interest among the nations, foreshadowing an age of settled peace and good-will. More and more willingly each decade do the nations manifest their willingness to bind themselves by solemn treaty to the processes of peace, the processes of frankness and fair concession. So far the United States has stood at the front of such negotiations. She will, I earnestly hope and confidently believe, give fresh proof of her [illegible] adherence to the cause of international friendship by ratifying the several treaties of arbitration awaiting renewal by the Senate. In addition to these, it has been the privilege of the Department of State, to negotiate with of the leading and most enlightened governments of the world treaties by which it is agreed that whenever differences of interest or of policy arise they shall be publicly analyzed, and discussed by all interested choices by the parties, before either nation determines its course of action. There is only one possible standard by which to determine controversies between the United States and other nations, and that is compounded of these two elements: our own honour and our obligations to the peace of the world. A test so compounded ought easily to govern both the establishment of new treaty obligations and the interpretation of those already assumed

A. "State of the Union" Message to Congress. First page of President Wilson's text for his annual message to Congress, December 2, 1913. Written on the President's own typewriter, with corrections in his handwriting.



February 19, 1918.

My dear Mr. Hoover,

May I not call your attention to this important point:

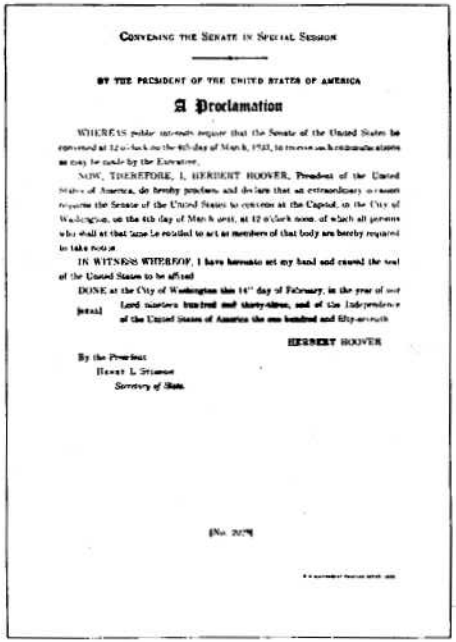
There is pressing need of the full co-operation of the packing trade, of every officer and employee, in the work of hurrying provisions abroad. Let the packers understand that they are engaged in a war service in which they must take orders and act together if the Food Administration requires.

W. W

under the direction of the Food Administration

B. Memo to an Agency Chief. Original letter by President Wilson to Herbert Hoover, the Food Administrator, Feb. 19, 1918, directing Hoover to apply pressure to the packing trade.

Figure 39. Types of Presidential Papers.



CONVENING THE SENATE IN SPECIAL SESSION

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

WHEREAS public interests require that the Senate of the United States be convened at 12 o'clock on the 4th day of March, 1913, to receive such communications as may be made by the Executive;

NOW, THEREFORE, I, HERBERT HOOVER, President of the United States of America, do hereby proclaim and declare that an extraordinary occasion requires the Senate of the United States to convene at the Capitol, in the City of Washington, on the 4th day of March next, at 12 o'clock noon, of which all persons who shall at that time be entitled to act as members of that body are hereby required to take notice.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 14th day of February, in the year of our Lord nineteen hundred and thirty-three, and of the Independence of the United States of America the one hundred and fifty-seventh.

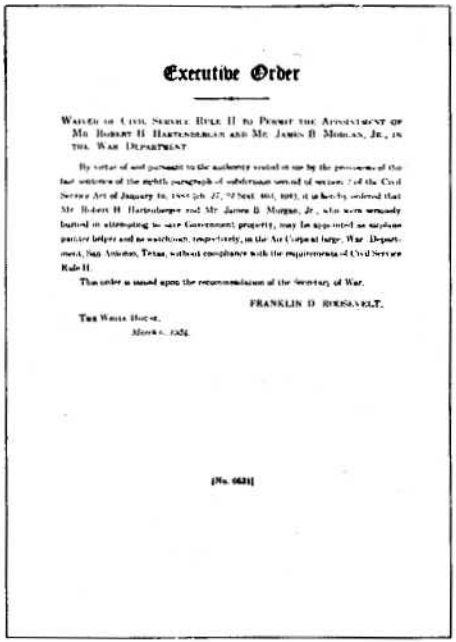
[SEAL]

HERBERT HOOVER

By the President:
HENRY L. STIMSON
Secretary of State.

