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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Privileged Draft (October 8, 2001) [6 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	6	10/08/2001	
002	Draft	President's Authority to Issue Executive Order to Enhance Aviation Security [4 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Secretary Card - From: Brett Kavanaugh	4	10/05/2001	
003	Handwritten Note	Limiting Employees to Citizens [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	1	N.D.	
004	Memorandum	Options for Aviation Security [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	2	N.D.	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Aviation Security: Aviation Security [2]

FRC ID:

9121

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
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006	Fact Sheet	Enhancing Aviation Safety & Security [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	2	N.D.	
007	Q and A	Questions & Answers on the President's Agenda to Improve Aviation Security [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]	5	N.D.	
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* authority to create privately funded entity
524-4487

PRIVILEGED DRAFT (October 8, 2001)

- (1) * user fees - Sec to give authority to user fees
- (2) * existing contracts
- (3) * federal managers + trainers

By the authority vested in me as President by the Constitution and the laws of the United

States of America, it is hereby ordered as follows:

Sec. 1. Purposes.

enterprise
report within 6 months

- appropriations?
- general emergency powers to impose regime

The ~~safety and~~ security of the United States civil air transportation system is critical to the national security of the United States and to the basic freedom of American citizens to move in intrastate, interstate, and international transportation.

JOSTA

Sec. 2. Federal Law Enforcement Personnel at Airports.

(a) The Secretary of Transportation ("Secretary") and the Attorney General shall provide for the deployment of Federal law enforcement personnel at airports sufficient to meet aviation safety and security needs.

in coordination with

(b) The Secretary shall ensure that at least one law enforcement officer authorized to carry firearms is stationed at each airport security screening location.

[Federal?]

Sec. 3. Security of Aircraft and Ground Access to Secure Areas.

(a) The Secretary, in consultation with the airport operator and Federal, State, and local law enforcement authorities, shall order the deployment of law enforcement personnel sufficient to secure aircraft and ground access to secure areas. In considering where and how to deploy such personnel, the Secretary shall consider the physical security needs of air traffic control facilities, parked aircraft, aircraft servicing equipment, aircraft supplies (including fuel), automobile parking facilities, and access and transportation areas at airports served by other means of transportation.

- law enforcement personnel
- perimeter security
- passenger cut off
- screening
- Federal air marshals
- training of crews
- blight de h security
- blight school security
- Homeland Security Council

(b) The Secretary shall require that airport and air carrier personnel with access to a secure area of an airport or aircraft be screened so that they cannot threaten

* review within 6 months and report to Congress on how screening is working

HOUSE LEADERS won't bring it up → EO

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aviation security.

- (c) The Secretary shall require that air carriers and airports involved in air transportation and intrastate air transportation implement security awareness programs for airport employees, ground crews, and other individuals employed at such airports.

Sec. 4. Passenger and Cargo Screening.

Pursuant to sections 46105, 44931, 44932, 44904, 44903, 44701, 44912, and 44933 of title 49, and pursuant to the constitutional authority of the President to defend the homeland, the Secretary shall take the following actions to respond to the emergency arising out of the attacks of September 11, 2001, and the ongoing terrorist threat to aviation security and national security:

- (a) In the interest of national security, the Secretary shall provide for the screening of all passengers and cargo, including United States mail, that will be carried aboard an aircraft in air transportation or intrastate air transportation. The screening shall take place before boarding.
- (b) In the interest of national security, the Secretary shall ensure that employees of the Federal government train, manage, and supervise screeners. The Secretary shall ensure that the Federal trainers, managers, and supervisors of screeners possess qualifications that the Secretary deems necessary to ensure aviation security and national security, including appropriate language and educational skills. All Federal personnel involved in training, managing, and supervising screeners shall be citizens of the United States.
- (c) In the interest of national security, the Secretary shall ensure that passenger and cargo screeners are adequately qualified, trained, and supervised.

- (1) All screeners shall possess qualifications that the Secretary deems necessary to ensure aviation security and national security, including appropriate language and educational skills. All screeners shall be citizens of the United States.
- (2) The Secretary shall ensure that all screeners undergo a mandatory and rigorous training program designed and conducted by Federal employees.
- (d) In the interest of national security, the United States shall contract with private security companies to perform the screening functions at airports. For any airport where, in the Secretary's determination, a private screening company is not available or not able to adequately perform the screening function, the Secretary shall direct the Federal Government to employ personnel sufficient to perform the screening function.
- (e) In the interest of national security and pursuant to 5 U.S.C. 7103, all Federal personnel involved in training, managing, and supervising screeners shall be exempt from the requirements of chapter 71 of title 5. To the extent appropriate and pursuant to and consistent with 5 U.S.C. 7531-7532, the Secretary or his designee may remove or suspend without pay any employee involved in training, managing, or supervising screeners.
- (f) The Secretary, in coordination with the Director of the Office of Management and Budget, shall ensure that the United States owns and properly maintains all airport screening equipment.

Sec. 5. Federal Air Marshals.

- (a) In order to protect the national security of the United States, the Secretary shall:

- (1) provide for deployment of Federal air marshals sufficient to maintain the security and safety of air transportation in the United States;
 - (2) provide for background investigations of candidates for appointment as Federal air marshals that are consistent with the requirements imposed for comparable Federal law enforcement officers;
 - (3) provide for appropriate training, supervision, and equipment of Federal air marshals; and
 - (4) require air carriers to provide seating for Federal air marshals on any flight without regard to the availability of seats on that flight.
- (b) The Secretary may use personnel from other Federal departments and agencies to provide air marshal service on domestic and international flights.

Sec. 6. Training of Flight and Cabin Crews.

The Secretary shall establish a mandatory security and safety training program for flight and cabin crews of aircraft providing air transportation.

Sec. 7. Flight Deck Security.

To ensure security of the flight deck, the Secretary shall:

- (a) Prohibit access by all individuals, except necessary and authorized personnel, to the flight deck of an aircraft engaged in air transportation or intrastate air transportation;
- (b) Require appropriate strengthening of the flight deck door and locks on any aircraft operating in air transportation or intrastate air transportation such that the door cannot be forced open from the passenger compartment;
- (c) Require that flight deck doors remain locked while any aircraft is in flight except when necessary to permit the flight crew ingress and egress;

- (d) Prohibit the possession of a key to any such flight deck by any member of the flight crew who is not assigned to the flight deck;
- (e) Require that air carriers establish procedures so that cabin crews of aircraft can notify flight deck crews of security breaches and other emergencies;
- (f) Require that the transponder remain operational at all times while the aircraft is in flight; and
- (g) Take other action as may be appropriate to ensure the safety and security of the aircraft.

Sec. 8. Payment to Airlines for Improved Flight Deck Security.

The Director of the Office of Management and Budget shall direct \$500 million to air carriers designated by the Secretary to assist the air carriers in improving flight deck security.

Sec. 9. Flight School Security.

In the interest of national security, the Secretary shall prohibit any person subject to regulation under chapter 449 of title 49 from providing training in aircraft operation to an alien who has not been certified by the Secretary as eligible for such training. The Secretary shall establish appropriate procedures to screen and certify aliens who seek training in aircraft operation.

Sec. 10. Coordination by ~~Office of~~ Homeland Security, *Council.*

- (a) The ~~Office of~~ Homeland Security, *Council* shall work with the intelligence community to coordinate intelligence, security, and criminal enforcement activities affecting the safety and security of aviation at all United States airports and air navigation facilities involved in air transportation. *and interstate air transportation*
- (b) The Secretary, acting through the ~~Office of~~ Homeland Security, *Council* shall --

- (1) explore the technical feasibility of developing a common database of individuals who may pose a threat to aviation security;
- (2) enter into memoranda of understanding with other Federal agencies to share or otherwise cross-check data on individuals identified on Federal agency databases who may pose a threat to aviation security; and
- (3) evaluate technologies that might be useful in improving the safety and security of aviation in the United States.

Sec. 11. International Aviation.

The Secretary shall work with the International Civil Aviation Organization and with appropriate civil aviation authorities of foreign governments under section 44907 of title 49 to address security concerns on flights by foreign carriers, including flights to and from the United States.

Sec. 12. General Provisions.

This order does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies or instrumentalities, its officers or employees, or any other person.

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THE WHITE HOUSE
WASHINGTON

October 5, 2001

MEMORANDUM FOR SECRETARY CARD

FROM: BRETT M. KAVANAUGH BK

RE: PRESIDENT'S AUTHORITY TO ISSUE EXECUTIVE ORDER TO
ENHANCE AVIATION SECURITY

The President possesses legal authority to issue an executive order that would achieve his primary objectives with respect to aviation security. The executive order would direct the Secretary of Transportation and Administrator of the Federal Aviation Administration to take actions that are within the scope of the existing statutory authorities of the Secretary and the Administrator.

I. Legal Authority

• Federal Air Marshals

The President may direct the Administrator of the FAA to increase the number of federal air marshals and may direct her to impose additional eligibility requirements and additional duties on air marshals.

• Cockpit Security; \$500 million "grant"

The President may direct \$500 million of the supplemental appropriation for improved cockpit integrity. The President may further direct the Administrator to establish appropriate standards for cockpit security, including standards for: access to the door, fortifying the door, continuous operation of the transponder, and informing the cockpit crew of activity in the cabin.

• Creation of Aviation Security Coordination Council

The President may direct the creation of a Council to coordinate intelligence, security, and criminal enforcement activities related to aviation security. Such a Council could consist, for example, of the following officials or their designees: Secretary of Transportation, Director of Office of Homeland Security, Attorney General, Director of FBI, Secretary of Defense, Secretary of Treasury, and Director of CIA. The President could direct the Council to review, oversee, and make recommendations with respect to aviation security, and otherwise to coordinate aviation security.

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Exec Order

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- **Miscellaneous Security Measures**

The President may direct the Secretary and Administrator to establish new standards for airport perimeter security, anti-hijacking training, research with respect to biological and chemical weapons, and flight school security.

- **Federal Standards for Screening**

The President may direct the Administrator to establish additional federal standards relating to screening procedures, as well as for the qualifications, background, and conduct of the screeners themselves. The standards could include citizenship and language requirements.

- **Oversight of Screeners by Federal Employees**

The President may direct that the Administrator use federal employees to train, manage, and supervise screeners, and to conduct background checks on screeners. In the short term, any money needed for this aspect of the program would come from the supplemental appropriation. (The President is authorized by statute, 5 U.S.C. 7103 and 7531, to exempt federal employees from federal employee labor laws if necessary in the interest of national security; that should be the case for these trainers, managers, and supervisors.)

- **Federal Contracts with Screening Companies**

The President may direct that the Administrator contract with private screening firms in order that those firms perform the passenger and baggage screening functions at airports. This is one aspect of a possible executive order that would raise a question of legal authority. Section 44901 of Title 49 provides that, for purposes of screening passengers or baggage, "an employee or agent of an air carrier . . . must use or operate . . . a weapon-detecting facility or procedure." This provision was designed to identify the party responsible for screening in airports -- namely, the air carrier and not the airport operator.

We have concluded, however, that the President has two options for directing the Administrator to contract directly with *private* screening companies.

First, the President may direct that the Administrator enter 3-party contractual arrangements with screening companies and air carriers. Under these contractual arrangements, the screeners would be trained, managed, and supervised by federal employees, but the air carriers would be partners (secondary partners, to be sure) with the government. The contracts would be structured to reflect this arrangement, and the screeners therefore would be both federal contractors and "agents" of the air carriers. This approach should avoid litigation risk under section 44901.

Second, in addition or in the alternative, the President may rely on certain Title 49 authorities that, in our judgment, provide an implied emergency/security exception to section 44901. This approach would allow the Administrator to enter into contracts with private screening firms without involving air carriers in the arrangements. The relevant sections of Title 49 include:

- section 46105 (when “emergency exists related to safety in air commerce,” Administrator may issue orders “to meet the emergency”);
- section 44931 (Director of Intelligence and Security in Department of Transportation may “carry out other duties and powers the Secretary decides are necessary to ensure . . . the security of the traveling public”);
- section 44932 (“The Assistant Administrator for Civil Aviation Security shall . . . develop ways to strengthen air transportation security, including ways to . . . strengthen preflight screening of passengers”);
- section 44904 (Administrator “shall take necessary steps to improve domestic air transportation security by correcting deficiencies in that security”);
- section 44903 (“The Administrator shall prescribe regulations to protect passengers and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violence or aircraft piracy”);
- section 44701 (Administrator “shall promote safe flight of civil aircraft in air commerce by prescribing . . . regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security.”);
- section 44912 (Administrator “shall establish and carry out a program to accelerate and expand . . . the implementation of technologies and procedures to counteract terrorist acts against civil aviation”; that may include procedures with respect to “the ability to screen passengers, carry-on baggage, checked baggage, and cargo”); and
- section 44933 (“Federal Security Managers” at each airport shall establish the “responsibilities of each air carrier . . . for air transportation security at the airport” and shall “serve as the on-site coordinator of the Administrator’s response to terrorist incidents and threats at the airport”).

This second option poses mild litigation risk under section 44901 because the screeners would not be employees or agents of the air carriers, but we believe that a court would uphold this option in light of: (i) the statute’s significant emergency and security provisions, (ii) the required judicial deference to a reasonable Executive Branch interpretation of a statute with multiple, general provisions, (iii) the statute’s broad overall purpose of protecting security and safety during emergencies and crises, (iv) the fact that no private party would be injured as a result of this action (which raises a standing issue as well for any potential plaintiff), and (v) the overall national security situation at this time.

• **Federal Government Purchase of Security Equipment**

The President may direct the Administrator to purchase and if necessary upgrade screening equipment currently in the airports. The money for the purchases would come from the supplemental appropriation.

II. Additional Considerations Related to Executive Order (prepared with Department of Transportation)

- **Considerations in favor of an executive order**
 - Key House leaders recommend this approach.
 - The executive order would facilitate an immediate start to the program, which would enhance aviation security and increase public confidence in flying.
 - This approach would demonstrate leadership by the President.
 - Under an executive order, the screeners would not be federal employees.
- **Considerations against an executive order**
 - In his Chicago speech, the President asked Congress to pass his aviation security package. With the exception of the issue of the employment status of screeners, both the House and Senate bills closely track his proposals. The Senate is expected to pass a bill next week.
 - An executive order likely would generate significant friction with a number of Senate Republicans and virtually all Democrats. It could contribute to a public perception that the recent bipartisan approach to security and other issues has ended.
 - An executive order would delay only temporarily the need for Congress to address these issues, as Congress eventually would be required to appropriate money to continue these policies and programs.

Looking Abroad For Answers on Airport Security

Attacks Add Urgency to Long U.S. Effort

By GREG SCHNEIDER
Washington Post Staff Writer

AMSTERDAM—Hurrying past the soaring metal girders and green glass of Schiphol Airport here, a passenger isn't likely to notice much tighter security than in many U.S. airports.

Show your passport, scan your bag, walk through the metal detector; set it off and they'll pat you down. Some of the guards even work for companies that provide security in the United States.

But there are fundamental differences that go deeper than the easy way in which the Dutch workers shift from Dutch to English to, sometimes, French.

Schiphol, considered one of the finest airports in Europe, has a highly trained, closely monitored force of security guards who work in a standardized and efficient environment. U.S. airports do not. A recent Federal Aviation Administration study found that airport screeners in an unnamed European country were at least twice as likely as their American counterparts to spot dangerous items in scanned baggage.

The aftermath of the deadly terrorist attacks of Sept. 11 has only emphasized the difference, with U.S. travelers reporting wild variations in security crackdowns across the country—individual car searches in Raleigh, N.C., for example, but no armed guards, and laptops and cell phones passing quickly through X-ray machines at Dulles International Airport.

Now American officials are looking overseas for lessons on how to improve the most sprawling, busiest air travel system in the world. Practices such as an extensive policy of certifying airport workers in Belgium and Israel's aggressive steps to make airplanes secure suggest the commitment of resources and planning the United States will face.

These techniques have long been studied by U.S. experts; there was simply never the will to imitate them until the unthinkable actually happened. Authorities have always argued that terrorism is not a threat here, or that the regulatory process is too cumbersome to change, or that the airlines can't afford a more European-style security system, said Kenneth Quinn, counsel to the contractor trade group the Aviation Security Association and former chief counsel for the FAA.

"Now that we have had our bell rung on all three accounts, we are moving in lightning speed in that direction," he said.

Keeping a Close Eye

The middle-aged American couple stepped up to a clean-cut, uniformed security guard at Schiphol Airport. As an armed member of the Dutch royal police looked on, the guard—an employee of a private contractor who had undergone a year of training through a royal police academy—began questioning the couple about some Arabic stamps on the man's passport.

After at least 10 minutes, and following a consultation with the police supervisor, the guard sent the couple on to their U.S.-bound flight—which they boarded after two more passport checks and a search of their hand luggage.

The scene suggests not only how Amsterdam has targeted particular flights and travelers for extra security measures but also how tightly the government and its private contractor work together.

In the United States and Canada, the airlines themselves hire security companies to handle baggage and passenger screening. At Japan's Narita International Airport, the airlines hire separate companies to screen checked baggage but combine to hire one contractor to X-ray carry-on bags. That means that several contractors can work in a single airport—a situation many other countries discourage.

Several officials of airports overseas said that government oversight is the fundamental ingredient of an aviation security system. But they also said that the actual work of screening baggage and passengers is best performed by private contractors. Only that way, the officials said, can the government have absolute control over the quality of the work.

"It's harder to do quality control on our government people," said Frank Durinckx, director of Belgium's Aviation Inspectorate and chairman of a Europe-wide task force on aviation security. Government agencies do not like to criticize themselves or one another, he said, and civil servants are hard to get rid of if they aren't performing well.

"If we give the work to a private contractor, we have control over them," Durinckx said. "If we're not pleased with a screener, we can withdraw his license. If we're not pleased with a company, we can get rid of it."

Sixty government inspectors work at the Brussels airport to oversee about 400 employees of the private company Securis, an arm of the Swedish Securis Group AB. The company must be certified by the Ministry of Transportation, and each individual employee must be certified by the Civil Aviation Administration.

The employees undergo training at a government-run institute that serves as a center for training airport security officials from all over Europe.

Contractors say they prefer working for a government instead of an airline. "It gives you a healthy financial basis to do your security in an effective way," said Kris van den Briel, chief operating officer for Securis in Brussels. "In the U.S., [the airlines] get a competitive advantage by using a cheap screener."

In the Netherlands, airport security is the job of the Ministry of Justice, which carries out its policies through the Royal Marechaussee—akin to a federal police force. The royal police hire a private contractor to do the actual work of inspecting bags and collecting passports.

But the supervision is intense. Including a squad of immigration police, the royal police station 1,300 agents at the country's main airport, Schiphol. They oversee about 1,500 employees of the security company Securoop Nederland arm of Group 4/Falcks.

The government's role has become a political issue in the Netherlands in the wake of the U.S. terrorist attacks. Before Sept. 11, one house of parliament had approved legislation to hand over security planning—but not ultimate authority—to the semi-private company the Schiphol Group, which operates the airport. Now Prime Minister Wim Kok is reconsidering his support for that measure under public pressure to keep a higher degree of government oversight.

In France, airports do the hiring of security contractors, and must draw from a list of companies approved by the Interior Ministry. Britain allows its airports to either hire a contractor or perform the work themselves; the two biggest airports—London's Heathrow and Gatwick—maintain their own security forces.

And Israel, widely regarded as having the most airtight aviation security in the world, maintains a system of contractors overseen by the government.

In Congress, a bill to strengthen U.S. airline security has been delayed in part by debate about whether to make security workers federal employees. Senate Majority Leader Thomas A. Daschle (D-S.D.) told CNN yesterday that he is confident the Senate will resolve its dispute this week. "There is no doubt that federalization is going to be a big part of the overall answer to what needs to be done in airports across the country," he said.

Good Training, Pay

Every couple of years, the Belgian government makes Cliff Lodiwejkx take a test to prove he deserves to keep his job as a Brussels Airport security guard. He doesn't resent it. The process gives him the same feeling he gets when he reads the mail bulletins or the monthly security magazine that his company sends him: His job matters.

"If you start reading about it and learning about it, you start to love your job, because you know what you are actually doing and why you are here makes a difference," said the 29-year-old father of two.

Lodiwejkx has worked at the Brussels airport for six years. U.S. security workers tend to leave their jobs in less than six months.

Belgium has one of the lowest turnover rates in Europe for airport security guards, at 15 percent or less. Even the continent-wide average of below 50 percent is dramatically lower than in the United States, where turnover can range from 150 percent per year to even 400 percent.

That level of turnover horrifies European airport officials. "The weakest link in airport security is the human factor," said Durinckx, the Belgian aviation security director.

Most European governments perform criminal background checks on prospective security employees and require basic language skills, while some—including the Netherlands and Belgium—require screeners to be residents of the country.

A year ago, Belgium began a pilot project being studied by other European countries in which it certifies individual airport security workers based on their level of training.

All airport workers must first train to be security guards, then take aviation-related training as a specialty. The basic airport guard undergoes about 120 hours of government training, or more than twice as much as currently required in the United States.

A guard might have to train an extra 256 hours to get certified for higher levels of work, such as using conventional X-ray scanners or explosive-detection systems. Eventually, the nation's trade unions hope to tie pay to level of certification so workers can climb a clearly defined career ladder.

Belgium tends to be a proving ground for such new policies, partly because of its position as a crossroads of Europe, with both NATO and the European Union headquartered in Brussels. But the country also is small enough to keep costs low on such experimentation.

The new certification system will cost less than \$1 million a year, Durinckx said, and is to be paid for with a levy of only a few cents on each airplane ticket. A similar system in the United States, where some 30,000 security workers would have to be certified, would be a far more daunting task, he said.

Pay is another reason other countries boast a better retention rate among airport workers.

In England, for instance, workers at the three major London area airports start at a salary of \$27,500 a year. Overtime and bonuses push that figure over \$30,000—more than what starting teachers earn, a little less than a beginning police officer.

In Japan, screeners are recruited with salaries of up to \$1,416 per month, plus bonuses. That level compares with starting pay at other Japanese companies, according to an official at the government-supervised Airport Security Business Center, a training facility.

U.S. workers generally make minimum wage—\$7 to \$8 an hour—with no health benefits. Airport security companies in Japan, England, Belgium, the Netherlands, France and Israel all provide health coverage for their employees.

Technology to the Rescue

Waiting in line to have their passports checked this week at Schiphol Airport, passengers stood looking at a strange gate monitored not by a security guard but by a computer display. "Privium Members Only," read a cryptic sign over the sleek metal contraption.

Though it was temporarily blocked off by a sheet of plywood, this was an example of one type of technology that security planners hope will soon make airport passage both safer and quicker.

European Union residents will soon be able to pay a small fee to pass through that Privium gate without having to stop and be interviewed by a passport screener. The system relies on iris scanning technology both to identify the passenger and track his or her movements.

It will work like this: The traveler will get his iris scanned and that information will be stored in a tiny computer chip implanted in a plastic card. At the gate, the traveler will insert the card and be immediately identified by a vast database. Then he will move forward and have his eye scan verified by another machine.

"It's safer than a regular check because the computer will know every time where somebody is," said Marianne de Bies, a spokeswoman for the Schiphol Group.

Another area where European airports are counting on technology to make a difference is in the screening of checked baggage, which relies on complex machinery that can pick out explosive devices automatically.

Most European countries have agreed to use such equipment to screen 100 percent of checked baggage by 2003. Belgium is near that goal now, but even for a small country, it represents a sizable investment. In the United States, complete screening would carry an enormous price tag.

A spokesman for Invision Technologies, which makes three types of super-advanced scanners, said the top-line model costs about \$1.5 million and can process 800 bags an hour. Judging from yearly passenger levels, Baltimore-Washington International Airport would need 53 of those machines to scan every bag put on every plane—at a cost of about \$80 million. Dulles would need 20 at a cost of \$30 million and Reagan National, based on past years' passenger levels, would need 16 at a cost of \$24 million.

But experts say other benefits would offset some of that cost. There might be less need for screening individual passengers if all baggage gets thoroughly examined by new technologies that are more thorough than conventional X-ray systems.

And for a system as vast as the one in the United States, that is a key consideration—balancing the need for safety against the need and desire for freedom of movement. Israel, for example, has a grueling but effective policy of subjecting travelers to intense interviews before allowing them on a flight.

With each passenger grilled by multiple security officials, the screening process in Israel can take 45 minutes or more. That's less of a problem if the airline, like Israel's El-Al, flies only 25 flights or so per day.

In the United States, such an approach could back up the entire commercial aviation system.

Israel also has stopped providing a firearm for pilots in favor of using plainclothes armed air marshals on each flight, according to a congressional staffer who was briefed recently by El-Al officials.

Holes in the System

At an airport in Bamako in the West African nation of Mali, a regional flight to Ivory Coast has begun boarding. Passengers with money have bought their way to the front of the line and are trooping through with enormous suitcases that could never fit in an overhead bin.

The baggage X-ray machine works only intermittently, but that does not seem to bother the security manager, who carefully cleans his nails and does not even look up as the metal detector beeps repeatedly at passengers waltzing through.

European airlines flying from Western Africa back to Europe have tightened up security procedures in recent weeks, but the scene in Mali remains typical for other flights throughout the region.

And that worries aviation safety experts.

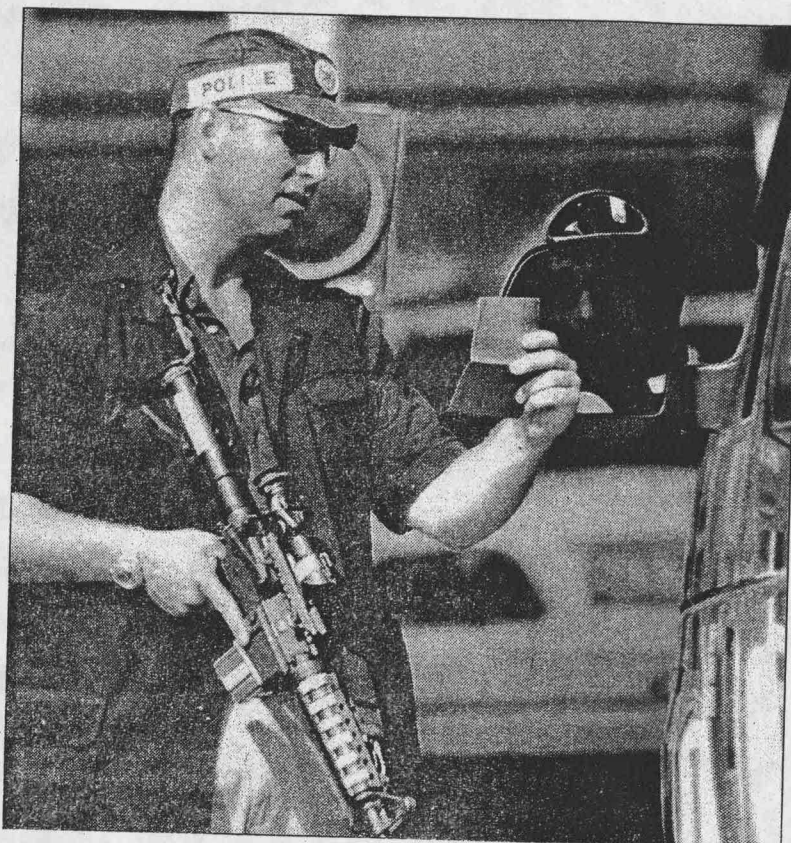
"That is one of the forthcoming problems," said Durinckx. If Western nations fix their own problems, the developing world could be an unguarded backdoor.

Durinckx was standing in the auditorium at the European Aviation Security Training Institute in Brussels, and on the dais were a stack of books with titles such as "Bomb Designs," "The Anarchist Handbook" and "Guerilla Air Defense—How to Shoot Down an Aircraft on Final Approach."

Such books are banned in Belgium, but Durinckx ordered them from the United States over the Internet. With no way to stop such material from circulating, he said, it is more important than ever for countries to exchange ideas and standardize policies for keeping air travel safe.

Staff writers Cindy Webb, Jeff Hall, Michael Greenspon, T.R. Reid, Doug Farah, Akiko Kashiwagi, Bill Brubaker and Helen Dewar contributed to this report.

WAR AGAINST TERRORISM



BY URIEL SINAI—ASSOCIATED PRESS

An Israeli police officer checks the identity card of a driver entering Ben-Gurion International Airport near Tel Aviv.



BY ITSUO INOUE—ASSOCIATED PRESS

A policeman stands guard at Haneda Airport in Tokyo yesterday after security was stepped up because of the U.S. and British attacks on Afghanistan.

AG - 7 Judge Gonzalez

costs of ~~Hallam~~ Chelsea

OLC - Limiting Employees to Citizens

- constitutional status - OK

more recent cases - OK

- state police officers (Foley v. Connally)

435 US 297 (1978)

(Burger, CJ)

- cannot exclude aliens from
all jobs

- restrict

- juries, police officers

- "American values"

Hampton
(Stevens)

426 US 88 (1975/76)

civil service commission

↳ stuck down

↳ more narrow

↳ federal govt has more
authority than states in
this area

↳ overriding national
interest

(i) ~~on~~ state level

(ii) federal govt

(iii)

jury

→ officers
→ federal level

OPTIONS FOR AVIATION SECURITY

1. Implement President's Original Proposal through Executive Order

President has authority to direct Secretary of Transportation and FAA Administrator to:

- establish new standards for airport perimeter security and screening functions;
- use federal employees to train, manage, supervise and conduct background checks on baggage and passenger screeners;
- contract with private security firms to perform passenger and baggage screening functions; and
- upgrade security and screening equipment at airports.

(All of these measures can be funded with the supplemental appropriation in the short term).

Pros:

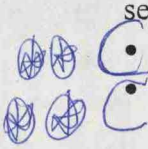
- accomplishes the President's objectives quickly;
- favored by key House Republicans;
- allows the President to keep some distance from Congressional stand-off;
- creates leverage with those that favor full federalization;

Cons:

- only viable if House leaders have the votes to prevent a victory for full federalization or can prevent a vote altogether;
- somewhat vulnerable to legal challenge, particularly with respect to contracting with private firms because of legal requirement that screeners be employees or agents of air carriers;
- merely delays Congressional intervention until appropriation of new money becomes necessary to continue these policies and programs;
- could be seen as a heavy handed end to bipartisan consultation;
- likely to anger Senate Republicans who favor full federalization.

2. Support Full Federalization with Protections

The President could support creation of a new entirely federal workforce to handle airport security, BUT insist upon the following:

- 
- transition period to prevent mass departure of existing screeners;
 - exemption from federal civil service and procurement laws for new federal workforce;
 - no strike provision
 - exemption from Administrative Procedures Act for new Airport Security Agency; and
 - prohibition on amendments on unrelated issues (such as Amtrack security and airline worker relief).

Pros:

- likely to have significant popular support;

→ Daschle → air carriers → do EO

- likely to be acceptable to substantial majority in Senate and members of House who favor full federalization;
- creates freedom as possible short of privatizing the workforce.

Cons:

- conflicts with President's original proposal;
- causes serious problems with House Republican leaders;
- creates a minimum of 28,000 new federal employees
- minimizes, but does not necessarily eliminate, transition concerns

3. Limited Full Federalization Compromise



federal screeners

14,000
✓
in place
by

The President could offer a compromise proposal requiring that a certain number of screeners (e.g. half) become federal employees after an appropriate transition period. The remaining screeners could remain private employees. The details of this potential compromise have not yet been worked out.

Pros:

- would avoid full federalization (if acceptable to Congress);
- presumably would be less objectionable to those who oppose full federalization.
- Demonstrates strong Presidential leadership in breaking impasse and preserving "bipartisanship"

Cons:

- may not be acceptable to those who favor full federalization, or to those who oppose federalization;
- creates a larger new federal workforce.

worth a try

DASCHLE



EO ROUTE IF
NOT

no strike

EO scaled back
Moral high ground

can't fund

* running out of options
- full fed for big airports
but not small airports
- BIG 4 together



"Huntington, Clare" <Clare.Huntington@usdoj.gov>
10/05/2001 01:55:28 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP
cc:
Subject: Aviation security memo

Brett,

Below are a few questions. Let me know if anything is not clear, or if you want to talk about this further. My number is 514-4487. Thanks

Clare

Federal Air marshals:

1. Where would the money come from? Would we need an additional allocation from Congress? We understand that there exists a small federal air marshal program, but presumably this has a limited budget, set by Congress.

Cockpit security:

1. We assume the new standards would be set pursuant to some general rulemaking authority of the Administrator to establish safety standards, but have you thought about whether the new standards would be established with notice and comment? If you wanted it to take place right away, you might have a good cause exception. Or, meeting the standards could be a condition of receiving the grant. The latter scenario would not assure that all carriers have the improved cockpit doors, however, because a carrier could simply decline the grant.

Council:

No questions.

Miscellaneous security:

1. We have the same questions as for the cockpit security: we assume there is a general rulemaking authority to set the new standards (perimeter security, etc.), but will the standards be set with notice and comment (perhaps with a good cause exception?)?

2. For the "research with respect to biological and chemical weapons," is this research on how such weapons could be used in connection with airplanes? Who will conduct the research? Will there be grants to outside entities? Or does the FAA or the Dept of Transportation have a research wing that would do this?

Federal standards for screening:

No questions.

Oversight of screeners:

1. You mention in the memo that the federal employees could be paid, at least initially, from the

supplemental appropriation. Is this what you had in mind as needing an exemption from the federal employee labor laws? If not, it's not clear what needs to be exempted.

Federal contracts with screening companies:
We do not have any new questions.

Enhancing Aviation Safety & Security

Fact Sheet



Expanded Federal Air Marshal Program:

Since September 11, the U.S. government has been steadily increasing the number of Federal Air Marshals using law enforcement officers loaned from various federal agencies. The President will continue to expand the Air Marshal program and seek congressional approval to make this expansion permanent. The requirements and qualifications of Federal Air Marshals are among the most stringent of any U.S. federal law enforcement agency.

Federal Grant Program to Strengthen Aircraft Security:

Effective October 1, 2001, a fund of \$500 million will be established to finance aircraft modifications to delay or deny access to the cockpit. Funding may be provided through grants or cost sharing arrangements and will be used for a number of projects, including to develop and implement means to:

- Restrict opening of the cockpit door during flight;
- Fortify cockpit doors to deny access from the cabin to the pilots in the cockpit;
- Alert the cockpit crew to activity in the cabin; and
- Ensure continuous operation of the aircraft transponder in the event the crew faces an emergency.

Federal Management of Airport Security Services:

The President will work with Congress to put the federal government in charge of airport security and screening services.

The new security will be performed by a combination of federal and non-federal workforce, with federal uniformed personnel managing all operations and maintaining a visible presence at all commercial airports.

The federal government will:

- Establish new standards for security operations.
- Supervise the passenger and baggage security at the 420 commercial passenger airports nationwide.
- Perform intensive background checks and train and test screeners and security personnel.
- Purchase and maintain all equipment.
- Oversee patrolling of secure areas and monitoring of the quality of the airport's access controls.
- Work with other law enforcement authorities at the federal, state and local levels as well as serve as a key facilitator of coordination regarding homeland security.

Immediate Airport Security Measures:

Fully implementing the extensive security proposal may take four to six months. During that time, the President will help ensure that every airport has a strong security presence by asking the Governors of the 50 States to call up the National Guard – at the federal government's expense – to augment existing security staff at every commercial airport nationwide.

Prior to deployment the National Guard personnel will receive training in airport security techniques from the FAA.

Questions & Answers on the President's Agenda to Improve Aviation Safety

National Guard Deployment

Q: What is the goal of deploying the National Guard to airports?

To immediately deploy a trained, armed and highly visible federal presence to enhance security at the nation's commercial airports.

Q: How many National Guard personnel will be deployed?

Sufficient National Guard personnel to staff checkpoints (many composed of multiple adjacent screening stations) at about 420 airports nationwide (including territories and commonwealths).

Q: When will the National Guard deployment begin?

The President will ask governors to begin the deployments immediately.

Q: What kind of training will be provided?

FAA will design and deliver comprehensive training in National Guard Armories and on-the-job training at airports addressing:

- Legal and operational considerations of the checkpoint operation
- Courteous and efficient screening
- Safe handling of deadly or dangerous items
- Incident management
- Conflict resolution
- Screening techniques and equipment

Q: Who will pay for the costs associated with the mobilization?

The federal government will pay the entire costs of the mobilization

Q: What will be the duties, responsibilities, and authorities of the National Guard?

Provide a highly visible, armed deterrence at security checkpoints

- Monitor and reinforce the pre-existing checkpoint structure and operations
- Monitor alertness and performance, and in conjunction with the ground security coordinator, ensure corrective actions are taken as necessary
- Actively provide assistance to screeners and supervisors as necessary
- Assist in responding to and resolving routine contentious situations, when requested
- Assist local law enforcement conducting regular duties at the checkpoint, upon request.

- Evaluate checkpoint operations and provide observations and recommendations to the checkpoint supervisors and FAA.

Q: Why didn't the President federalize the National Guard?

Because mobilization through the governors gives the National Guard additional civilian law enforcement powers.

Expansion of the Federal Air Marshal Program

Q: How many Federal Air Marshals were there before Sept. 11 and how many will there be under the new expansion?

The Federal Air Marshal force is now being significantly expanded. For reasons of national security, we are not able to divulge certain information – including their numbers, flights, training, funding levels, and weapons.

Q: Why didn't we have Federal Air Marshals on the hijacked flights?

Federal Air Marshals have always been deployed to the areas of greatest risk. Prior to Sept. 11 the greatest risk to U.S. carriers was believed to be outside of the U.S.

Q: What are the training and qualifications requirements for Air Marshals?

The requirements and qualifications of Federal Air Marshals are among the most stringent of any U.S. federal law enforcement agencies. In fact, they have the highest shooting qualification standards of all such agencies. These high and demanding standards will be maintained as we expand the program.

We are currently using a significant number of law enforcement officers from other agencies to serve as temporary air marshals as we expand the force. These officers have all received intensive training on the unique aspects of preventing hijackings.

→ could do
↓
approve

Q: When will the new program be fully staffed?

While we are not able to divulge staffing numbers due to national security concerns, the dramatic expansion of the air marshal program will lead to improved aviation security for passengers and flight crews.

Q: What should someone do if he or she wants to become a Federal Air Marshal?

The response from the American public to our call for more Federal Air Marshals has been overwhelming and heart-warming. Volunteers can download an application from the FAA web-site. The address is: jobs.faa.gov. Our latest tally showed 5.2 million hits and more than 150,000 applications downloaded.

Aviation Security & Aircraft Modernization Grants

Q: What specific new activities will the government be undertaking?

The President will work with Congress to put the federal government in charge of airport security and screening services. The new security will be performed by a combination of federal and non-federal workforce, with federal uniformed personnel managing all operations and maintaining a visible presence at all commercial airports.

The federal government will:

- Establish new standards for security operations.
- Supervise the passenger and baggage security at the 420 commercial passenger airports nationwide.
- Perform intensive background checks and train and test screeners and security personnel.
- Purchase and maintain all equipment.
- Oversee patrolling of secure areas and monitoring of the quality of the airport's access controls.
- Work with other law enforcement authorities at the federal, state and local levels as well as serve as a key facilitator of coordination regarding homeland security.

Q: What are the grants to be used for?

Effective October 1, 2001, a fund of \$500 million will be established to finance aircraft modifications to delay or deny access to the cockpit. Funding may be provided through grants, cost sharing or other arrangements and will be used for a number of projects, including to develop and implement means to:

- Restrict opening of the cockpit door during flight;
- Fortify cockpit doors to deny access from the cabin to the pilots in the cockpit;
- Alert the cockpit crew to activity in the cabin; and
- Ensure continuous operation of the aircraft transponder in the event the crew faces an emergency.

Q: Who is eligible for the grants?

The objective of this grant program is to quickly make modifications to airplanes that prohibit unwanted entry to the cockpit.

Since the airlines are responsible for making the necessary changes to their airplanes, applications will only be accepted from the airlines. Initially, only U.S. airlines will be eligible for the grants. Individuals and groups outside the airline community with designs that they believe prohibit entry to the cockpit should work directly with the airlines to make their designs known.

** owned or operated by state + local govts*

standards

primitives

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express delegation

const or Stat authority

reversed

Q: Why aren't foreign carriers that fly into and out of the U.S. eligible?

The objective is to identify immediate changes that can be made to prohibit unwanted entry into the cockpit. Under international law, the country that operates the airplane is primarily responsible for its design and operation. So, changes to international airplanes need to be coordinated with those authorities. The US government will work closely and share ideas and information on safety and cockpit protections with all foreign authorities.

Q: How will the grant funds be awarded?

DOT Secretary Mineta will work with the Federal Aviation Administration to establish a Board that will apply a set of discrete criteria that will ensure the fair and equitable distribution of the funds. The award will be based upon the applicant's ability to meet defined requirements that will be specified in the award criteria. Applicants must be able to demonstrate their ability to design, develop, and/or install the safety enhancement within an established timeframe. Applicants must be able to demonstrate that the product can be applied across the aviation industry. Funds will be awarded through established processes to quickly disburse Federal funds.

Q: What kind of projects can be funded in the short term?

There have already been ideas presented by some airlines to provide protection against intrusion: Examples of these ideas include:

- Deadbolts, bars, nets or similar devices across the inside of the flight deck doors
- Video cameras in the cabin to allow flight crew to monitor activity in the cabin without leaving the flight deck
- Additional technology used to alert Air Traffic Control of a hijacking situation

Q: Why don't you just order the airlines to make the necessary changes?

There are too many differences among aircraft designs to come up with a single improvement that will deny access to every cabin.

We want safety improved as quickly as possible, and airlines are in the best position to implement the best solutions in the shortest amount of time.

Q: Will the best ideas be shared among airlines?

The government will not make cockpit protection design details publicly available because of security reasons. However, the government will require that any technology or other solution that is funded be available for any airline to use. It would be inefficient to expect every airline to come up with their own solutions for every aircraft. We should share information so more passengers can be more safe as soon as possible.

Q: What other safety plans are being considered?

A task force convened by Secretary Mineta is already working on longer-term ideas that will enhance security and safety. Their report will be presented to the Secretary on Monday October 1.

Redacted

Rachael L. Sunbarger

09/27/2001 02:10 PM

Record Type: Record

To:

cc:

Subject: PRESS BRIEFING BY A SENIOR ADMINISTRATION OFFICIAL ON AIRLINE SAFETY - Chicago, Illinois

THE WHITE HOUSE

Office of the Press Secretary
(Chicago, Illinois)

For Immediate Release September 27, 2001

PRESS BRIEFING BY
A SENIOR ADMINISTRATION OFFICIAL
ON AIRLINE SAFETY

O'Hare International Airport
Chicago, Illinois

11:35 A.M. CDT

SENIOR ADMINISTRATION OFFICIAL: Hi, how are you doing? As most of you are aware, last week, on Saturday, the President signed into law a package that had been worked with Congress to provide for stabilization of the airline industry in light of the terrorist attacks of September 11th. I think most of you probably know already what the details of that package were, but I'll just go over them very quickly.