[No. 2079]

C. A Presidential Proclamation.



Executive Order

WAIVER OF CIVIL SERVICE RULE II TO PERMIT THE APPOINTMENT OF MR. ROBERT H. HARTENBERGER AND MR. JAMES B. MORGAN, JR., IN THE WAR DEPARTMENT

By virtue of and pursuant to the authority vested in me by the provisions of the last sentence of the eighth paragraph of subdivision second of section 7 of the Civil Service Act of January 16, 1883 (ch. 27, 22 Stat. 403, 406), it is hereby ordered that Mr. Robert H. Hartenberger and Mr. James B. Morgan, Jr., who were seriously injured in attempting to save Government property, may be appointed as airplane parties helper and as watchman, respectively, in the Air Corps at large, War Department, San Antonio, Texas, without compliance with the requirements of Civil Service Rule II.

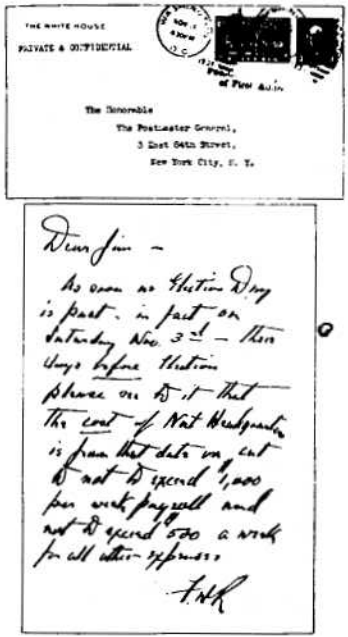
This order is issued upon the recommendation of the Secretary of War.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
March 1, 1934.

[No. 6631]

D. An Executive Order.



THE WHITE HOUSE
PRIVATE & CONFIDENTIAL

The Honorable
The Postmaster General,
3 East 64th Street,
New York City, N. Y.

Dear Jim —

As soon as Election Day is past — in fact on Saturday Nov. 3rd — there ought before Election shows us by it that the cost of Nat'l Headquarters is from that date on not to exceed $1,000 per week payroll and not to exceed $50 a week for all other expenses.

F.D.R.

E. The President as Party Chief. A memo to James Farley sharply curtailing Democratic overhead facilities, Nov. 3, 1934.

Figure 39. ***(continued)***

dent. The formulation of general policy, then, remains an exclusive prerogative of Congress.

It must not be thought that the President drafts his executive orders independently of outside influence. Probably the vast majority of them are based on information supplied by Department heads; however, the President must assume final responsibility for them. Informal orders and memoranda may even be written by administrative chiefs. Others will be drawn up in the presidential offices, with the advice and counsel of Department heads, members of the White House Staff, important congressmen, and party leaders outside the government. In his functioning as the managing director of the government the President is subject, as he is in each of his other political roles, to the influence of political needs.

QUESTIONS AND PROBLEMS

1. What are the reasons that may impel the President sometimes to execute the laws meticulously and at other times loosely or in an extended manner?
2. What are the formal and the informal limitations on the presidential appointing power over the executive branch of the government?
3. Compare the roles of Congress and of the federal courts in the process of presidential appointments and removals.
4. What controls do Congress and the courts have over the President's power to supervise the administration of government?
5. Of the four major types of presidential powers described in this chapter, which do you believe is most subject to checks and balances? Which least subject?