The \$5 billion in cash grants for immediate cash injection into the airlines to make up for losses that they suffered in the week directly following the attack, and expected losses because of decreased demand in the couple of months following the attack before the end of the year.

The package also approved \$10 billion in loan guarantees and set up a stabilization board chaired by the Chairman of the Federal Reserve, and including Secretary O'Neill, Secretary Mineta, and the Comptroller General as an ex officio member.

It also took care of some retrospective liability and prospective liability concerns that were making it difficult for the airlines to achieve the economic stability to move forward, and at the same time, set up a fair and expeditious process for compensating victims.

The President thought that was critical to do that last week in order to provide the stability the airlines would need to keep the planes flying. At the same time, the President reserved, last week, \$3 billion for safety and airline security because he understood, as did the leaders in Congress, that the single most important thing we can do for the airlines to get them back on their feet and stable is to restore consumer confidence and the confidence of the American public that the American airlines'

airplanes are safe.

So, today, the President rolled out, as you know, the outlines of his proposal that he'll be working -- the administration will be working with Congress on over the next few days and weeks as to how to achieve that airline security. I'll just go over very quickly what the main pillars of that proposal are, and then I'll take any questions you may have.

The first one is that the President announced that we're dramatically expanding the federal air marshal program. That expansion has been underway since September 11th. It will continue over the next few months, and the President will seek to make the expansion of the program permanent, with Congress' support.

 The second step is that the federal government is going to assume responsibility for the security of our airports and airlines. What the President is proposing is to set up a federal agency that will assume management and control of the screening and security functions, and provide a uniform federal law enforcement presence at our nation's commercial airports.

The third pillar of the President's proposal is to set aside \$500 million in grants to the airlines to provide cockpit security and aircraft security. The Department of Transportation will begin taking applications immediately; the funds will become available October 1st. And those funds will be used for programs that can immediately begin -- that the airlines can immediately begin implementing to provide for cockpit security, and will also go to fund research and development for advance technologies that will provide continued and greater security in the future. And you heard the President mention a couple of those today -- things like transponders that can't shut off from the cockpit in flight, and a little bit further down the road, working on technologies that could allow the air traffic control to take control of an aircraft in flight by remote control and bring it to ground safely in the event the pilot should lose control.

So those are the basic pillars. And the last one, actually, is a transitional announcement that the President made today, which is that he is going to be asking the governors of the 50 states to provide National Guardsmen to provide security at the 420 commercial airports in the country, to immediately begin restoring that confidence of the flying public so they see a uniformed presence of a federal officer -- well, in this case, a state officer as a National Guardsman, and will have that security of knowing that there are armed personnel there overseeing the functions of the security personnel.

And I'll open it up to any questions.

Q In terms of security, the actual screeners will not be federal workers, they will just be federal supervision in training and background checks, right?

SENIOR ADMINISTRATION OFFICIAL: Once the President's final proposal is in place or with the National Guardsmen?

Q No, what's the President's final proposal?

SENIOR ADMINISTRATION OFFICIAL: Oh, what the President is proposing and what he's going to work with Congress on over the next few days is a plan that would have a federal agency supervise, oversee, manage, train --

Q I understand that, but the actual workers would not be federal workers?

SENIOR ADMINISTRATION OFFICIAL: Some of the workers I think will be federal workers. There will be armed law enforcement personnel -- federal law enforcement personnel. The actual screeners? The intention is that the federal government will have the option of contracting that out to private firms who the federal government will train, supervise, do background checks on, and set the



standards for.

Q Now, in terms of the sky marshals, are we talking 100,000 sky marshals, which people say that's what it would take to put one on every aircraft?

SENIOR ADMINISTRATION OFFICIAL: The number of sky marshals is not -- is something the administration is going to try and keep classified for the obviously security reasons, is that we don't want terrorists knowing how many are up there and kind of figure out what the odds are. But it's going to be dramatically increased -- it already has been significantly increased and will continue to be over the next couple of weeks, and then finally when the President and the Congress make the plan permanent.

Q Is there some sort of range you can give us -- like tenfold or -- on the numbers for sky marshals, can you give any kind of ballpark thing, percentage, a tenfold increase --

SENIOR ADMINISTRATION OFFICIAL: No, is the short answer. Like I say, we're going to keep that classified as much as possible. It's a dramatic increase. It already has been a dramatic increase, and as I say, it's going to continue. And to some extent, those numbers will have to be finalized between the administration and Congress. But it's going to be dramatic.

Q And it's obviously not every flight. There will not be an sky marshal on every flight in America, right? You can't say what percentage, even?

SENIOR ADMINISTRATION OFFICIAL: No, I'm not prepared to say that at this time.

Q Can you say how you select the flights the sky marshals fly on?

SENIOR ADMINISTRATION OFFICIAL: Well, generally speaking, the FAA currently makes a determination as to the threat assessment. They look and take advantage of whatever intelligence information they might have and try and determine the best allocation of the federal air marshals that they have. And as I say, that number is increasing by the day.

Q Can we say that there were no federal air marshals on the flights that were hijacked on September 11th?

SENIOR ADMINISTRATION OFFICIAL: I believe that's been confirmed, that there were not.

Q What about calls from some of the mayors that the President's proposals don't go far enough? They say they want security along the par of what's already in place in Israel and Germany and France.

SENIOR ADMINISTRATION OFFICIAL: Well, I can tell you the administration has been working -- the question was how does the administration respond to complaints by mayors --

Q -- to the mayors' call that the measures don't go far enough.

SENIOR ADMINISTRATION OFFICIAL: Which mayor?

Q The U.S. Conference of Mayors are saying the proposals don't go far enough.

SENIOR ADMINISTRATION OFFICIAL: Well, the first thing is I think the proposal was just announced today. It's going to take a little bit of time, as the President works with Congress, to see the exact language of what comes out of it. But I think most people, when they sit down and look at it, are going to think that this is a considerable improvement. The federal government is assuming responsibility for the security of our airports and airlines, and the administration thinks that the best way to do that is to

take the approach the President announced today.

One of the reasons for that, quite frankly, is that when you have private contractors, the federal government has much more flexibility in terms of hiring and firing. And I think that a lot of people will come to see that that actually contributes to safety because the federal government will have much more latitude to take employment actions when they think that safety standards aren't being met.

Q But in terms of them saying they want security forces like in Israel, France or in Germany?

SENIOR ADMINISTRATION OFFICIAL: Well, I think every country has different security circumstances and has different population circumstances. Israel, obviously, has a very different set of circumstances with the number of airlines that it has and the number of flights, the number of people, the number of airports. I think that when folks get a look at this plan, they'll see it's very robust and that the President and, I think, the Congress are very serious about assuring the safety of America's airports and aircraft.

Q On the National Guard deployment as a temporary basis -- how quickly could they get into the airports, given the time for activation, and then the FAA training?

SENIOR ADMINISTRATION OFFICIAL: We think that that could happen very quickly, in a matter of days, actually. There's going to be some coordination that needs to take place between the FAA and the Department of Defense will be assisting the coordination with the state governors. FAA has a plan to do training on the spot either at the airports or at armories, and FAA tells us that they can do that training in three or four days. So the hope is that the governors will respond, and I think the belief is the governors will respond very quickly to provide the resources, and the FAA will be in just as quickly as possible to start on that training.

Q What will they actually do at airports?

SENIOR ADMINISTRATION OFFICIAL: The intention is to station the guardsmen at the security checkpoints at the airports. There are 420 airports, roughly 750 security checkpoints. The FAA has worked out the numbers that they think are appropriate to provide security and to provide the American public with the confidence that there's an armed, trained professional force there to ensure the safety of the airports.

Q So they won't be replacing the people who run --

SENIOR ADMINISTRATION OFFICIAL: They will not be replacing the people -- they will be augmenting. They'll be --

Q How many guardsmen, and what's the cost?

SENIOR ADMINISTRATION OFFICIAL: The initial estimate of the numbers of guardsmen it will take is somewhere in the neighborhood of 4,000 to 5,000, which I think closer to this 4,000 number. But the idea is to get these folks on the ground, and FAA will continue to look at it and see exactly whether those numbers are meeting the needs.

Q Will they carry live ammunition? Because guardsmen usually don't.

SENIOR ADMINISTRATION OFFICIAL: I'm going to have to direct that question to either the FAA or the Department of Defense. I actually don't know the answer to that.

Q Cost?

SENIOR ADMINISTRATION OFFICIAL: The cost of this -- first estimates -- and we're still working it out, and of course, it depends on how the governors respond -- but the initial cost estimates are somewhere in the ballpark of \$100 million to \$150 million. That will be for a six-month period. Hopefully, it will be less than that -- be required for less than that.

Q Democrats on the House, a lot of them, have said that they don't want to pass this legislation, security legislation, without measures or legislation for the displaced workers. The President didn't address that issue today in any sort of specificity. Is that something that the administration is going to do in the next week?

SENIOR ADMINISTRATION OFFICIAL: The question is, some Democrats on the Hill want to link displaced workers legislation with an airline security package, and what's our position on that.

Q Yes, if this legislation is going to be held up unless those demands are met.

SENIOR ADMINISTRATION OFFICIAL: Our anticipation is that this legislation won't get held up, that we've had very close consultations with Democrats and Republicans in both Houses. Everybody is extremely interested in providing for airline-aircraft security. I think everybody understands how important that is to the traveling public and to the economy. So our expectation is we're going to be able to work well with both Houses and members from both parties, and hopefully move with the speed that the administration and Congress was able to move with last week in getting the important stabilization package through.

Q And where are you, though, on that issue of help for these workers?

SENIOR ADMINISTRATION OFFICIAL: I'm going to let the President speak to that -- you said he did not speak to that today -- I'm just going to talk about what he did speak about today.

Q Has the President ruled against allowing pilots to carry guns?

SENIOR ADMINISTRATION OFFICIAL: It's not my understanding that the President has made a ruling of any sort on that. The FAA and the Department of Transportation are viewing all manner of proposals, and they'll continue to do so. This, by no means, I think the President said yesterday -- and Claire can correct me on this -- I think he said we're open to all proposals and the administration is listening to them. It's not, obviously, part of the package the President rolled out today, but the Secretary of Transportation and the Administrator of the FAA will continue to evaluate the proposals as they come on.

Q And just to follow up on the stationing of the Guard troops, do you anticipate they will be needed for less than six months then, while these other measures are implemented?

SENIOR ADMINISTRATION OFFICIAL: Right now we're estimating that it will take 4 to 6 months to get these measures through. That's assuming, as I said in response to the last question, that the Congress moves quickly, which I think that they will -- 4 to 6 months. We're going to try to get this program up as fast as possible and provide the American public with the security that they need.

Q Two questions. The federal agency, do you see it as a free-standing, or under which department would it be? And the remote control proposal, how much money do you actually plan to spend on that?

SENIOR ADMINISTRATION OFFICIAL: On the first one, the federal agency, the proposal right now is to set this up under a federal agency. The final determination hasn't been made. As I said, the administration is in consultation with Congress on all of these elements of the proposal, and obviously, the

administration will be listening very closely to what Congress has to say about where they think this agency -- where this authority ought to be. And the administration is reviewing options for that as well.

On the second question, which was remote control, I don't know how much of the money, of the \$500 million that the President set aside today will be devoted to research and development on that. The Department of Transportation is going to be reviewing applications for grant money and for research and development options, and they'll have to make judgments as to what the most promising uses of that \$500 million are.

Q On cockpit doors again, you've got 4,000 aircraft with 10 different cockpit designs. It seems to me that those are some real logistical hurdles to get over in retrofitting. What is the -- overseas carriers? Will they be required to have fortified doors to enter American air space?

SENIOR ADMINISTRATION OFFICIAL: Right now the President's proposal is focusing on the domestic air carriers. It's exactly right that one of the logistical challenges is that there are many different aircraft models with many different structural designs; each one presents different design challenges, which is why the President has decided to use this grant program that makes the money available so that airlines can quickly get to work on designing the best approaches, most effective, most efficient approaches for their particular aircraft, rather than mandating a one-size-fits-all solutions which may not take into consideration particular design concerns.

Q About the federal agency, at what point did you determine -- that the FAA --

SENIOR ADMINISTRATION OFFICIAL: I'm not sure any final determinations have been made as to where this responsibility will be lodged. There have been concerns raised by members on the Hill that maybe the FAA is not the most appropriate agency, but I'm not prepared to say that --

Q Aren't you guys calling for a different agency, quasi-agency to handle security management and oversee that? Why do that and not use the existing structures under the FAA? What's wrong with the FAA?

SENIOR ADMINISTRATION OFFICIAL: There's not anything wrong with the FAA. We're moving into -- this isn't to suggest there's anything wrong with the FAA. We're moving to a new type of security arrangement in the United States, one that hadn't been contemplated before and is not contemplated by the current organizational structure of the FAA, or of its current capacity.

Again, I'm not here to tell you that any particular agency has been ruled in or ruled out for this function, but it will, at the end of the day, have a law enforcement function as there will be uniform law enforcement personnel in the airports.

Q Just to follow up on that, because we keep tossing around some words -- you're actually talking about creating an office that would be within some other department or agency, right? You're not really talking about creating a new agency?

SENIOR ADMINISTRATION OFFICIAL: The determination of where this authority is going to be lodged has not been finally decided. And I think --

Q Well, what would you like? You would like it to be an office within some existing authority, right?

SENIOR ADMINISTRATION OFFICIAL: By some existing authority, one of the Cabinet departments, it will be lodged under one of the Cabinet departments.

Q -- to be lodged under one of the Cabinet departments as a separate agency?

SENIOR ADMINISTRATION OFFICIAL: Not necessarily as a separate agency. The authority may go with an agency that's currently established. It may be a new authority within an existing department. These are the things we're going to need to talk about, and the President and the administration are continuing to discuss with the members of Congress and taking their input on that. It's obviously an important question and one that we'll be focusing on over the next few days.

Q Two questions. First, a follow-up on the agency question. Will this agency have then authority to make policy decisions in terms of passenger profiling? And secondly, I'm wondering about the National Guard. Did you say 4,000-5,000?

SENIOR ADMINISTRATION OFFICIAL: Between 4,000 and 5,000.

Q There are 420 airports. That averages out to about 10 per airport. How many National Guardsmen are you expecting to be at airports like O'Hare?

SENIOR ADMINISTRATION OFFICIAL: Well, it's going to depend on the size of the airport and the type of security mechanisms that they currently have. The FAA has done analysis and determined what's the appropriate presence for these National Guardsmen at security checkpoints -- basically, where screening takes place.

Q They're not going to be at gates, or anything like that?

SENIOR ADMINISTRATION OFFICIAL: The current plan is that they will be stationed at the screening checkpoints. And for the vast majority of airports, that's very small, and many airports in the United States are very small and will be able to be serviced by a smaller number of Guardsmen. The bigger airports obviously will have more people stationed there and they'll have more shifts, so they'll have more people over the course of the 24-hour period, as well.

Q And on the passenger profiling?

Q -- you mean a checkpoint where you have the mags and where you go through and you put your bag on -- that's where they're going to be?

SENIOR ADMINISTRATION OFFICIAL: Yes, sir. They're going to be at the screening checkpoints where the passengers and the bags go through.

Q -- on passenger profiling, will the agency have that type of regulatory authority --

SENIOR ADMINISTRATION OFFICIAL: The agency will be tasked with setting the standards, doing screening and background and providing for airport security. To the extent that that requires access to certain information, that may be in the plan. That will be -- those are the details that will be worked out when the agency is designed, or the function of the agency is designed. But the expectation is that this agency will be responsible for and will be able to provide for security for the nation's airports.

Thank you.

END 11:56 A.M. CDT

10/3
TECHNICAL
ASSISTANCE

AMENDMENT NO.

CAL. NO.

[STAFF WORKING DRAFT]

October 3, 2001

Purpose: To improve aviation security.

(Also see
associated
amendments to
text)

IN THE SENATE OF THE UNITED STATES—107TH Cong., 1ST Sess.

S. 1447, 107TH Congress, 1ST Session

OCTOBER —, 2001

() Referred to the Committee on _____ and
ordered to be printed

() Ordered to lie on the table and to be printed

INTENDED to be proposed by Mr. HOLLINGS (for himself
and Mr. McCAIN)

Viz: Strike out all after the enacting clause and insert the
following:

1 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

2 (a) **SHORT TITLE.**—This Act may be cited as the
3 “Aviation Security Act”.

4 (b) **TABLE OF CONTENTS.**—The table of contents for
5 this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Findings.
- Sec. 3. Transportation security function.
- Sec. 4. Aviation Security Coordination Council.
- Sec. 5. Improved flight deck integrity measures.
- Sec. 6. Deployment of Federal air marshals.
- Sec. 7. Improved airport perimeter access security.
- Sec. 8. Enhanced anti-hijacking training for flight crews.
- Sec. 9. Passenger screening.
- Sec. 10. Training and employment of security screening personnel.
- Sec. 11. Suspension and removal.
- Sec. 12. Research and development.
- Sec. 13. Flight school security.

Sec. 14. Report to Congress on security.
Sec. 15. General aviation and air charters.
Sec. 16. Security funding.
Sec. 17. Increased funding flexibility for aviation security.
Sec. 18. Authorization of funds for reimbursement of airports for security man-
dates.
Sec. 19. Definitions.

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) The safety and security of the civil air
4 transportation system is critical to the United
5 States' security and its national defense.

6 (2) A safe and secure United States civil air
7 transportation system is essential to the basic free-
8 dom of Americans to move in intrastate, interstate,
9 and international transportation.

10 (3) The terrorist hijackings and crashes of pas-
11 senger aircraft on September 11, 2001, converting
12 civil aircraft into guided bombs for strikes against
13 civilian and military targets requires the United
14 States to change fundamentally the way it ap-
15 proaches the task of ensuring the safety and security
16 of the civil air transportation system.

17 (4) The existing fragmentation of responsibility
18 for that safety and security among government
19 agencies and between government and nongovern-
20 ment entities is inefficient and unacceptable in light
21 of the hijackings and crashes on September 11,
22 2001.

1 (5) The General Accounting Office has rec-
2 ommended that security functions and security per-
3 sonnel at United States airports should become a
4 Federal government responsibility.

5 (6) Although the number of Federal air mar-
6 shals is classified, their presence on both inter-
7 national and domestic flights would have a deterrent
8 effect on hijacking and would further bolster public
9 confidence in the safety of air travel.

10 (7) The effectiveness of existing security meas-
11 ures, including employee background checks and
12 passenger pre-screening, is impaired because of the
13 inaccessibility of, or the failure to share information
14 among, data bases maintained by different Federal
15 and international agencies for criminal behavior or
16 pertinent intelligence information.

17 **SEC. 3. TRANSPORTATION SECURITY FUNCTION.**

18 ~~(a) IN GENERAL.—Section 102 of title 49, United~~
19 ~~States Code, is amended—~~

20 (1) by redesignating subsections (d), (e), and
21 (f) as subsections (e), (f), and (g); and

22 (2) by inserting after subsection (c) the fol-
23 lowing:

24 “(d) DEPUTY SECRETARY FOR TRANSPORTATION
25 SECURITY.—

*See
amendments*

1 ~~“(1) IN GENERAL.—~~The Department has a
2 Deputy Secretary for Transportation Security, who
3 shall be appointed by the President, by and with the
4 advice and consent of the Senate. The Deputy Sec-
5 retary for Transportation Security shall carry out
6 duties and powers prescribed by the Secretary relat-
7 ing to security for all modes of transportation.

8 “(2) AVIATION-RELATED DUTIES.—The Deputy
9 Secretary—

10 “(A) is responsible for day-to-day Federal
11 security operations for air transportation or
12 intrastate air transportation;

13 “(B) shall coordinate and direct, as appro-
14 priate, the functions and responsibilities of the
15 Secretary of Transportation and the Adminis-
16 trator of the Federal Aviation Administration
17 under chapter 449;

18 “(C) shall work in conjunction with the
19 Administrator of the Federal Aviation Adminis-
20 tration with respect to any actions or activities
21 that may affect aviation safety or air carrier op-
22 erations;

23 “(D) is responsible for hiring and training
24 personnel to provide security screening at all
25 United States airports involved in air transpor-

1 ~~tation or intrastate air transportation, in con-~~
2 sultation with the Attorney General, the Sec-
3 retary of Defense, and the heads of other ap-
4 propriate Federal agencies and departments;
5 and

6 “(E) shall actively cooperate and coordi-
7 nate with the Attorney General, the Secretary
8 of Defense, and the heads of other appropriate
9 Federal agencies and departments with respon-
10 sibilities for national security and criminal jus-
11 tice enforcement activities that are related to
12 aviation security through the Aviation Security
13 ~~Coordination Council.”~~

14 (b) REVIEW AND DEVELOPMENT OF WAYS TO
15 STRENGTHEN SECURITY.—Section 44932(c) of title 49,
16 United States Code, is amended—

- 17 (1) by striking “x-ray” in paragraph (4);
18 (2) by striking “and” at the end of paragraph
19 (4);
20 (3) by striking “passengers.” in paragraph (5)
21 and inserting “passengers;” and
22 (4) by adding at the end the following:
23 “(6) to strengthen and enhance the ability to
24 detect nonexplosive weapons, such as biological,
25 chemical, or similar substances; and

1 “(7) to evaluate such additional measures as
2 may be appropriate to enhance physical inspection of
3 passengers, luggage, and cargo.”.

4 ~~(c) TRANSITION.—Until the Deputy Secretary for~~
5 ~~Transportation Security takes office, the functions of the~~
6 ~~Deputy Secretary that relate to aviation security shall be~~
7 ~~carried out by the Assistant Administrator for Civil Avia-~~
8 ~~tion Security of the Federal Aviation Administration.~~

*See
Amendments*

9 **SEC. 4. AVIATION SECURITY COORDINATION COUNCIL.**

10 (a) IN GENERAL.—Section 44911 of title 49, United
11 States Code, is amended by adding at the end the fol-
12 lowing:

13 “(f) AVIATION SECURITY COORDINATION COUN-
14 CIL.—

15 “(1) IN GENERAL.—There is established an
16 Aviation Security Coordination Council.

17 “(2) FUNCTION.—The Council shall work with
18 the intelligence community to coordinate intelligence,
19 security, and criminal enforcement activities affect-
20 ing the safety and security of aviation at all United
21 States airports and air navigation facilities involved
22 in air transportation or intrastate air transportation.

23 “(3) CHAIR.—The Council shall be chaired by
24 the Secretary of Transportation or the Secretary’s
25 designee.

1 “(4) MEMBERSHIP.—The members of the
2 Council are:

3 “(A) The Secretary of Transportation, or
4 the Secretary’s designee.

5 “(B) The Attorney General, or the Attor-
6 ney General’s designee.

7 “(C) The Secretary of Defense, or the Sec-
8 retary’s designee.

9 “(D) The Secretary of the Treasury, or the
10 Secretary’s designee.

11 “(E) The Director of the Central Intel-
12 ligence Agency, or the Director’s designee.

13 “(F) The head, or an officer or employee
14 designated by the head, of any other Federal
15 agency the participation of which is determined
16 by the Secretary of Transportation ~~in consulta-~~
17 ~~tion with the Attorney General,~~ to be appro-
18 priate.

19 “(g) CROSS-CHECKING DATA BASE INFORMATION.—
20 The Secretary of Transportation, acting through the Avia-
21 tion Security Coordination Council, shall—

22 “(1) explore the technical feasibility of devel-
23 oping a common database of individuals who may
24 pose a threat to aviation or national security;

1 “(2) enter into memoranda of understanding
2 with other Federal agencies to share or otherwise
3 cross-check data on such individuals identified on
4 Federal agency data bases, and may utilize other
5 available data bases as necessary; and

6 “(3) evaluate and assess technologies in devel-
7 opment or use at Federal departments, agencies,
8 and instrumentalities that might be useful in im-
9 proving the safety and security of aviation in the
10 United States.”.

11 (b) POLICIES AND PROCEDURES.—Section 44911(b)
12 of title 49, United States Code, is amended by striking
13 “international”.

14 (c) STRATEGIC PLANNING.—Section 44911(c) of title
15 49, United States Code, is amended by striking “consider
16 placing” and inserting “place”.

17 **SEC. 5. IMPROVED FLIGHT DECK INTEGRITY MEASURES.**

18 (a) IN GENERAL.—~~The~~ Administrator of the Federal
19 Aviation Administration ~~shall~~, as soon as possible after the
20 date of enactment of this Act, ^{to} issue an order (without re-
21 gard to the provisions of chapter 5 of title 5, United States
22 Code)—

23 (1) prohibiting access to the flight deck of air-
24 craft engaged in air transportation or intrastate air
25 transportation except to authorized personnel;

*To the extent
of the Secretary
of Transportation
deems appro-
priate, the
Secretary shall
instruct*

express
→
*part of \$500M
grant*
FAA
has
authority
contract

1 (2) requiring the strengthening of the flight
2 deck door and locks on any such aircraft operating
3 in air transportation or intrastate air transportation
4 that has a rigid door in a bulkhead between the
5 flight deck and the passenger area to ensure that
6 the door cannot be forced open from the passenger
7 compartment;

8 (3) requiring that such flight deck doors remain
9 locked while any such aircraft is in flight except
10 when necessary to permit the flight deck crew access
11 and egress;

12 (4) prohibit the possession of a key to any such
13 flight deck door by any member of the flight crew
14 who is not assigned to the flight deck; and

15 (5) take such other action, including modifica-
16 tion of safety and security procedures, as may be
17 necessary to ensure the safety and security of the
18 aircraft.

19 (b) COMMUTER AIRCRAFT. *The Secretary shall direct*
20 ^{to} investigate means of securing, to the greatest feasible ex-
21 tent, the flight deck of aircraft operating in air transpor-
22 tation or intrastate air transportation that do not have
23 a rigid fixed door with a lock between the passenger com-
24 partment and the flight deck and issue such an order as
25 the Administrator deems appropriate (without regard to

1 the provisions of chapter 5 of title 5, United States Code)
2 to ensure the inaccessibility, to the greatest extent fea-
3 sible, of the flight deck while the aircraft is so engaged.

4 **SEC. 6. DEPLOYMENT OF FEDERAL AIR MARSHALS.**

5 (a) IN GENERAL.—Section 44903(d) of title 49,
6 United States Code, is amended by adding at the end the
7 following:

8 “The Secretary may place Federal air marshals on every
9 scheduled passenger flight in air transportation and intra-
10 state air transportation.”.

11 (b) DEPLOYMENT.—Within 30 days after the date of
12 enactment of this Act, the Secretary of Transportation,
13 under the authority of subsections (d) and (e) of section
14 44903 of title 49, United States Code, shall—

15 (1) provide for deployment of Federal air mar-
16 shals on flights in air transportation and intrastate
17 air transportation;

18 (2) provide for appropriate background and fit-
19 ness checks for candidates for appointment as Fed-
20 eral air marshals;

21 (3) provide for appropriate training, super-
22 vision, and equipment of Federal air marshals; and

23 (4) require air carriers to provide seating for
24 Federal air marshals on any flight without regard to
25 the availability of seats on that flight.

1 (c) INTERNATIONAL FLIGHTS.—The Secretary shall
2 work with the International Civil Aviation Organization
3 and with appropriate civil aviation authorities of foreign
4 governments under section 44907 of title 49, United
5 States Code, to address security concerns on flights by for-
6 eign air carriers to and from the United States.

7 (d) INTERIM MEASURES.—The Secretary may, after
8 consultation with the heads of other Federal agencies and
9 departments, use personnel from those agencies and de-
10 partments ~~on a reimbursable or nonreimbursable basis,~~
11 to provide air marshal service on domestic and inter-
12 national flights, and may use the authority provided by
13 section 324 of title 49, United States Code, for such pur-
14 pose.

15 (e) REPORTS.—

16 (1) IN GENERAL.—The Secretary of Transpor-
17 tation shall submit the following reports in classified
18 form, if necessary, to the Senate Committee on
19 Commerce, Science, and Transportation and the
20 House of Representatives Committee on Transpor-
21 tation and Infrastructure:

22 (A) Within 18 months after the date of en-
23 actment of this Act, an assessment of the pro-
24 gram carried out under section 44903(d) of
25 title 49, United States Code.

1 (B) Within 120 days after such date, an
2 assessment of the effectiveness of the security
3 screening process for carry-on baggage and
4 checked baggage.

5 (C) Within 12 months after the date of en-
6 actment of this Act, an assessment of the safety
7 and security-related training provided to flight
8 and cabin crews.

9 (2) RECOMMENDATIONS.—The Secretary may
10 submit, as part of any report under this subsection
11 or separately, any recommendations the Secretary
12 may have for improving the effectiveness of the Fed-
13 eral air marshal program or the security screening
14 process.

15 (f) COOPERATION WITH OTHER AGENCIES.—The last
16 sentence of section 106(m) of title 49, United States Code,
17 is amended by striking “supplies and” and inserting “sup-
18 plies, personnel, services, and”.

19 **SEC. 7. IMPROVED AIRPORT PERIMETER ACCESS SECU-**
20 **RITY.**

21 (a) IN GENERAL.—Section 44903 of title 49, United
22 States Code, is amended by adding at the end the fol-
23 lowing:

24 “(h) IMPROVED AIRPORT PERIMETER ACCESS SECU-
25 RITY.—

1 “(1) IN GENERAL.—The Secretary of Transpor-
2 tation, in consultation with the airport operator and
3 law enforcement authorities, may order the deploy-
4 ment of such personnel at any secure area of the
5 airport as necessary to counter the risk of criminal
6 violence, the risk of aircraft piracy at the airport,
7 the risk to air carrier aircraft operations at the air-
8 port, or to meet national security concerns.

9 “(2) SECURITY OF AIRCRAFT AND GROUND AC-
10 CESS TO SECURE AREAS.—In determining where to
11 deploy such personnel, the Secretary shall consider
12 the physical security needs of air traffic control fa-
13 cilities, parked aircraft, aircraft servicing equipment,
14 aircraft supplies (including fuel), automobile parking
15 facilities within airport perimeters or adjacent to se-
16 cured facilities, and access and transition areas at
17 airports served by other means of ground or water
18 transportation. The Secretary of Transportation,
19 after consultation with the Aviation Security Coordi-
20 nation Council, shall consider whether airport and
21 air carrier personnel *and other individuals* with access to such areas
22 should be screened to prevent individuals who
23 present a risk to aviation security or national secu-
24 rity from gaining access to such areas.

1 “(3) DEPLOYMENT OF FEDERAL LAW EN-
2 FORCEMENT PERSONNEL.—The Secretary of Trans-
3 portation may enter into a memorandum of under-
4 standing or other agreement with the Attorney Gen-
5 eral or the head of any other appropriate Federal
6 law enforcement agency to deploy Federal law en-
7 forcement personnel at an airport in order to meet
8 aviation safety and security concerns.”.

9 (b) SMALL AND MEDIUM AIRPORTS.—The Adminis-
10 trator of the Federal Aviation Administration shall de-
11 velop a plan to provide technical support to small and me-
12 dium airports to enhance security operations, including
13 screening operations, and to provide financial assistance
14 to those airports to defray the costs of enhancing security.

15 (c) CHEMICAL AND BIOLOGICAL WEAPON DETEC-
16 TION.—Section 44903(c)(2)(C) of title 49, United States
17 Code, is amended to read as follows:

18 “(C) MAXIMUM USE OF CHEMICAL AND BIO-
19 LOGICAL WEAPON DETECTION EQUIPMENT.—The
20 Secretary of ~~Transportation~~ shall require airports to
21 maximize the use of technology and equipment that
22 is designed to detect potential chemical or biological
23 weapons.”.

*To the extent
the Secretary
deems
appropriate,*

*see
amendment*

1 (d) IMPROVEMENT OF SECURED-AREA ACCESS CON-
2 TROL.—Section 44903(g)(2) of title 49, United States
3 Code, is amended—

4 (1) by striking “weaknesses by January 31,
5 2001;” in subparagraph (A) and inserting “weak-
6 nesses”;

7 (2) by striking subparagraph (D) and inserting
8 the following:

9 “(D) on an ongoing basis, assess and test
10 for compliance with access control require-
11 ments, report annually findings of the assess-
12 ments, and assess the effectiveness of penalties
13 in ensuring compliance with security procedures
14 and take any other appropriate enforcement ac-
15 tions when noncompliance is found;”;

16 (3) by striking “program by January 31,
17 2001;” in subparagraph (F) and inserting “pro-
18 gram;”; and

19 (4) by striking subparagraph (G) and inserting
20 the following:

21 “(G) work with airport operators to
22 strengthen access control points in secured
23 areas (including air traffic control operations
24 areas, maintenance areas, crew lounges, bag-
25 gage handling areas, ^{concessions,} and catering delivery

1 areas) to ensure the security of passengers and
2 aircraft and consider the deployment of biomet-
3 ric or similar technologies that identify individ-
4 uals based on unique personal characteristics.”.

5 (e) EMPLOYMENT INVESTIGATIONS AND RESTRIC-
6 TIONS.—Section 44903(c) of title 49, United States Code,
7 is amended by adding at the end the following:

8 “(3) The Administrator ^{may} ~~shall~~ establish pilot programs
9 in no fewer than 20 airports to test and evaluate new and
10 emerging technology for providing access control and other
11 security protections for closed or secure areas of the air-
12 ports. Such technology may include biometric or other
13 technology that ensures only authorized access to secure
14 areas.”.

15 (f) AIRPORT SECURITY AWARENESS PROGRAMS.—
16 The Secretary of Transportation shall require air carriers
17 and airports involved in air transportation or intrastate
18 air transportation to develop security awareness programs
19 for airport employees, ground crews, and other individuals
20 employed at such airports.

21 **SEC. 8. ENHANCED ANTI-HIJACKING TRAINING FOR**
22 **FLIGHT CREWS.**

23 (a) IN GENERAL.—The Secretary of Transportation
24 shall develop a ~~mandatory air-crew~~ program of training
25 for flight and cabin crews of aircraft providing air trans-

1 portation or intrastate air transportation in dealing with
2 attempts to commit aircraft piracy (as defined in section
3 46502(a)(1)(A) of title 49, United States Code).

4 (b) NOTIFICATION PROCEDURES.—The Adminis-
5 trator of the Federal Aviation Administration shall review
6 the procedures by which cabin crews of aircraft can notify
7 flight deck crews of security breaches and other emer-
8 gencies.

9 **SEC. 9. PASSENGER SCREENING.**

10 (a) IN GENERAL.—Section 44901 of title 49, United
11 States Code, is amended to read as follows:

12 **“§ 44901. Screening passengers and property**

13 “(a) IN GENERAL.—The Secretary of Transpor-
14 tation ~~in consultation with the Attorney General~~ shall
15 provide for the screening of all passengers and property,
16 including United States mail, that will be carried aboard
17 an aircraft in air transportation or intrastate air transpor-
18 tation. The screening shall take place before boarding and,
19 except as provided in subsection (e), shall be carried out
20 by Federal government personnel. In carrying out this
21 subsection, the Secretary shall maximize the use of avail-
22 able nonintrusive and other inspection and detection tech-
23 nology that is approved by the Administrator of the Fed-
24 eral Aviation Administration for the purpose of screening
25 passengers, baggage, or cargo.

1 “(b) DEPLOYMENT OF ARMED PERSONNEL.—

2 “(1) IN GENERAL.—The Secretary of Transpor-

3 tation, ~~in consultation with the Attorney General~~ *ensure that*

4 shall ~~order the deployment of~~ law enforcement per- *are stationed*

5 sonnel authorized to carry firearms at each airport

6 security screening location to ensure passenger safe-

7 ty and national security.

8 “(2) MINIMUM REQUIREMENTS.—Except at air-

9 ports required to enter into agreements under sub-

10 section (c), the Secretary shall order the deployment

11 of at least 1 law enforcement officer at each airport

12 security screening location. At the 100 largest air-

13 ports in the United States, in terms of annual pas-

14 senger enplanements for the most recent calendar

15 year for which data are available, the Secretary shall

16 order the deployment of additional law enforcement

17 personnel at airport security screening locations if

18 the Secretary determines that the additional deploy-

19 ment is necessary to ensure passenger safety and

20 national security.”.

21 “(c) SECURITY AT SMALL COMMUNITY AIRPORTS.—

22 “(1) PASSENGER SCREENING.—In carrying out

23 subsection (a) and subsection (b)(1), the Secretary

24 of Transportation, ~~with the approval of the Attorney~~

25 ~~General~~, may require any nonhub airport (as defined

1 in section 41731(a)(4)) or smaller airport with
2 scheduled passenger operations to enter into an
3 agreement under which screening of passengers and
4 property will be carried out by qualified, trained
5 State or local law enforcement personnel if—

6 “(A) the screening services are equivalent
7 to the screening services that would be carried
8 out by Federal personnel under subsection (a);

9 “(B) the training and evaluation of indi-
10 viduals conducting the screening or providing
11 security services meets the standards set forth
12 in section 44935 for training and evaluation of
13 Federal personnel conducting screening or pro-
14 viding security services under subsection (a);
15 and

16 “(C) the airport is reimbursed by the
17 United States for the costs incurred in pro-
18 viding the required screening, training, and
19 evaluation.

20 “(2) DETERMINATION OF LIMITED REQUIRE-

21 MENTS.—The Secretary ~~in consultation with the At-~~
22 ~~torney General~~ may prescribe modified aviation se-
23 curity measures for a nonhub airport if the Sec-
24 retary determines that specific security measures are

1 not required at a nonhub airport at all hours of air-
2 port operation because of—

3 “(A) the types of aircraft that use the air-
4 port;

5 “(B) seasonal variations in air traffic and
6 types of aircraft that use the airport; or

7 “(C) other factors that warrant modifica-
8 tion of otherwise applicable security require-
9 ments.

10 “(3) ADDITIONAL FEDERAL SECURITY MEAS-
11 URES.—At any airport required to enter into a reim-
12 bursement agreement under paragraph (1), the Sec-
13 retary and the Attorney General—

14 “(A) may provide or require additional se-
15 curity measures;

16 “(B) may conduct random security inspec-
17 tions; and

18 “(C) may provide assistance to enhance
19 airport security at that airport.

20 “(d) MANUAL PROCESS.—

21 “(1) IN GENERAL.—The Administrator ^{may} ~~shall~~ re-
22 quire a manual process, at explosive detection sys-
23 tem screening locations in airports where explosive
24 detection equipment is underutilized, which will aug-
25 ment the Computer Assisted Passenger Prescreening

1 System by randomly selecting additional checked
2 bags for screening so that a minimum number of
3 bags, as prescribed by the Administrator, are exam-
4 ined.

5 “(2) LIMITATION ON STATUTORY CONSTRUC-
6 TION.—Paragraph (1) shall not be construed to limit
7 the ability of the Administrator to impose additional
8 security measures when a specific threat warrants
9 such additional measures.

10 “(3) MAXIMUM USE OF EXPLOSIVE DETECTION
11 EQUIPMENT.—In prescribing the minimum number
12 of bags to be examined under paragraph (1), the
13 Administrator shall seek to maximize the use of the
14 explosive detection equipment.

15 “(e) FLEXIBILITY OF ARRANGEMENTS.—In carrying
16 out subsections (a), (b), and (c), the Secretary of Trans-
17 portation may use memoranda of understanding or other
18 agreements with the Attorney General or the heads of ap-
19 propriate Federal law enforcement agencies covering the
20 utilization and deployment of personnel of the Department
21 of Justice or such other agencies.”.

22 (b) DEPUTIZING OF STATE AND LOCAL LAW EN-
23 FORCEMENT OFFICERS.—Section 512 of the Wendell H.
24 Ford Aviation Investment and Reform Act for the 21st
25 Century is amended—

1 (1) by striking "purpose of" in subsection
2 (b)(1)(A) and inserting "purposes of (i)"; and

3 (2) by striking "transportation;" in subsection
4 (b)(1)(A) and inserting "transportation, and (ii)
5 providing security screening services under section
6 44901(c) of title 49, United States Code;"

7 (c) TRANSITION.—The Secretary of Transportation
8 shall complete the full implementation of section 44901
9 of title 49, United States Code, as amended by subsection
10 (a), as soon as is practicable but in no event later than
11 18 months after the date of enactment of this Act. The
12 Secretary may make or continue such arrangements, in-
13 cluding arrangements under the authority of sections
14 40110 and 40111 of that title, for the screening of pas-
15 sengers and property under that section as the Secretary
16 determines necessary pending full implementation of that
17 section as so amended.

18 **SEC. 10. TRAINING AND EMPLOYMENT OF SECURITY**
19 **SCREENING PERSONNEL.**

20 (a) IN GENERAL.—Section 44935 of title 49, United
21 States Code, is amended—

22 (1) by redesignating subsection (f) as sub-
23 section (i); and

24 (2) by striking subsection (e) and inserting the
25 following:

*NOTE: The
screener
provisions for
p 22-30
are probably
not implementable
in the limited
transition period.*

*Modify from
FAA
pending
rule*

1 “(e) SECURITY SCREENERS.—

2 “(1) TRAINING PROGRAM.—The Secretary of

3 Transportation ~~in consultation with the Attorney~~

4 ~~General~~, shall establish a program for the hiring and

5 training of security screening personnel.

6 “(2) HIRING.—

7 “(A) QUALIFICATIONS.—The Secretary

8 shall establish, within 30 days after the date of

9 enactment of the Aviation Security Act, quali-

10 fication standards for individuals to be hired by

11 the United States as security screening per-

12 sonnel. *Notwithstanding any other provision of law,*

13 Those standards shall, at a minimum,

14 “(i) to have a satisfactory or better

15 score on a Federal security screening per-

16 sonnel selection examination;

17 “(ii) to have been a national of the

18 United States, as defined in section

19 101(a)(22) of the Immigration and Nation-

20 ality Act (8 U.S.C. 1101(a)(22)), for a

21 minimum of 5 consecutive years;

22 “(iii) to have passed an examination

23 for recent consumption of a controlled sub-

24 stance;

“(iv) to meet, at a minimum, the re-
quirements set forth in subsection (f); and

3 “(v) to meet such other qualifications
4 as the Secretary may establish.

5 “(B) BACKGROUND CHECKS.—The Sec-
6 retary shall require that an individual to be
7 hired as a security screener undergo an employ-
8 ment investigation (including a criminal history

9 record check) under section 44936(a)(1). *To the extent*
 10 *practicable, the background check shall be*
 11 "(C) DISQUALIFICATION OF INDIVIDUALS *conducted*
 12 WHO PRESENT NATIONAL SECURITY RISKS.— *before*
 The Secretary, in consultation with the heads of *training.*

13 other appropriate Federal agencies, shall estab-
14 lish procedures, in addition to any background
15 check conducted under section 44936, to ensure
16 that no individual who presents a threat to na-
17 tional security is employed as a security screen-

18 er. (D) The Secretary may impose additional
19 "(3) EXAMINATION; REVIEW OF EXISTING requirements in
20 RULES.—The Secretary shall develop a security the interests of
21 screening personnel examination for use in deter security, as
22 mining the qualification of individuals seeking em the Secretary
23 ployment as security screening personnel. The Sec deems
24 retary shall also review, and revise as necessary, any appropriate.

1 standard, rule, or regulation governing the employ-
2 ment of individuals as security screening personnel.

3 “(f) EMPLOYMENT STANDARDS FOR SCREENING
4 PERSONNEL.—

5 “(1) ~~SCREENER REQUIREMENTS.~~ *Notwithstanding another provision of*
6 *law,* An indi-
7 vidual may not be employed as a security screener
8 unless that individual meets the following require-
9 ments:

9 “(A) The individual shall possess a high
10 school diploma, a General Equivalency Diploma,
11 or experience that the Secretary has determined
12 to have equipped the individual to perform the
13 duties of the position.

14 “(B) The individual shall possess basic ap-
15 titudes and physical abilities including color
16 perception, visual and aural acuity, physical co-
17 ordination, and motor skills to the following
18 standards:

19 “(i) Screeners operating screening
20 equipment shall be able to distinguish on
21 the screening equipment monitor the ap-
22 propriate imaging standard specified by
23 the Secretary. Wherever the screening
24 equipment system displays colors, the oper-
25 ator shall be able to perceive each color.

1 “(ii) Screeners operating any screen-
2 ing equipment shall be able to distinguish
3 each color displayed on every type of
4 screening equipment and explain what each
5 color signifies.

6 “(iii) Screeners shall be able to hear
7 and respond to the spoken voice and to au-
8 dible alarms generated by screening equip-
9 ment in an active checkpoint environment.

10 “(iv) Screeners performing physical
11 searches or other related operations shall
12 be able to efficiently and thoroughly ma-
13 nipulate and handle such baggage, con-
14 tainers, and other objects subject to secu-
15 rity processing.

16 “(v) Screeners who perform pat-downs
17 or hand-held metal detector searches of in-
18 dividuals shall have sufficient dexterity and
19 capability to thoroughly conduct those pro-
20 cedures over a individual’s entire body.

21 “(C) The individual shall be able to read,
22 speak, and write English well enough to—

23 “(i) carry out written and oral in-
24 structions regarding the proper perform-
25 ance of screening duties;

1 “(ii) read English language identifica-
2 tion media, credentials, airline tickets, and
3 labels on items normally encountered in
4 the screening process;

5 “(iii) provide direction to and under-
6 stand and answer questions from English-
7 speaking individuals undergoing screening;
8 and

9 “(iv) write incident reports and state-
10 ments and log entries into security records
11 in the English language.

12 “(D) The individual shall have satisfac-
13 torily completed all initial, recurrent, and ap-
14 propriate specialized training required by the
15 security program, except as provided in para-
16 graph (2).

17 “(2) EXCEPTIONS.—An individual who has not
18 completed the training required by ~~paragraph~~ ^{subsections} (1) e
19 may be employed during the on-the-job portion of
20 training to perform security functions if that
21 individual—

22 “(A) is closely supervised; and

23 “(B) does not make independent judg-
24 ments as to whether individuals or property

1 may enter a sterile area or aircraft without fur-
2 ther inspection.

3 “(3) REMEDIAL TRAINING.—No individual em-
4 ployed as a security screener may perform a screen-
5 ing function after that individual has failed an oper-
6 ational test related to that function until that indi-
7 vidual has successfully completed the remedial train-
8 ing specified in the security program.

9 “(4) ANNUAL PROFICIENCY REVIEW.—The Sec-
10 retary shall provide that an annual evaluation of
11 each individual assigned screening duties is con-
12 ducted and documented. An individual employed as
13 a security screener may not continue to be employed
14 in that capacity unless the evaluation demonstrates
15 that the individual—

16 “(A) continues to meet all qualifications
17 and standards required to perform a screening
18 function;

19 “(B) has a satisfactory record of perform-
20 ance and attention to duty based on the stand-
21 ards and requirements in the security program;
22 and

23 “(C) demonstrates the current knowledge
24 and skills necessary to courteously, vigilantly,
25 and effectively perform screening functions.

1 “(5) OPERATIONAL TESTING.—In addition to
2 the annual proficiency review conducted under para-
3 graph (4), the Secretary shall provide for the oper-
4 ational testing of such personnel.

5 “(g) TRAINING.—

6 “(1) USE OF OTHER AGENCIES.—The Secretary
7 of Transportation shall enter into a memorandum of
8 understanding or other arrangement with the Attor-
9 ney General, or any other Federal agency or depart-
10 ment with appropriate law enforcement responsibil-
11 ities, to provide personnel, resources, or other forms
12 of assistance in the training of security screening
13 personnel.

14 “(2) TRAINING PLAN.—The Secretary shall,
15 within 60 days after the date of enactment of the
16 Aviation Security Act, develop a plan for the train-
17 ing of security screening personnel. The plan shall,
18 at a minimum, require that before being employed
19 as a security screener, an individual—

20 “(A) has completed 40 hours of classroom
21 instruction or successfully completed a program
22 that the Secretary determines will train individ-
23 uals to a level of proficiency equivalent to the
24 level that would be achieved by such classroom
25 instruction;

1 “(B) has completed 60 hours of on-the-job
2 instruction; and

3 “(C) has successfully completed an on-the-
4 job training examination prescribed by the Sec-
5 retary.

6 “(3) EQUIPMENT-SPECIFIC TRAINING. *To the extent practicable,* ~~An in-~~
7 dividual employed as a security screener may not use
8 any security screening device or equipment in the
9 scope of that individual's employment unless the in-
10 dividual has been trained on that device or equip-
11 ment and has successfully completed a test on the
12 use of the device or equipment.

13 “(h) TECHNOLOGICAL TRAINING.—The Secretary of
14 Transportation shall require training to ensure that
15 screeners are proficient in using the most up-to-date new
16 technology and to ensure their proficiency in recognizing
17 new threats and weapons. The Secretary shall make peri-
18 odic assessments to determine if there are dual use items
19 and inform security screening personnel of the existence
20 of such items. Current lists of dual use items shall be part
21 of the ongoing training for screeners. For purposes of this
22 subsection, the term ‘dual use’ item means an item that
23 may seem harmless but that may be used as a weapon.”.

24 (b) CONFORMING AMENDMENTS.—

1 (1) Section 44936(a)(1)(A) is amended by in-
2 serting "as a security screener under section
3 44935(e) or a position" after "a position".

4 (2) Section 44936(b) of title 49, United States
5 Code, is amended—

6 (A) by inserting "the Secretary," after
7 "subsection," in paragraph (1); and

8 (B) by striking "An" in paragraph (3) and
9 inserting "The Secretary, an".

10 (c) TRANSITION.—The Secretary of Transportation
11 shall complete the full implementation of section 44935(e),
12 (f), (g), and (h) of title 49, United States Code, as amend-
13 ed by subsection (a), as soon as is practicable. The Sec-
14 retary may make or continue such arrangements for the
15 training of security screeners under that section as the
16 Secretary determines necessary pending full implementa-
17 tion of that section as so amended.

18 (d) EXPEDITED PERSONNEL PROCESS.—

19 ~~(1) AUTHORIZATION OF EMPLOYMENT.—The~~
20 Secretary of Transportation may appoint and fix the
21 compensation of such a number of individuals as
22 may be necessary to carry out section 44901 and
23 44903 of title 49, United States Code, in accordance
24 with the provisions of part III of title 5, United
25 States Code, without regard to any limitation on

*see
amendments*

1 ~~number of employees imposed by any other law or~~
2 ~~Executive Order.~~

3 (2) STRIKES PROHIBITED.—Section 7311(3)
4 and section 7116(b)(7) of title 5, United States
5 Code, apply to individuals employed as security
6 screeners.

7 ~~SEC. 11. SUSPENSION AND REMOVAL.~~

8 (a) IN GENERAL.—Notwithstanding other provision
9 of law (specifically including section 7532 of title 5,
10 United States Code), the Secretary of Transportation may
11 suspend without pay an individual employed as a security
12 screener under title 49, United States Code, when the Sec-
13 retary considers that action necessary in the interests of
14 national security or because the screener has failed to per-
15 form screening duties adequately. To the extent that the
16 Secretary determines that the interests of national secu-
17 rity permit, the suspended employee shall be notified of
18 the reasons for the suspension. Within 30 days after the
19 notification, the suspended employee is entitled to submit
20 to the official designated by the Secretary statements or
21 affidavits to show why he should be restored to duty.

22 (b) Subject to subsection (c) of this section, the Sec-
23 retary may remove an employee suspended under sub-
24 section (a) of this section ~~when, after such investigation~~
25 ~~and review as he considers necessary, the Secretary deter-~~

yes

1 ~~mines that removal is necessary or advisable in the inter-~~
2 ~~ests of national security or because the screener has failed~~
3 ~~to perform screening duties adequately. The determination~~
4 ~~of the Secretary is final.~~

5 (c) An employee suspended under subsection (a) of
6 this section who--

7 (1) had a permanent or indefinite appointment
8 for at least 3 years;

9 (2) has completed his probationary or trial pe-
10 riod; and

11 (3) is a citizen of the United States;

12 is entitled, after suspension and before removal, to—

13 (A) a written statement of the charges
14 against him, within 30 days after suspension,
15 which may be amended within 30 days there-
16 after and which shall be stated as specifically as
17 security considerations permit;

18 (B) an opportunity within 30 days there-
19 after, plus an additional 30 days if the charges
20 are amended, to answer the charges and submit
21 affidavits;

22 (C) a hearing, at the request of the em-
23 ployee, by a Department of Transportation au-
24 thority duly constituted for this purpose;

1 ~~(D) a review of his case by the Secretary~~
2 or his designee, before a decision adverse to the
3 employee is made final; and
4 (E) a written statement of the decision of
5 the Secretary.

6 **SEC. 12. RESEARCH AND DEVELOPMENT.**

7 Section 44912(b)(1) of title 49, United States Code,
8 is amended—

9 (1) by striking “complete an intensive review
10 of” and inserting “periodically review”;

11 (2) by striking “commercial aircraft in service
12 and expected to be in service in the 10-year period
13 beginning on November 16, 1990;” in subparagraph
14 (B) and inserting “aircraft in air transportation;”;
15 and

16 (3) by redesignating subparagraphs (D)
17 through (F) as subparagraphs (E) through (G), re-
18 spectively, and inserting after subparagraph (C) the
19 following:

20 “(D) the potential release of chemical, bio-
21 logical, or similar weapons or devices either
22 within an aircraft or within an airport;”.

yes
on
our
own

1 **SEC. 13. FLIGHT SCHOOL SECURITY.**

2 (a) PROHIBITION.—Chapter 449 of title 49, United
3 States Code, is amended by adding at the end the fol-
4 lowing new section:

5 “§ 44939. Training to operate ^{*Certain*} ~~jet-propelled~~ aircraft

6 “(a) PROHIBITION.—No person subject to regulation
7 under this part may provide training in the operation of
8 any ~~jet-propelled~~ ^{*rated over 12,500 pounds*} aircraft to any alien (or other individual
9 specified by the Secretary of Transportation under this
10 section) within the United States unless the ~~Attorney General~~ ^{*Secretary of Transportation*}
11 ~~and~~ issues to that person a certification of the completion
12 of a background investigation of the alien under sub-
13 section (b).

14 “(b) INVESTIGATION.—

15 “(1) REQUEST.—Upon the joint request of a
16 person subject to regulation under this part and an
17 alien (or individual specified by the Secretary) for
18 the purposes of this section, the ~~Attorney General~~ ^{*Secretary*}
19 shall—

20 “(A) carry out a background investigation
21 of the alien or individual; and

22 “(B) upon completing the investigation,
23 issue a certification of the completion of the in-
24 vestigation to the person.

1 “(2) SCOPE.—A background investigation of an
2 alien or individual under this subsection shall consist
3 of the following:

4 “(A) A determination of whether there is
5 a record of a criminal history for the alien or
6 individual and, if so, a review of the record.

7 “(B) A determination of the status of the
8 alien under the immigration laws of the United
9 States.

10 “(C) A determination of whether the alien
11 or individual presents a national security risk to
12 the United States.

13 “(c) SANCTIONS.—A person who violates subsection
14 (a) shall be subject to administrative sanctions that the
15 Secretary of Transportation shall prescribe in regulations.
16 The sanctions may include suspension and revocation of
17 licenses and certificates issued under this part.

18 “(d) COVERED TRAINING.—For the purposes of sub-
19 section (a), training includes in-flight training, training in
20 a simulator, and any other form or aspect of training.

21 “(e) REPORTING REQUIREMENT.—Each person sub-
22 ject to regulation under this part that provides training
23 in the operation of any ~~jet propelled~~ *rated over 12,500 pounds* aircraft shall report
24 to the Secretary of Transportation, at such time and in
25 such manner as the Secretary may prescribe, the name,

1 address, and such other information as the Secretary may
2 require concerning—

3 “(1) each alien to whom such training is pro-
4 vided; and

5 “(2) every other individual to whom such train-
6 ing is provided as the Secretary may require.

7 “(f) ALIEN DEFINED.—In this section, the term
8 ‘alien’ has the meaning given the term in section 101(a)(3)
9 of the Immigration and Nationality Act (8 U.S.C.
10 1101(a)(3)).”.

11 (b) CLERICAL AMENDMENT.—The table of sections
12 at the beginning of such chapter is amended by adding
13 at the end the following new item:

“44939. Training of aliens to operate jet-propelled aircraft.”.

14 (c) INTERNATIONAL COOPERATION.—The Secretary
15 of Transportation, in consultation with the Secretary of
16 State, shall work with the International Civil Aviation Or-
17 ganization and the civil aviation authorities of other coun-
18 tries to improve international aviation security through
19 screening programs for flight instruction candidates.

20 **SEC. 14. REPORT TO CONGRESS ON SECURITY.**

21 Within 60 days after the date of enactment of this
22 Act, ~~the Attorney General and~~ the Secretary of Transpor-
23 tation shall transmit a report to the Congress containing
24 ~~their joint~~ recommendations on additional measures for

1 the Federal government to address transportation security
2 functions.

3 **SEC. 15. GENERAL AVIATION AND AIR CHARTERS.**

4 The Secretary of Transportation shall submit to the
5 Congress within 3 months after the date of enactment of
6 this Act a report on how to improve security with respect
7 to general aviation and air charter operations in the
8 United States.

9 **SEC. 16. SECURITY FUNDING.**

10 (a) **USER FEE FOR SECURITY SERVICES.**—

11 (1) **IN GENERAL.**—Chapter 481 is amended by
12 adding at the end thereof the following:

13 **"§ 48114. User fee for security services charge**

14 "(a) **IN GENERAL.**—The Secretary of Transportation
15 shall collect a user fee from air carriers. Amounts collected
16 under this section shall be treated as offsetting collections
17 to offset the costs of providing aviation security services
18 to air carriers. The amounts collected shall be immediately
19 available to the Secretary for obligation and expenditure
20 for its activities, and shall remain available in a revolving
21 fund, to be established by the Secretary, until expended.

22 "(b) **AMOUNT OF FEE.**—Air carriers shall pay \$2.50

23 for each passenger enplanement.

*adjusted annually
to reflect changes in the consumer price
index."*

*cannot
direct
uses
fees*

*↓
specifically*

1 (2) CLERICAL AMENDMENT.—The table of sec-
2 tions for chapter 481 is amended by adding at the
3 end thereof the following:

“48114. User fee for security services”.

4 (3) EFFECTIVE DATE.—The amendment made
5 by paragraph (1) shall apply with respect to trans-
6 portation beginning after the date which is 180 days
7 after the date of enactment of this Act.

8 (b) SPECIFIC AUTHORIZATION OF APPROPRIA-
9 TIONS.—

10 (1) IN GENERAL.—Part C of subtitle VII of
11 title 49, United States Code, is amended by adding
12 at the end the following:

13 “CHAPTER 483. AVIATION SECURITY FUNDING.

“Sec.
“48301. Aviation security funding

14 “§ 48301. Aviation security funding

15 “There are authorized to be appropriated for fiscal
16 years 2002, 2003, and 2004, such sums as may be nec-
17 essary to carry out chapter 449 and related aviation secu-
18 rity activities under this title.”.

19 (2) CONFORMING AMENDMENT.—The subtitle
20 analysis for subtitle VII of title 49, United States
21 Code, is amended by inserting after the item relating
22 to chapter 482 the following:

“483. Aviation Security Funding.....48301”.

1 SEC. 17. INCREASED FUNDING FLEXIBILITY FOR AVIATION
2 SECURITY.

3 (a) LIMITED USE OF AIRPORT IMPROVEMENT PRO-
4 GRAM FUNDS.—

5 (1) BLANKET AUTHORITY.—Notwithstanding
6 any provision of chapter 471 of title 49, United
7 States Code, or any rule, regulation, or agreement
8 thereunder to the contrary, for fiscal year 2002 an
9 airport operator may use amounts made available
10 under that chapter to defray additional direct secu-
11 rity-related expenses imposed by law or rule after
12 September 11, 2001, for which funds are not other-
13 wise specifically appropriated or made available
14 under this or any other Act.

15 (2) AIRPORT DEVELOPMENT FUNDS.—Section
16 47102(3) of title 49, United States Code, is amend-
17 ed by adding at the end the following:

18 “(J) after September 11, 2001, and before
19 October 1, 2002, for fiscal year 2002, addi-
20 tional operational requirements, improvement of
21 facilities, purchase and deployment of equip-
22 ment, hiring, training, and providing appro-
23 priate personnel, or an airport or any aviation
24 operator at an airport, that the Secretary deter-
25 mines will enhance and ensure the security of

A handwritten signature, possibly "S. 1447", is written in the right margin. It is enclosed in a large, loopy scribble. A line from the top right points towards the signature.

1 passengers and other persons involved in air
2 travel.”.

3 (3) ALLOWABLE COSTS.—Section 47110(b)(2)
4 of title 49, United States Code, is amended—

5 (A) by striking “or” in subparagraph (B);

6 (B) by inserting “or” after “executed;” in
7 subparagraph (C); and

8 (C) by adding at the end the following:

9 “(D) if the cost is incurred after Sep-
10 tember 11, 2001, for a project described in sec-
11 tion 47102(3)(J), and shall not depend upon
12 the date of execution of a grant agreement
13 made under this subchapter;”.

14 (4) DISCRETIONARY GRANTS.—Section 47115
15 of title 49, United States Code, is amended by add-
16 ing at the end the following:

17 “(i) CONSIDERATIONS FOR PROJECT UNDER EX-
18 PANDED SECURITY ELIGIBILITY.—In order to assure that
19 funding under this subchapter is provided to the greatest
20 needs, the Secretary, in selecting a project described in
21 section 47102(3)(J) for a grant, shall consider the non-
22 federal resources available to sponsor, the use of such non-
23 federal resources, and the degree to which the sponsor is
24 providing increased funding for the project.”.

1 (5) FEDERAL SHARE.—Section 47109(a) of
2 title 49, United States Code, is amended—

3 (A) by striking “and” in paragraph (3);

4 (B) by striking “47134.” in paragraph (4)
5 and inserting “47134; and”; and

6 (C) by adding at the end the following:

7 “(5) for fiscal year 2002, 100 percent for a
8 project described in section 47102(3)(J).”.

9 (b) APPORTIONED FUNDS.—For the purpose of car-
10 rying out section 47114 of title 49, United States Code,
11 for fiscal year 2003, the Secretary shall use, in lieu of
12 passenger boardings at an airport during the prior cal-
13 endar year, the greater of—

14 (1) the number of passenger boardings at that
15 airport during 2000; or

16 (2) the number of passenger boardings at that
17 airport during 2001.

18 (c) EXPEDITED PROCESSING OF SECURITY-RELATED
19 PFC REQUESTS.—The Administrator of the Federal
20 Aviation Administration shall, to the extent feasible, expe-
21 dite the processing and approval of passenger facility fee
22 requests under subchapter I of chapter 471 of title 49,
23 United States Code, for projects described in section
24 47192(3)(J) of title 49, United States Code.

1 **SEC. 18. AUTHORIZATION OF FUNDS FOR REIMBURSEMENT**
2 **OF AIRPORTS FOR SECURITY MANDATES.**

3 (a) AUTHORIZATION OF APPROPRIATIONS.—There
4 are authorized to be appropriated to the Secretary of
5 Transportation such sums as may be necessary for fiscal
6 year 2002 to compensate airport operators for eligible se-
7 curity costs.

8 (b) REIMBURSABLE COSTS.—The Secretary may re-
9 imburse an airport operators (from amounts made avail-
10 able for obligation under subsection (a)) for the direct
11 costs incurred by the airport operator in complying with
12 new, additional, or revised security requirements imposed
13 on airport operators by the Federal Aviation Administra-
14 tion on or after September 11, 2001.

15 (c) DOCUMENTATION OF COSTS; AUDIT.—The Sec-
16 retary may not reimburse an airport operator under this
17 section for any cost for which the airport operator does
18 not demonstrate to the satisfaction of the Secretary, using
19 sworn financial statements or other appropriate data,
20 that—

21 (1) the cost is eligible for reimbursement under
22 subsection (b); and

23 (2) the cost was incurred by the airport oper-
24 ator.

25 The Inspector General of the Department of Transpor-
26 tation and the Comptroller General of the United States

1 may audit such statements and may request any other in-
2 formation that necessary to conduct such an audit.

3 (d) CLAIM PROCEDURE.—Within 30 days after the
4 date of enactment of this Act, the Secretary, after con-
5 sultation with airport operators, shall publish in the Fed-
6 eral Register the procedures for filing claims for reim-
7 bursement under this section of eligible costs incurred by
8 airport operators.

9 **SEC. 19. DEFINITIONS.**

10 Except as otherwise explicitly provided, any term
11 used in this Act that is defined in section 40102 of title
12 49, United States Code, has the meaning given that term
13 in that section.

○

Source: All Sources > Secondary Legal > Law Reviews, Combined 

Terms: "executive order" and president and legislation and "presidential directive" and date(aft 1996) (Edit Search)

Focus: "executive order" (Exit FOCUS™)

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ARTICLE: The Use and Abuse of **Executive Orders** and Other Presidential Directives

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SUMMARY:

... A driving force behind this increased interest has been the concern expressed by many citizens and lawmakers over the content and scope of several of President Bill Clinton's **executive orders** and land proclamations. ... A signing statement ordering all executive branch officials not to enforce a particular provision in the statute as unconstitutional would have the same effect as a signing statement in the form of a proclamation that the President believes a particular provision to be null and void. ... There is reason, however, to be cautious when comparing the **executive order** output of Presidents from different eras, even in the same century. ... President Clinton repealed a number of important **executive orders** issued by Presidents Reagan and Bush, both of whom had issued a variety of crosscutting **executive orders** calling on executive branch agencies to take important constitutional or institutional principles into account when taking regulatory action. ... President Clinton's American Heritage Rivers Initiative (AHRI), established by **Executive Order** 13,061, is an example of a presidential directive that appears to be illegal but has not yet been judicially invalidated because of a "technical" standing problem. ...

TEXT:

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I. Introduction

In recent years, there has been a renewed interest in the proper use and possible abuse of

executive orders and other presidential directives. A driving force behind this increased interest has been the concern expressed by many citizens and lawmakers over the content and scope of several of President Bill Clinton's **executive orders** and land proclamations. ¹ Congress has responded to this concern by holding hearings and considering several bills designed to curb the President's authority to issue such directives. ² In an exceedingly rare act, the courts recently joined the fray by striking down one of President Clinton's **executive orders**. ³ Litigation to contest the validity of other directives is ongoing. ⁴

Despite the increased public attention on **executive orders** and similar directives, public understanding of the legal foundation and proper uses of presidential decrees is limited. Thus, the increased public attention generally has been accompanied by confusion and occasional misunderstandings regarding the legality and appropriateness of various presidential actions.

Such confusion stems in part from the fact that the President's authority to issue such directives is not expressly set forth in the Constitution and its boundaries are still somewhat [*270] unclear. ⁵ Accordingly, it is probably not possible to provide a simple recitation of the governing law or prudential guidelines that apply to presidential directives. However, it is possible to discern and describe a legal framework of analysis that courts have used to help determine issues of validity. Beyond questions of legality, there are many separate but important issues of policy. Two broad policy questions also present themselves: (1) whether a given power the President possesses ought to be used to advance a particular policy objective, and (2) whether a particular draft directive effectively advances such a policy goal.

This article seeks to illuminate the above policy questions as well as to supply a legal framework of analysis for judging questions of validity. First, it addresses the source of current popular confusion by providing a general overview of the President's use of **executive orders** and other presidential directives. To that end, it presents a discussion of both historical practice and of the sources of presidential authority. Second, it sets forth a legal framework of analysis for testing the legitimacy of a given **executive order**. Third, using both historical examples and examples from the Clinton administration, it presents a set of criteria for determining when an otherwise legal order might nevertheless be improper as a matter of policy. Finally, it discusses a number of reforms related to the use and abuse of presidential directives.

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II. The Separation of Powers

There can be no liberty where the legislative and executive powers are united in the same person.

- Charles-Louis de Secondat,

Baron de Montesquieu ⁶

The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.

- James Madison ⁷

One of the great and enduring gifts from the Founders' generation was the inclusion of separation of powers principles in the United States Constitution. The Framers studied the writings of Montesquieu and other political philosophers as well as the workings of the separate branches of their own state governments. ⁸ Their conscious design to enforce this

separation of functions was carefully explained both in The Federalist Papers and also during the debates over ratification of the United States Constitution. ⁹ The separation of powers is now enshrined in the Constitution, implicitly in its structure and expressly in the provisions of Articles I, II, and III. ¹⁰

Any discussion of the proper scope of executive and congressional authority requires a basic understanding of this concept of the separation of powers. The constitutional separation of powers, therefore, informs all aspects of the debate over a President's proper authority to issue **executive orders** and proclamations. ¹¹ It reinforces a President's right or [*272] duty to issue a decree, order, or proclamation to carry out a particular power that truly is committed to his discretion by the Constitution or by a lawful statute passed by Congress. On the other hand, the constitutional separation of powers may restrict presidential power where the President attempts to issue an order regarding a matter that is expressly committed to another branch of government; it might even render presidential action void. Separation of powers principles alone, however, will not always yield a clear answer. For example, they may be indeterminate where the locus of power is unclear or ambiguous, or where two branches of government share power over a particular subject matter. ¹²

In the previous administration, however, a base motive seemed to prevail in the use of executive power. Former President Clinton proudly publicized his use of executive decrees in situations where he failed to achieve a legislative objective. ¹³ Moreover, he repeatedly flaunted his **executive order** power to curry favor with narrow or partisan special interests. ¹⁴ As if this were not enough, Clinton's top White House political advisers made public statements about his use of executive decrees that were designed to incite a partisan response, stating, for example, that the executive power was "cool" and promising that Clinton would wield it to the end of his term. ¹⁵

A President who abuses his executive authority undermines the constitutional separation of powers and may even violate it. History will show that President Clinton abused his authority in a variety of ways and that his disrespect for the rule of law was [*273] unprecedented. ¹⁶ Given this pattern, it should come as no surprise that President Clinton sometimes abused his **executive order** authority as well. It would be a mistake, however, to try to restrict a President's lawful and proper **executive order** authority because of one abusive President.

Moreover, defenders of executive authority will find much in President Clinton's use of **executive orders** and proclamations that is instructive, even if they dispute the lawfulness or policy goals of individual decrees. In short, some helpful lessons can be learned from recent experience about how an aggressive President can use his power for appropriate and beneficial purposes. These lessons can help guide the current and future Presidents in making executive decisions.

III. Defining Presidential Directives

In order to place issues of legality and policy in their proper context, it is important to begin with an understanding of the nature and history of executive decrees.

From the founding of the nation, American Presidents have developed and used various types of presidential or executive "directives." ¹⁷ Although **executive orders** and presidential proclamations are the best known directives, many other documents have a similar function and effect. ¹⁸ Reduced to their common core, presidential directives are simply written, rather than oral, instructions or declarations issued by the President. Because we would neither expect nor want the President to limit himself solely to oral instructions and declarations, it is not surprising that every President has used written directives to run the executive branch of government.

A. Early Presidential Directives

On June 8, 1789, three months after he was sworn in as President of the United States, George Washington sent an instruction to the holdover officers of the Confederation government asking each of them to prepare a report "to impress me with a full, precise, and distinct general idea of the affairs of [*274] the United States."¹⁹ Although the term "**executive order**" was not used until many years later,²⁰ President Washington's instruction was the precursor of the **executive order** and was unquestionably proper. Every chief executive has the inherent power to order subordinates to prepare reports for him on the performance of their duties. The United States Constitution expressly provides that the President may require his principal officers to prepare such reports.²¹

A few months later, a joint committee of Congress requested that President Washington "recommend to the people of the United States a day of public thanksgiving."²² On October 3, 1789, President Washington responded with a proclamation urging the people to recognize Thursday, November 26, 1789, as a day of thanksgiving.²³ For centuries, heads of state had issued proclamations commemorating victorious battles and national holidays;²⁴ there was no reason for Congress or the President to conclude that the Constitution removed this ceremonial function from the head of state. Congress may go further than the President and pass laws fixing a particular holiday and granting paid leave to federal employees, but the [*275] President is free in the absence of congressional action to recommend such celebrations as he sees fit.²⁵

Executive orders have also been used to direct foreign policy since the presidency of George Washington, when he issued a proclamation in 1793 stating that the United States would be "friendly and impartial toward the belligerent powers" of Britain and France.²⁶ In this "Neutrality Proclamation," Washington justified his power to issue such a statement on the "law of nations."²⁷ A firmer ground would have been the constitutional powers vested in the President over foreign affairs. Washington, with the concurrence of Secretary of State Thomas Jefferson and Secretary of the Treasury Alexander Hamilton, did not convene the Congress to debate the proclamation before issuing it.²⁸ James Madison, among others, criticized Washington's proclamation as an over-extension of executive authority and an infringement on Congress's authority to decide issues of war and peace.²⁹ Congress, however, later gave approval to Washington's course of action by passing the Neutrality Act of 1794, at Washington's request, giving the President power to prosecute violators of the proclamation.³⁰ This early episode [*276] demonstrates that the President and Congress may have overlapping responsibilities, and in such situations, the scope of the President's power to act unilaterally is sometimes unclear.

B. Sources of Presidential Authority

Although President Washington's Thanksgiving Proclamation was hortatory, other proclamations or orders that communicate presidential decisions may be legally binding.³¹ Ultimately the authority for all presidential orders or directives must come from either the Constitution or from statutory delegations.³² The source of authority (constitutional versus statutory) carries important implications for the extent to which that authority may be legitimately exercised or circumscribed. Regardless of the source of substantive power, however, the authority to use written directives in the exercise of that power need not be set forth in express terms in the Constitution or federal statutes. As is explained further below, the authority to issue directives may be express, implied, or inherent in the substantive power granted to the President.³³

The Constitution expressly mentions certain functions that are to be performed by the President. Congress has augmented the President's power by delegating additional authority within these areas of responsibility. The following are among the more important grants of authority under which the President may issue at least some directives in the exercise of his constitutional and statutorily delegated powers: Commander in Chief, Head of State, Chief Law Enforcement Officer, and Head of the Executive Branch.

The Constitution directs the President to fill the role of Commander in Chief. ³⁴ The President's power as Commander in Chief is limited by other constitutional powers granted to Congress, such as the power to declare war, raise and support the armed forces, make rules for the regulation of the armed **[*277]** forces, and provide for calling forth the militia of the several states. ³⁵ The President's power as military commander, however, is still broad with respect to the armed forces at his disposal, including some situations in which Congress has not acted to declare war. ³⁶

In addition to his role as Commander in Chief, the President also serves as Head of State. ³⁷ As such, the President is solely responsible for carrying out foreign policy, including the sole power to recognize foreign governments, to receive foreign ambassadors, and to negotiate treaties. ³⁸ Congress may enact laws affecting foreign policy, and two-thirds of the Senate must ratify any treaty before it becomes binding law, ³⁹ but Congress must still leave the execution of foreign policy and diplomatic relations to the President. ⁴⁰

Presidential duties also include acting as Chief Law Enforcement Officer. The President has the sole constitutional obligation to "take Care that the Laws be faithfully executed," ⁴¹ and this grants him broad discretion over federal law enforcement decisions. He has not only the power, but also the responsibility to see that the Constitution and laws are interpreted correctly. ⁴² In addition, the President has absolute **[*278]** prosecutorial discretion in declining to bring criminal indictments. ⁴³ As in the exercise of any other constitutional power, one may argue that a particular President is abusing his discretion, but even in such a case, he cannot be compelled to prosecute any criminal charges.

Finally, the President is also charged with the responsibility of serving as Head of the Executive Branch. The Framers debated and rejected the creation of a plural executive. They selected a "unitary executive" and determined that he alone would be vested with "the executive power" of Article II. ⁴⁴ After much debate, the Framers also determined that the President would nominate and appoint (with the Senate's consent in some cases) all officers in the executive branch. With very few exceptions, all appointed officials who work in the executive branch serve at the will and pleasure of the President, even if Congress has specified a term of years for a particular office. ⁴⁵ All this was designed to ensure the President's control over officials in the executive branch ⁴⁶ and to promote "energy in the executive." ⁴⁷

[*279] When the President is lawfully exercising one of these functions, the scope of his power to issue written directives is exceedingly broad. ⁴⁸ In short, he may issue or execute whatever written directives, orders, guidelines (such as prosecutorial guidelines or nondiscriminatory enforcement policies), communiques, dispatches, or other instructions he deems appropriate.

In addition to providing the first example of a presidential directive, Washington's presidency also presents an early historical example of the type of broad power available to the President when issuing an order pursuant to an express grant of authority. On August 7, 1794, President Washington issued a proclamation ordering those engaged in the Whiskey Rebellion to disperse and calling forth the militia to put down the rebellion. ⁴⁹ This proclamation was issued pursuant to statutory authority expressly delegated to the President. ⁵⁰ The statute provided that the President first had to warn citizens to disperse and return to their homes. Following that warning, he could call forth the militia to deal with any individuals who did not follow this command. ⁵¹ Thus, the Whiskey Rebellion Proclamation may have been the first directive issued pursuant to power conferred by Congress.

Andrew Johnson's presidency, on the other hand, provides an example of a presidential proclamation issued where the power to issue the written declaration is either implied or inherent in a constitutional grant of power. On December 25, 1868, President Andrew Johnson issued a proclamation, the "Christmas Proclamation," pardoning "all and every person who directly or indirectly participated in the late insurrection or rebellion" related to

the Civil War. ⁵² President Johnson's Christmas Proclamation was grounded squarely on his constitutional [***280**] pardon power. ⁵³ The Supreme Court subsequently ruled that the proclamation was "a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect." ⁵⁴ Although the pardon power is explicit, the text of the Constitution does not specify how the President may exercise that power or communicate his decisions. The argument that the President was limited to issuing formal legal documents that specified particular individuals and particular crimes was rejected in *Armstrong*, which upheld his power to issue general pardons by public proclamation of unnamed people and for unremunerated crimes. ⁵⁵

As the Christmas Proclamation demonstrates, the President's authority to issue written directives is not limited to express language in the Constitution that grants him power to issue such directives. The President possesses additional authority to issue certain directives where that is the reasonable implication of the power granted (implied authority) or if it is inherent in the nature of the power conferred (inherent authority). ⁵⁶ The term "Commander in Chief of the Army and Navy" (as used in Article II of the Constitution) necessarily implies that the commander can issue oral and written commands. Moreover, it is inherent in the nature of a military commander that he issue such orders.

If the President's authority is implied or inherent in a statutory grant of power, Congress remains free to negate or modify that authority. ⁵⁷ Congress also has latitude in defining or refining the procedures the President must take in the exercise of his authority, although there are some constitutional limits to Congress's power to micromanage executive branch decision-making procedures. ⁵⁸

[***281**] When the President is exercising powers inherent in Article II of the Constitution, Congress has much less ability to regulate or circumscribe the President's use of written directives. ⁵⁹ Some of President Clinton's claims of implied and inherent authority were outrageous. ⁶⁰ The U.S. Court of Appeals for the District of Columbia Circuit struck down one of his **executive orders** that was based on such an overly broad claim, demonstrating that a President's claim that he is exercising inherent constitutional power will not always prevail. ⁶¹ But when the President is exercising a legitimate constitutional power, for example, his authority as Commander in Chief, Congress and the courts have little or no say in how the President communicates his commands. ⁶²

Unless Congress has specified that the statutory power may be exercised only in a particular way, the President may broadly issue directives in the exercise of his statutorily delegated authority. A few examples of Congress's conditional grant of statutory authority are mentioned herein, but as previously explained, there are limits to how far Congress can go in an attempt to micromanage even the President's statutorily delegated authority. ⁶³ For example, Congress can grant the President or his Attorney General the authority to deport certain illegal aliens, but it cannot attempt to retain a veto over [***282**] the final decision as it tried to do in the Immigration and Naturalization Act. ⁶⁴

In sum, a President has broad discretion to use written directives when he is lawfully exercising one of his constitutional or statutorily delegated powers. Any broad power or discretion can be abused, but it would be wrong to confuse such potential or real abuse with the many legitimate uses.

IV. The Legal Framework of Analysis

A. The History of **Executive Orders**

A legal framework of analysis is required in order to separate legitimate presidential directives from those that are abusive or improper. Unfortunately, a dearth of governing law and prudential guidelines in the area of **executive orders** makes the articulation of that framework difficult. Reference to history, therefore, is essential when seeking to uncover the

necessary analytical structure. Wartime crises, for example, demand the type of swift action achieved most readily through executive action. Not surprisingly, most salient historical examples of the use of **executive orders** are to be found in times of national crisis. Abraham Lincoln, Franklin Roosevelt, and Harry Truman all faced such periods. All issued controversial and illustrative **executive orders**.

Abraham Lincoln used presidential directives to run the early months of the Civil War, ⁶⁵ presenting Congress with the option of either adopting his practices as legislation or cutting off support for the Union army. In an effort to defeat the Southern rebellion, Lincoln issued a proclamation on April 15, 1861 activating troops and calling for Congress to convene on July 4. ⁶⁶ He also issued proclamations to procure warships and to expand the size of the military. ⁶⁷ In both cases, the proclamations [***283**] provided for payment to be advanced from the Treasury without congressional approval. ⁶⁸ These latter actions were probably unconstitutional, but Congress acquiesced in the face of wartime contingencies, and the matters were never challenged in court. ⁶⁹

During his time in office, President Franklin Roosevelt greatly expanded the use of **executive orders**, partly in response to the growth of government and partly in response to the demands placed on him as Commander in Chief during World War II. ⁷⁰ Unfortunately, FDR also showed a tendency to abuse his **executive order** authority and to claim powers that were not conferred on him in the Constitution or by statute. ⁷¹ President Harry Truman followed this pattern of governing by **executive order**. Some of President Truman's **executive orders** were to his credit, such as the integration of the armed forces, ⁷² and some were to his shame, such as the attempted seizure of the steel industry during the Korean conflict. ⁷³

The Supreme Court's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure Case), which struck down one of Truman's **executive orders**, ⁷⁴ as well as subsequent practice, helped create a workable understanding regarding when a President's **executive order** authority is and is not valid. A slight [***284**] modification of Justice Robert Jackson's famous framework of analysis is as follows: The President's authority, to act or issue an **executive order**, is at its apex when his action is based on an express grant of power in the Constitution, in a statute, or both. ⁷⁵ His action is the most questionable when there is no grant of constitutional authority, either express or inherent, and his action is contrary to a lawful statute or provision of the Constitution. ⁷⁶

Although this framework of analysis is a helpful starting point, a deeper understanding still requires a substantive knowledge of the relevant statutory law and a President's and Congress's constitutional powers. For example, a careful review of the substantive law illustrates why President Truman's desegregation of the armed forces was proper notwithstanding Congress's constitutional authority regarding the military. Congress has the power to create and maintain the military forces, ⁷⁷ and it has the power to "make Rules for the Government and Regulation" of the military, including the Uniform Code of Military Justice. ⁷⁸ Congress's constitutional power permits it to establish standards for the induction of soldiers, including height, weight, and age restrictions. ⁷⁹ When Congress has acted pursuant to its constitutional authority and its act does not violate any other provision of the Constitution, its rules govern, among other things, who shall serve in the military as well as what their pay and retirement age shall be. ⁸⁰

When President Truman desegregated the armed forces, ⁸¹ he was not interfering either with any congressional power over induction or with any military rules of conduct. President Truman exercised his authority as Commander in Chief to assign individual soldiers lawfully in his command to units that [***285**] he deemed appropriate. Moreover, Truman also had a constitutional duty to stop government racial discrimination. ⁸² Thus, even if Congress had wanted to override the desegregation order, it possessed no authority to tell the President how to detail the soldiers already in his command. This example demonstrates that an analysis of the legitimacy of **executive orders** requires careful attention to the underlying

constitutional and statutory powers of each branch.

There may be close cases in which the validity of the **executive order** is uncertain, such as when a claim of inherent constitutional authority is arguable and where Congress has been silent or its will is unclear. Nevertheless, Presidents since Truman were generally more careful to stay within their constitutional and statutory grants of authority in the exercise of their **executive order** authority - until the Administration of President Clinton.⁸³ Although the number of illegal **executive orders** issued by President Clinton does not constitute a large percentage of his total,⁸⁴ the pattern of illegal orders, often without any claim of statutory or constitutional authority, is still striking. One obvious example was President Clinton's "striker replacement" **executive order**.⁸⁵ The legal decision it spawned provides additional guidance for determining the legality of future **executive orders** and thus is worthy of a brief discussion.

In 1993, President Clinton urged Congress to enact a statute that would prohibit employers from hiring permanent replacements for striking workers. The right to hire such permanent replacement workers was firmly established in both [*286] the National Labor Relations Act (NLRA) and in decisions of the Supreme Court.⁸⁶ Congress refused to authorize the change in law in 1993-1994.⁸⁷ Shortly after Republicans gained control of Congress in 1995, the President issued **Executive Order 12,954**, an attempt to achieve through executive fiat what he could not achieve through legislation.⁸⁸ President Clinton claimed authority under the **Federal Property and Administrative Services Act** (the "Procurement Act")⁸⁹ to require all large government contractors, which employed roughly twenty-two percent of the labor force, to agree not to hire permanent replacements for lawfully striking employees.⁹⁰

In *Chamber of Commerce of the United States v. Reich*, the United States Court of Appeals for the District of Columbia Circuit unanimously overturned the **executive order** and the implementing regulations that had been issued by the Secretary of Labor.⁹¹ The court first determined that it had jurisdiction over the case - despite what the court described as President Clinton's "breathtakingly broad claim of non-reviewability of presidential actions."⁹² In short, the court said that it did not have to defer to the President's claim that he was acting pursuant to lawful authority under the Procurement Act.⁹³ On the merits, the court ruled that since the NLRA grants an employer the right to hire permanent replacements for striking workers, it would not read the general purposes of the Procurement Act as trumping this specific right of employers.⁹⁴ The court distinguished **Executive Order 11,246** (which guaranteed equal employment opportunities) and **Executive [*287] Order 12,092** (which restricted wage increases for government contractors) as not being in conflict with any other statute.⁹⁵

Reich stands for the seemingly obvious proposition that the President may not use his statutory discretion in one area to override a right or duty established in another law. As a legal matter, however, Reich does not stand for the proposition that the President may not use his statutory discretion in one area to advance other lawful policy goals. Whether it is wise to do so is a separate question. Thoughtful people have argued that a President ought not to use his procurement power or similar administrative discretion to promote unrelated policy goals.⁹⁶ That debate, however, is a political and prudential one about which reasonable people can differ.

B. Lawful Orders, Bad Policy

A narrow focus on illegal **executive orders**, however, would not include many arguably legal orders that are still highly improper as a matter of policy. This distinction between illegal and improper **executive orders** is important for a variety of reasons. While almost all President Clinton's illegal **executive orders** were in furtherance of an improper policy or political objective, many of the most objectionable are within the outer bounds of what is legal. President Bush should carefully review and rescind or revise both types of "bad" **executive orders**, but his legal duty and his policy options in doing so might be affected by this

distinction. Thus, it is helpful to keep the various categories of **executive orders** and proclamations in mind.

In addition to the legal evaluation, two broad questions mentioned earlier may help guide the policy evaluation: (1) whether use of a given presidential power is appropriate given a particular policy objective, and (2) whether a particular draft directive effectively or appropriately advances that policy goal. The first question raises issues of precedent and macro-policy; the second raises issues of drafting and prudence.

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C. Types of Presidential Directives

Most presidential directives fit into one of two functional categories represented by the two types of directives issued by President Washington in 1789. ⁹⁷ One broad category includes documents with written instructions from the President to executive branch officials on how they are to carry out their duties. ⁹⁸ Most **executive orders** fall into this category. Another category includes written statements that communicate a presidential decision or declaration to a broad group of people that might include government officials, the general public, or even foreign governments. ⁹⁹ Most presidential proclamations fall into this second category.

Not much turns on even this distinction, however, because different types of directives can have the same effect. Some statutes delegating authority to the President provide that he must exercise that authority by issuing a particular type of directive - such as an **executive order** or a proclamation. ¹⁰⁰ But there is no statute or other authority that defines different presidential directives or distinguishes one type from another. Apart from tradition, historical usage, and a few words common to each device (such as the title), there are no rules regarding the substance of each directive. ¹⁰¹ In short, a President can comply with a statute that requires him to make a particular statutory determination by proclamation simply by placing the [*289] word "Proclamation" at the top of the document and using a phrase like "it is hereby proclaimed" somewhere in the text before the determination.

The distinction between **executive orders** and proclamations was even less clear in other eras. President Abraham Lincoln directed much of the early Civil War by proclamation, including calling forth the militia. ¹⁰² Calling forth the militia is now typically accomplished by **executive order**. ¹⁰³ In 1862, President Lincoln issued the first formally designated "**executive order**." ¹⁰⁴ Later that year in his "Emancipation Proclamation," he ordered federal officials not to return captured former slaves to the states in rebellion. ¹⁰⁵ In sum, apart from the title, there is not much that distinguishes Lincoln's **executive orders** from his wartime proclamations. Likewise, President Andrew Johnson could have issued an **executive order** (instead of a proclamation) on Christmas Day 1868 that all public officials recognize and give effect to his decision to pardon all persons recently in rebellion. While modern practice has delineated the borders of these devices somewhat more, there is little to constrain a President from departing from the modern practice.

The presidential "signing statement" demonstrates that hybrid directives are even harder to categorize. Presidents often issue such written statements when they sign a bill into law. ¹⁰⁶ Presidential signing statements are themselves a type of [*290] directive, but they can incorporate language similar to that in an **executive order** or a presidential proclamation. For example, some signing statements identify a provision of the bill that the President believes is unconstitutional and instruct executive branch officials not to enforce the provision. ¹⁰⁷ Assuming the President has this power, ¹⁰⁸ the wording of his signing statement should not matter. A signing statement ordering all executive branch officials not to enforce a particular provision in the statute as unconstitutional would have the same effect as a signing statement in the form of a proclamation that the President believes a particular provision to be null and void. A faithful servant in the executive branch ought to give both statements the same effect. An official outside the executive branch ought to give both statements the same

deference. ¹⁰⁹

As the above discussion indicates, there is often little that distinguishes one order from another. Nevertheless, modern scholars have attempted to categorize the various directives. One scholar has identified more than twenty different types of presidential directives. ¹¹⁰ Even this list, however, is incomplete. A partial list of presidential directives includes the following: administrative orders, certificates, designations of officials, **executive orders**, general licenses, interpretations, letters on tariffs and international trade, military orders, various types of national security instruments (such as national security action [*291] memoranda, national security decision directives, national security directives, national security reviews, national security study memoranda, presidential review directives, and presidential decision directives), presidential announcements, presidential findings, presidential reorganization plans, presidential signing statements, and proclamations. ¹¹¹

Despite the specialized settings in which some of these directives are used, it is misleading to over-classify presidential directives as comprising separate and distinct "types" just because they have different headings at the top of the first page. The distinctions are often ones of mere convenience or the result of arbitrary bureaucratic evolution. ¹¹² As the list of directives also demonstrates, a new President and a creative bureaucracy could come up with twenty-four new "types" if they wished to do so.

There are, however, some practical constraints that limit, or at least influence, a President's decision on which form of directive to use. As mentioned earlier, tradition and historical practice will often lead to a particular choice. For example, a President will probably want to use a published **executive order** to repeal or modify a previously published **executive order**. Political considerations may also weigh in favor of a more or less public directive. But unless a statute requires a President to use one form of directive in the exercise of his statutory (as opposed to constitutional) authority, the President can revoke or modify a previous directive or issue a new one in any written form he chooses, oral or written. To a military officer in the field of battle, telephone calls, cables, or handwritten notes from the President are, and should be, equally compelling orders. ¹¹³

[*292] Despite the variety of directives, there are sound reasons why scholars focus most of their attention on **executive orders** and presidential proclamations. **Executive orders** and presidential proclamations are the forms most frequently used to convey important decisions affecting the general public. Because better records have been kept of **executive orders** and proclamations, it is also possible to compare their relative use by different Presidents. In addition, most other presidential directives can be analogized to a typical **executive order** or presidential proclamation, so the discussion of them can be applied elsewhere.

D. Procedures for Issuing Proclamations and **Executive Orders**

The federal law governing presidential directives is sparse. Since 1935, a federal statute provides that presidential proclamations and **executive orders** "of general applicability and legal effect" must be published in the Federal Register unless the President determines otherwise for national security or other specified reasons. ¹¹⁴ In addition, some federal statutes that delegate statutory authority to the President require him to exercise that authority through the issuance of a particular type of directive, generally a published proclamation or an **executive order**. ¹¹⁵ Other than these few rules, a President is free to adopt procedures regarding the issuance and publication of directives as he sees fit.

For over one hundred years, the President has asked the Attorney General or another senior official in the Department of Justice to review draft **executive orders** and proclamations with regard to their form and legality. ¹¹⁶ Since 1962, the proper [*293] form and routing of **executive orders** and proclamations has been governed by **Executive Order 11,030**, ¹¹⁷ which makes the Director of the Office of Management and Budget responsible for

shepherding such directives through the process. ¹¹⁸

The Attorney General's review responsibility is currently delegated to the head of the Office of Legal Counsel (OLC) in the Department of Justice. ¹¹⁹ OLC staff attorneys work with lawyers in the Office of Management and Budget, the Office of White House Counsel, and the originating agency (if there is one) to ensure that the draft order or proclamation is legal and in the proper form. ¹²⁰ Once the order or proclamation is revised to his satisfaction, the Assistant Attorney General for OLC transmits it with a formal letter that dates back to the nineteenth century. The letter begins with the salutation "My dear Mr. President." ¹²¹ It summarizes the proclamation or order in a few paragraphs and then assures the President that the document for his signature has been approved with regard to form and legality. ¹²²

Some directives, including many military and national security orders, remain secret unless and until declassified. ¹²³ Others may not be secret, but are nevertheless unpublished. Many presidential designations of officials, such as a White House [*294] special assistant to the President, are so routine that they do not merit publication. ¹²⁴ Of increasing use and importance are presidential memoranda to the heads of executive departments and agencies. ¹²⁵ These memoranda also are rarely published, but some of them are more important than many **executive orders** that are published.

It is worth keeping in mind that a President may use one of the less public types of directives in almost any circumstance in which he could issue a published **executive order** or presidential proclamation. In some instances, President Clinton may have selected a memorandum format for political reasons precisely because he did not want to draw heightened attention to his act. President Clinton's initial instructions to allow openly homosexual personnel in the military ¹²⁶ and his order to allow abortions to be performed on military bases overseas ¹²⁷ were issued by memorandum. Thus, it is unwise to arbitrarily exclude nontraditional directives, such as memoranda, when examining a President's rule by executive decree. That said, a review of published directives will include most of the important directives that affect the public.

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E. Presidential Proclamations and **Executive Orders** by the Numbers

More than six thousand presidential proclamations have been issued since 1789. ¹²⁸ Although they were not numbered sequentially until early in the twentieth century, the earlier proclamations have been numbered retroactively. Newer ones are assigned a number upon issuance. As discussed elsewhere, the overwhelming number of modern proclamations are ceremonial or hortatory, such as the commemoration of Thanksgiving or recognition of some particular interest. The two exceptions in modern practice do not make up a significant number of the total: declarations of emergency and land regulations under the Antiquities Act of 1906. Both are discussed further below.

President Abraham Lincoln is credited with issuing the first directive called an "**executive order**" in 1862. ¹²⁹ Approximately thirteen thousand **executive orders** have been issued since. ¹³⁰ The number of **executive orders** issued by recent Presidents has not matched that of Presidents in the early and mid-twentieth century. ¹³¹ This is true even if the figures are adjusted to reflect the length of service in office. President Franklin Roosevelt, who [*296] served for over three terms, issued more **executive orders** per year than did any other President. ¹³²

There is reason, however, to be cautious when comparing the **executive order** output of Presidents from different eras, even in the same century. President Franklin Roosevelt was Commander in Chief during most of World War II. A wartime period will likely reflect many mobilization orders not applicable during other periods. In addition, the President's National Security Council was not created until 1947, and many of the specialized directives it now

drafts were not developed until recent Administrations. ¹³³ Thus, many of the **executive orders** issued by FDR might take some other form in a modern Administration. Many of these same considerations apply to other Presidents in the early and mid-twentieth century.

Although presidential **executive order** practices continue to evolve with each Administration, it is possible to make at least rough comparisons between the Presidents since 1960. On an annualized basis, President Carter outpaced other recent Presidents in the sheer number of **executive orders** issued. ¹³⁴ President Clinton, on the other hand, did not issue significantly more **executive orders** annually than either Presidents Reagan or Bush. ¹³⁵

A comparison based on numbers, however, is misleading. It is not the number, but the nature of a President's **executive orders** that is important. Perhaps even more important when judging **[*297]** the validity of a President's exercise of authority is the cumulative effect of a President's **executive orders**. As the next section shows, the overwhelming majority of directives, including **executive orders**, are routine and few have significant policy implications beyond the executive branch. It would be a mistake, therefore, to conclude that the number of **executive orders** or proclamations is a reliable indicator of whether a particular President has abused his **executive order** authority. In fact, a more careful review of **executive orders** suggests no correlation between the overall number of **executive orders** issued and the legitimacy of individual orders. The true measure of abuse of authority is not the overall number of directives, but whether any orders were illegal or abusive, and if so, how many and of what significance.

V. A Survey of Clinton Proclamations and **Executive Orders** ¹³⁶

The vast majority of modern presidential directives are routine or have little direct effect on the lives of citizens outside government. This is true even for **executive orders** and presidential proclamations, which tend on average to have a greater impact on the public than do other directives. A review of President Clinton's proclamations and **executive orders** reveals both similarities and important differences between Clinton's practices and those of his two predecessors. ¹³⁷

A. Proclamations

President Clinton used his proclamation authority in many of the same ways as previous Presidents. Many of his proclamations are hortatory, thus non-controversial. For example, President Clinton issued an annual Thanksgiving Proclamation and proclaimed that certain days, weeks, and months would **[*298]** commemorate or recognize some cause (e.g., American Heart Month). ¹³⁸

President Clinton's most significant departure from President Reagan and President George H.W. Bush was his use of his powers under the Antiquities Act of 1906 to designate millions of acres of federal land as protected national monuments. ¹³⁹ The most controversial of President Clinton's designations was Proclamation 6920, which established the 1.7 million-acre Grand Staircase-Escalante National Monument in Utah. ¹⁴⁰ Other designations were equally outrageous.

The Property Clause of the Constitution reserves to Congress authority over federal land. ¹⁴¹ Consequently, the President has no authority to regulate federal property except that granted by Congress. President Clinton's proclamations have been highly controversial, particularly with respect to the monuments' size, the process used to establish them, and the restrictions imposed on the use of the land. The Antiquities Act requires that monuments be "the smallest area compatible with the proper care and management of the objects to be protected." ¹⁴² With only a few exceptions, including the 10,950,000-acre Wrangell-St. Elias National Monument created by President Carter in 1978, ¹⁴³ most monuments are relatively small (less than 5,000 acres). All President Clinton's proclamations, however, cover large areas of land.

President Clinton also proclaimed the Grand Staircase-Escalante Monument with insufficient public participation and arguably without adequate due process. Although the Antiquities Act may appear to grant this authority at first blush, inconsistencies between the Act and subsequent laws that establish various notice and hearings processes raise important [*299] questions about the appropriate processes for designating monuments.¹⁴⁴ Legitimate questions also arise as to the applicability of the environmental review and due process requirements of the National Environmental Policy Act (NEPA).¹⁴⁵

While presidential proclamations creating national monuments do not usually result in the outright taking of private lands (they only change the form of control over lands already owned by the federal government), they can restrict activities on the land, such as mining, grazing, or timber harvesting, that is deemed to conflict with the intended purpose of the monument. The monuments created by President Clinton were intended to restrict significantly the use of natural resources.¹⁴⁶ They prevent almost all future uses of the land and may work as a partial taking of mining, grazing, and timber leases owned by private individuals. It is likely that a desire to prohibit such uses is one of the main reasons President Clinton was urged to grant monument status to certain parts of the Arctic National Wildlife Refuge just before he left office.

Several organizations have mounted legal challenges to President Clinton's proclamations. For example, the Utah Association of Counties, Utah Schools and Institutional Trust Lands Administration, and Mountain States Legal Foundation filed challenges against the designation of the Grand Staircase-Escalante National Monument.¹⁴⁷ They have raised questions about violations of the Antiquities Act, the relative authority of the Congress, President, and Secretary of the Interior to withdraw lands from public use, the application of mining and mineral leasing laws, procedural and substantive issues under NEPA and the Federal Land Policy and Management Act [*300] (FLPMA), the lawful size of the monuments, and the nature of the resources being protected.¹⁴⁸

Of particular importance is whether President Bush or any future President has the authority to reverse a proclamation establishing a national monument. Though he may be able to modify or narrow the boundaries of an existing national monument, the President's authority to rescind a proclamation is less clear. Past Presidents have modified national monuments, but none has reversed the designation of an existing monument. A recent Congressional Research Service report, "Authority of a President to Modify or Eliminate a National Monument," discusses this issue.¹⁴⁹ Although the matter is not entirely free from doubt, a President may at least have power to rescind any prior designation under the Antiquities Act that were illegal. In short, a subsequent President should at least have the power a court possesses to recognize the invalidity of a prior President's proclamation.

In addition, various legislative proposals for addressing the issues raised by President Clinton's proclamations were introduced in the last Congress.¹⁵⁰ These proposals focused principally on modifying the Antiquities Act and sought to ensure greater public consultation, environmental review, congressional approval, and other procedural protections.

With regard to his power under the Antiquities Act, President Bush should pursue four steps. First, he should review existing presidential authority to reverse designations of federal lands as national monuments. Second, he should examine existing designations to determine whether modifications in the boundaries or the allowed uses are appropriate. Third, he should, where necessary, seek congressional action to clarify presidential, congressional, and other executive branch authority to reverse or modify previously designated monuments. Finally, he should seek congressional action to [*301] increase public consultation, environmental review, and other procedures applicable to the creation of new monuments.

B. Administrative Orders

Over half of President Clinton's **executive orders** were routine administrative orders that can be broken down into two main groups or purposes: (1) orders designed to reorganize the executive branch, and (2) federal personnel decisions. Those two categories may, in turn, be further subdivided according to the general purposes advanced by particular orders. Orders reorganizing the executive branch may thus be classified according to four subcategories: (1) orders creating or terminating advisory boards, commissions, and councils; (2) orders establishing succession within executive agencies; (3) orders designating officials in the White House and executive agencies; and (4) orders delegating authority within the executive branch. Orders relating to federal personnel decisions may further be classified according to two subcategories: (1) orders establishing cost of living increases for the civil service; and (2) orders recognizing government holidays and government closures.¹⁵¹

President Clinton issued dozens of **executive orders** to establish or terminate a particular federal advisory board, commission, or council (collectively referred to here as "commissions"). All recent Presidents have created similar commissions. Many of these commissions expire with the passage of time or with the completion of a final report. President Bush is free to use or eliminate the rest. Indeed, each new President should review the list of such commissions to determine how many still exist and what purposes they serve. The creation, elimination, or consolidation of such commissions is unlikely to have a major policy impact on a new Administration.¹⁵²

Succession orders specify the hierarchy of authority within an agency and should be revised when Congress has modified or created new offices at the same level within the agency, such as the Assistant Secretary level. The typical order of succession lists the hierarchy by office rather than by office holder, and the [*302] order of succession may be dictated in part by statute.¹⁵³ In the Department of Justice, for example, the order of succession after the Attorney General is the Deputy Attorney General, the Associate Attorney General, the Solicitor General, then the Assistant Attorney General for the Office of Legal Counsel, and so forth.¹⁵⁴ During Watergate, for example, it was necessary for Solicitor General Robert Bork to become Acting Attorney General when the top two appointees stepped down during the Saturday Night Massacre.¹⁵⁵ The order of succession is invoked far more often for temporary assignments of responsibility when senior officials are on vacation or are otherwise unavailable due to vacancy in office, travel, or illness. President Bush is free to modify these succession orders but need not do so unless Congress modifies the principal offices within a particular agency. Once again, this is not a priority area.

Many designations of officials, such as those in the White House, and some delegations of authority will expire with the normal change in personnel at the beginning of a new Administration. The remaining designations of officials and delegations of authority will eventually come to the attention of officials in the Office of Presidential Personnel or the new Cabinet Secretaries. The administration should review previous designations and delegations, in an orderly fashion. In addition to those with responsibility for such matters within the White House, the President and his assistants should call upon the Justice Department's Office of Legal Counsel for legal advice on keeping agencies running smoothly pending confirmation of senior agency officials.¹⁵⁶

Many of President Clinton's personnel **executive orders** were also routine. These included **executive orders** that establish pay scales, annual salary increases, and conditions for civil service or appointed positions.

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C. Substantive Orders

Most of the remaining **executive orders** issued by President Clinton can be divided into five substantive categories: (1) foreign and defense policy, (2) environmental policy and natural resources, (3) regulatory review, (4) labor policy, and (5) civil rights issues. These **executive**

orders show the greatest break from past Administrations and include most of the controversial orders. Two other categories, government procurement and "emergency" orders, frequently overlap with and often include these five substantive categories. ¹⁵⁷

President Clinton repealed a number of important **executive orders** issued by Presidents Reagan and Bush, both of whom had issued a variety of crosscutting **executive orders** calling on executive branch agencies to take important constitutional or institutional principles into account when taking regulatory action. The constitutional and institutional principles elevated by Presidents Reagan and George H.W. Bush were varied but fundamental. They included paying special attention to the cost and benefit tradeoffs of government regulation (**Executive Order** 12,291; 1981), ¹⁵⁸ the constitutional structure of federalism with an instruction not to carelessly preempt state authority and law (**Executive Order** 12,612; 1987), ¹⁵⁹ avoiding interference with the traditional family (**Executive Order** 12,606; 1987), ¹⁶⁰ the constitutional guarantee against uncompensated takings of private property (**Executive Order** 12,630; 1988), ¹⁶¹ and the clarity of drafting regulations and whether any unclear rules would lead to costly and unnecessary lawsuits (**Executive Order** 12,778; 1991). ¹⁶²

[*304] President Clinton repealed each of these crosscutting **executive orders**. In some cases, he replaced them with weaker **executive orders** that purported to address the same goals. For example, his regulatory review **executive order**, **Executive Order** 12,866, weakened the cost-benefit analysis that agencies are required to prepare for review by the Office of Management and Budget. ¹⁶³ In 1998, President Clinton signed his initial federalism **executive order**, **Executive Order** 13,083, while in Birmingham, England. ¹⁶⁴ It created such an outcry, however, that he eventually suspended it in 1999 and replaced it with **Executive Order** 13,132. ¹⁶⁵

President Clinton's **executive orders** were characterized by five overarching themes. The first theme involved a relative shift in foreign policy and national security from concerns about national interests to international arrangements. The second involved the promotion of federal government control over environmental policy, with a corresponding disrespect for the rights of private property owners. The third included the expansion of federal regulatory power over various aspects of private life. The fourth theme of President Clinton's orders involved the promotion of organized unions' political agenda at the expense of government and consumer efficiency. Finally, President Clinton's **executive orders** often advanced a general theme of promoting preferential treatment of, and quotas for, certain racial and ethnic groups in violation of the constitutional principle of equal treatment under law.

More than half of Clinton's substantive orders were in the area of foreign affairs or national defense policy. Presidential directives in the foreign and national security arena should focus on aligning American policy with the President's priorities to ensure the effective defense of the United States and its allies. To this end, one of the Bush Administration's first priorities should be to issue new directives that provide for the protection of American territory from the increasing threat of ballistic missile attack. An equally important priority is mandating a comprehensive review of the Clinton Administration's **[*305]** Presidential Decision Directives, with specific attention focused on areas that affect strategic posture and peacekeeping commitments.

Consonant with the second of the above-enumerated themes, President Clinton, during his tenure issued over thirty-four **executive orders** related to the environment and natural resources, ¹⁶⁶ and made extensive use of **executive orders** to achieve his environmental policy and political objectives. Prior Presidents used **executive orders**, proclamations, or other administrative means to further environmental goals, the most notable recent example being President Nixon's creation of the Environmental Protection Agency. ¹⁶⁷ Few, however, reached the level achieved during the Clinton Administration.

Although most of President Clinton's orders were drafted so as to appear to focus primarily on

operations of the federal government, their clear intent was to affect the private marketplace, public behavior, and government policy at the state, local, and international levels. They ranged from actions that addressed comparatively straightforward matters of agency management to orders establishing environmental civil rights, linking environmental and trade policy, and using proclamations to establish national monuments or other protected areas.

Each **executive order** should be carefully reviewed to determine whether the current Administration should (1) allow it to continue, (2) revoke it or replace it with a new directive, (3) revise, supplement, or otherwise amend it, or (4) redirect agency implementation through a presidential memorandum or other action. Initially, the Bush Administration should reorient federal agency implementation of the existing orders. Certain orders, for example, have established interagency committees, comprised of Cabinet-level officers, that could be used to begin redirecting agency activity.

[*306] President Clinton was also active in the area of regulatory review. In 1993, President Clinton revoked several major **executive orders**, including **Executive Order** 12,291, which had governed important oversight aspects of federal regulatory and policymaking processes since 1981.¹⁶⁸ He replaced them with two orders that maintain many of the same underlying principles but contain important procedural and substantive flaws.¹⁶⁹ Clinton's **Executive Order** 12,866 on "Regulatory Planning and Review" currently governs the process for developing federal regulations.¹⁷⁰ The Bush Administration should replace the Clinton order with a stronger management tool that builds on **Executive Order** 12,291 and incorporates other procedures to strengthen the President's ability to exercise authority over the rulemaking process. In the meantime, the requirements of **Executive Order** 12,866, or any similar order, should be scrupulously enforced as part of an effort to see that the President can exercise his constitutional authority effectively.

President Clinton's **Executive Order** 13,132 on "Federalism," which replaced his failed **Executive Order** 13,083, attempts to clarify the relative roles of the states and the federal government in a variety of regulatory and policy actions.¹⁷¹ Although President Reagan's federalism **Executive Order** 12,612, which President Clinton repealed, is still superior to either of Clinton's statements on federalism, action by Congress, the states, and the Supreme Court in the intervening years suggests there may be grounds to revisit the issue. With proper input from state and local officials, President Bush is in a good position to begin the process of ensuring that the national government does not unconstitutionally encroach on powers reserved to the states or interfere with individual rights of citizens.

Just as he aggressively employed **executive orders** in the area of regulatory review, so did President Clinton apply **executive orders** in the area of labor law. The Clinton Administration used **[*307]** labor-related **executive orders** and directives primarily to advance the political objectives and interests of its supporters in organized labor.¹⁷² It also used these orders to create task forces to study a variety of workplace issues,¹⁷³ to improve employment opportunities for disabled Americans,¹⁷⁴ and to expand the number of groups covered by employment nondiscrimination **executive orders**.¹⁷⁵

The highest priority labor-related **executive orders** for the Bush Administration to review include (1) the financial reports that unions are required to furnish under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)¹⁷⁶ so that workers can more easily exercise their decision rights under *Communications Workers v. Beck*,¹⁷⁷ (2) the Birth and Adoption Unemployment Compensation regulation, which undermines the original intent of the Unemployment Insurance program,¹⁷⁸ and (3) all executive branch policies requiring federal contractors to enter into agreements with unions on construction projects.

The new administration would also be wise to review the work of the Clinton Administration in the area of civil rights. Approximately eighteen of President Clinton's **executive orders** contain a significant civil rights component. Of these, several are plainly unconstitutional as

an attempt to impose preferential governmental treatment on the basis of race and ethnicity with no remedial justification. These unconstitutional orders should be revoked as soon as practicable and replaced with orders that ensure equal treatment and equal opportunity for all Americans. Furthermore, another order should be issued to implement the Supreme Court's landmark decision in *Adarand Constructors, Inc. v. Peña*,¹⁷⁹ which held that all federal preference [*308] programs based on race or ethnic origin are presumptively unconstitutional.¹⁸⁰ Despite the Clinton Administration's efforts to resist these and other court rulings, the Bush Administration should undertake a careful review of all federal preference programs, whether created by statute or regulation, and take action consistent with *Adarand*.

VI. The Effect of Presidential Directives on Private Citizens

As the preceding section explains, many administrative directives either have no direct effect or have a trivial effect on the rights exercised by the general public. For example, a particular reporting structure or order of succession within the executive branch has no direct effect on the rights of private citizens even if it sometimes results in a different decision.¹⁸¹ Other directives may affect the general public but, depending on a variety of factors, may be difficult or impossible to challenge.¹⁸²

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A. Political Questions and Matters Squarely Committed to Presidential Discretion

Presidential decisions that present "political questions," as that term has been defined in the law, or actions that are squarely committed to the President's discretion do not present justiciable issues for a court to resolve.¹⁸³ There are, for example, unresolved questions regarding a President's power to commit troops in an undeclared war.¹⁸⁴ Such issues, however, often present political questions that only Congress and the President can resolve. Whether or not the overall military action is authorized, however, a President's tactical military commands are committed to his sole discretion.¹⁸⁵ Such tactical military commands simply are not subject to challenge, regardless of their effect on numerous people's lives.

A presidential pardon is another example of a decision squarely within the President's discretion.¹⁸⁶ President Thomas Jefferson believed that the Sedition Act of 1798 was unconstitutional, although the courts had upheld over ten convictions under it.¹⁸⁷ President Jefferson could not overturn the convictions. He did, however, drop the remaining prosecutions when he assumed office and pardoned two individuals still in prison. Jefferson's pardons were not subject to challenge. Likewise, President Clinton's pardons of sixteen Puerto Rican terrorists (the "FALN pardons") on August 11, 1999,¹⁸⁸ and his many questionable pardons on January 20, 2001,¹⁸⁹ are not subject to challenge in court, regardless of Clinton's alleged political or other improper motives in granting the pardons. The fact that the Sedition Act was [*310] unconstitutional¹⁹⁰ and Clinton's pardons were arguably corrupt does not make either one more or less subject to challenge. Thus, the congressional probe into President Clinton's FALN pardons was questionable unless Congress was willing to consider impeachment proceedings for an improper motive.¹⁹¹ Even then, nothing can change the effect of a duly issued pardon.¹⁹²

Delegations of presidential authority, in themselves, rarely alter public rights. Regardless of their effect on the public, most delegations of authority are squarely within the President's discretion and are thus immune from challenge. The Constitution provides for both principal and inferior officers to assist the President,¹⁹³ and the President's authority to delegate portions of his executive power within the executive branch has been broadly construed. For example, **Executive Orders** 2877 (1918)¹⁹⁴ and 12,146 (1979)¹⁹⁵ delegate to the Attorney General the responsibility to resolve legal disputes within the executive branch. Because the President possesses the power to interpret [*311] the law within the executive branch,¹⁹⁶ he may entrust some of that power to the Attorney General and order other federal officers

and employees to abide by the Attorney General's opinion. ¹⁹⁷

B. Directives with Indirect Effects on the Public

Some directives may not be subject to judicial review if the effect on private citizens is indirect or if the directive is implemented through agency regulations or other agency action. ¹⁹⁸ Both President Reagan's and President Clinton's regulatory review **executive orders** (**Executive Orders** 12,291 and 12,866, respectively) are examples of orders with indirect effects on private citizens. ¹⁹⁹ The orders required regulatory agencies to prepare certain analyses of proposed rules and to take various factors into account in their regulatory decisions. ²⁰⁰ The Office of Management and Budget (OMB) is charged with overseeing the rulemaking process. Neither order, however, altered the statutory obligations of the regulatory agencies to issue particular substantive rules. A citizen adversely affected by a regulation (or lack thereof) has the same judicial recourse regardless of the type of executive branch review the rule underwent. Thus, the citizen may challenge the resulting substantive rule but may not challenge the type of executive branch review it received.

The lack of judicial review to challenge a regulatory review **executive order** does not mean that such orders have no impact on the regulations issued. Presidents Reagan and Clinton would **[*312]** not have altered the type of review if they did not think it mattered. Nevertheless, it would be highly speculative to predict ex ante (assuming it can be discerned at all) what effect OMB review will have on a particular rule in the future. More important, the type of executive branch review, in itself, does not alter the rights of the private citizens who are subject to regulation to challenge the regulation directly in court.

Some **executive orders** explicitly instruct an agency head to issue particular regulations. In such situations, the regulations clearly result from the **executive order**. But it is usually easier for someone adversely affected by the regulation or other agency action to challenge the agency action itself rather than the presidential order. In litigation or other administrative challenges to the regulation, the fact that the President ordered that the regulation be issued is irrelevant unless the President possesses some constitutional or statutory power that augments the agency's authority. Whether or not the authority is cited, the underlying constitutional or statutory authority either exists to support the regulation or it does not. The fact that the agency was instructed by the President to issue the regulation generally adds nothing to the legal analysis.

C. Standing Requirements

Other directives may have a direct and predictable affect on the rights of parties outside the government, but before a court may act, the proper party must challenge the directive. ²⁰¹ If the President attempts to place conditions on who may bid for or receive government contracts, that action may have a predictable effect on prospective government contractors. A current or prospective government contractor who is adversely affected by the new conditions may seek to have them invalidated, but only such contractors and other injured parties within a foreseeable "zone of interest" may do so. ²⁰² The average citizen who is seeking to ensure good government does not have a "particularized injury" to redress, and his challenge will likely be thrown out of court on the grounds that he lacks standing. ²⁰³ Thus, even an unlawful **executive order** that directly affects the **[*313]** public will survive a challenge if no one with proper standing to sue brings the case.

President Clinton's American Heritage Rivers Initiative (AHRI), established by **Executive Order** 13,061, ²⁰⁴ is an example of a presidential directive that appears to be illegal but has not yet been judicially invalidated because of a "technical" standing problem. The scope of the initiative is somewhat unclear, and a thorough discussion of it is not possible here. The program grants power to "river navigators" to supervise and control development along designated rivers for a variety of purposes, including environmental, social, educational, and economic concerns. A river navigator's control purports to extend over the entire watershed

of the river. ²⁰⁵

In 1998, Representatives Helen Chenoweth (R-ID), Bob Schaffer (R-CO), Don Young (R-AK), and Richard Pombo (R-CA) sought an injunction in federal district court against implementation of the AHRI. ²⁰⁶ These Members of Congress alleged that the AHRI violated various laws, including several appropriations laws and other acts under the oversight of committees or subcommittees they chaired. ²⁰⁷ They attempted to invoke a "congressional standing" doctrine, alleging an injury to their right to vote as Members of Congress. Both the district court ²⁰⁸ and the U.S. Court of Appeals for the District of Columbia dismissed the suit without reaching the merits. ²⁰⁹ The judges rejected the argument that plaintiffs suffered an injury unique to Members of Congress and concluded instead that any injuries from AHRI were ""wholly abstract and widely dispersed."" ²¹⁰

VII. Reform Proposals

During the 106th Congress, several measures were introduced to address Congress's concern with President Clinton's broad assertion of power to govern by decree. At least two measures [***314**] were the subject of hearings held by the House Judiciary and Rules Committees. ²¹¹ House Concurrent Resolution 30 (H.C.R. 30), introduced by Representative Jack Metcalf (R-WA) with seventy-five other cosponsors, would have expressed the sense of Congress that any **executive order** that "infringes on the powers and duties of the Congress under article I, section 8 of the Constitution, or that would require the expenditure of Federal funds not specifically appropriated for the purpose of the **Executive order**, is advisory only and has no force or effect unless enacted as law." ²¹² H.C.R. 30 would have been "advisory only." ²¹³ Any statutory language modeled after the resolution, however, would have serious constitutional and other problems because of its ambiguous reach and its potential to interfere with, or "infringe" upon, the President's shared or exclusive powers.

The Separation of Powers Restoration Act (H.R. 2655), introduced by Representative Ron Paul (R-TX) in 1999, ²¹⁴ has several provisions that are worthy of further consideration and others that are problematic. H.R. 2655 would have terminated all existing national emergencies declared by Presidents under various statutes. ²¹⁵ The number of ongoing, declared emergencies is surprising. ²¹⁶ There clearly is a need for Congress or the President to review and terminate those that do not still present exigent circumstances.

H.R. 2655 also would have taken away the President's power to declare any future national emergency. ²¹⁷ A convincing case can be made that the emergency powers Congress has granted the President in various statutes (most notably, the International Emergency Economic Powers Act) are too broad. Yet narrowing the President's range of discretion by further defining an appropriate emergency or limiting the President's range of action for various emergencies might be wiser than simply eliminating all such power. Moreover, the President has some [***315**] inherent authority as Commander in Chief to take certain actions during a war or military crisis.

H.R. 2655 also would have attempted to define a presidential directive. ²¹⁸ In addition, it would have required that all presidential directives specify the constitutional and statutory basis for any action incorporated in the directive or be void as to parties outside the executive branch. ²¹⁹ With few exceptions, most recent Presidents before Clinton did cite the font of their authority in their executive directives. President Clinton cited some authority in a majority of his directives, but others were vague or had no citation of authority at all. ²²⁰ A faithful executive should not have a problem citing the authority for his actions, and this requirement would help citizens, lawyers, and the courts evaluate new directives. Although there may be some constitutional problems with the application of this requirement in some cases, it is worth further consideration and possible refinement.

Finally, H.R. 2655 would have attempted to expand the number of parties with standing to challenge an arguably unlawful directive, including members of Congress, state and local

officials, and any aggrieved person.²²¹ Because part of the standing doctrine is constitutional, a statute could not automatically confer standing on someone without a "particularized" injury in fact.²²² Nevertheless, the provision would potentially expand the range and number of persons who could bring suit to challenge a questionable directive by removing any statutory impediments to suit.

The President is free to take up such internal reforms as he deems appropriate, including any that are designed to address past congressional concerns. Such institutional reforms tend to have a more lasting effect than many statutory reforms, in part because executive branch officials are directly answerable to the President, and in part because such reforms are often instituted with more flexibility or sensitivity to the needs of future Presidents. Whatever the reason, it makes sense for a new [*316] President to follow tradition but also to consider, in time, proposals to improve the process by which executive directives are issued.

VIII. Conclusion

A proper understanding of a President's power to issue **executive orders**, proclamations, and other directives will enable President Bush both to use this power confidently in the exercise of his constitutional responsibilities and to implement important Administration policies. An aggressive use of this power is necessary for a modern President to project strength as leader of the free world and to manage the largest bureaucracy in the world.

The Bush Administration will have to weigh its legal options, political concerns, and policy objectives to find the right solution for each opportunity or problem. A substantive review of President Clinton's executive directives, however, suggests that President Bush has many opportunities to make a significant impact with a carefully orchestrated program of **executive orders** and presidential proclamations. Such a program may be even more important in light of the narrow margins in the 107th Congress.

FOOTNOTES:

¶n1. See Clinton to Designate Land for Ancient Sequoia Trees, Chi. Trib., Apr. 16, 2000, at C13; J.K. Dineen, Latest Prez Order: Forest Protection Bill Still Stumping GOP Annoyed, Daily News (N.Y.), Jan. 5, 2001, at A1; Eric Zorn, Timing of Pardons Lets Clinton Evade Accountability, Chi. Trib., Jan. 22, 2001, at N1.

¶n2. E.g., H.R. 1487, 106th Cong. (2000) (amending the Antiquities Act of 1906 to require the President to solicit public and congressional participation before designating a national monument); see also H.R. Con. Res. 254, 106th Cong. (2000); H.R. Con. Res. 30, 106th Cong. (1999). The 107th Congress has already held hearings as well. See Oversight Hearing on **Executive Orders** and Presidential Directives Before the House Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary, 107th Cong. (2001) [hereinafter Hearings] (statement of James V. Hansen, Representative, House Comm. on the Judiciary) (describing President Clinton's abuse of the Antiquities Act of 1906), available at http://www.house.gov/judiciary/hansen_032201.htm.

¶n3. Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1324, 1338-39 (D.C. Cir. 1996) (holding that the National Labor Relations Act preempted **Executive Order** 12,954, which Clinton sought to issue under the authority of the Procurement Act).

¶n4. See Kathleen Ingley, Congressman Wants to Block New Monument, *Ariz. Republic*, June 20, 2000, at B1; Jim Rayburn & Jerry Spangler, Counties' Suit Over Staircase Advances, *Deseret News* (Salt Lake City), Aug. 18, 1999, at A1.

¶n5. E.g., William J. Olson & Alan Woll, Cato Institute, **Executive Orders** and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power 9 (1999), available at <http://www.cato.org/pubs/pas/pa-358es.html> (discussing the lack of constitutional, statutory or judicial guidelines in determining the proper scope for presidential directives).

¶n6. As quoted by James Madison in *The Federalist* No. 47, at 304 (James Madison) (Isaac Kramnick ed., 1987) (citation omitted in original).

¶n7. *Id.* at 303.

¶n8. See Jack N. Rakove, *Original Meanings* 18 (1996). See generally George Mace, Locke, Hobbes, and *The Federalist Papers* (1979).

¶n9. See *The Federalist* Nos. 47, 48 (James Madison); see also James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, 311-12, 338 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press 1920) (1787) (reporting comments of James Madison and Elbridge Gerry on the importance of the separation of powers as a safeguard of liberty).

¶n10. The vesting clauses of the Constitution expressly delegate certain functions to specific branches. U.S. Const. art. I, 1, art. II, 1, cl. 1, art. III, 1.

¶n11. Such an approach is consistent with that of the Court, which routinely looks to separation of powers principles when confronted with a question of which branch has authority over a particular area. E.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the intent of the Framers to "divide the delegated powers of the new Federal Government into three defined categories" to ensure that "each branch of government would confine itself to its assigned responsibility").

¶n12. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (discussing the "zone of twilight" in which the President and the Congress may have "concurrent authority" or in which the distribution of power is "uncertain").

¶n13. See, e.g., Marc Lacey, Blocked by Congress, Clinton Wields a Pen, *N.Y. Times*, July 5,

2000, at A13.

¶n14. See, e.g., Washington in Brief, Wash. Post, Oct. 7, 2000, at A8 ("President Clinton signed an **executive order** to give minority-owned businesses a boost in obtaining a greater share of federal contracts.").

¶n15. Paul Begala, an aide to President Clinton, flippantly remarked, "Stroke of the pen. Law of the land. Kind of cool." James Bennet, True to Form, Clinton Shifts Energies Back to U.S. Focus, N.Y. Times, July 5, 1998, at A10. Bruce Reed, Clinton's domestic policy adviser, threatened that Clinton would be "signing **executive orders** right up until the morning of Jan. 20, 2001." Lacey, supra note 13, at A13. This promise President Clinton kept.

¶n16. See generally, e.g., The Rule of Law in the Wake of Clinton (Roger Pilon ed., 2000) (evaluating abuses of power by the Clinton administration).

¶n17. For a valuable study of **executive orders** and other presidential directives, see Olson & Woll, supra note 5.

¶n18. See discussion infra Part IV.C.

¶n19. Letter from George Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), in 30 The Writings of George Washington 343, 344 (John C. Fitzpatrick ed., 1939) (emphasis omitted).

¶n20. President Lincoln issued the first presidential directive to be formally designated as an "**executive order**." That directive was issued on October 20, 1862; however, it was not numbered as "**Executive Order** No. 1" until 1907. Olson & Woll supra note 5, at 24 n.34; see also discussion infra notes 128-30 and accompanying text.

¶n21. U.S. Const. art. II, 2, cl. 1 ("The President ... may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."). It could be argued that by expressly granting this power to the President with respect to principal officers, the Framers meant to deny this power with respect to inferior officers, but the rest of the clause and the drafting history suggest that this is not a plausible interpretation. Rather, it was meant to clarify that even principal officers, whose appointments are always confirmed by the Senate, were nevertheless subject to the President's control.

¶n22. 1 Annals of Cong. 90, 949 (Joseph Gales ed., 1789).

¶n23. See Proclamation: A National Thanksgiving (Oct. 3, 1789), reprinted in 1 Messages and Papers of the Presidents: 1789-1897, at 64 (James D. Richardson ed., 1896).

¶n24. Indeed, the Continental Congress issued several Thanksgiving Day proclamations between 1775 and 1787. See 1 Anson Phelps Stokes, Church and State in the United States 451-54 (1950). One such proclamation issued in 1777 stated that "it is the indispensable [sic] Duty of all men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for Benefits received, and to implore such farther [sic] Blessings as they stand in Need of." Id. at 452.

¶n25. The evolution of the Thanksgiving holiday is an example of this relationship. Congress declared Thanksgiving a permanent holiday in the District of Columbia in 1870 and for per diem federal employees in 1885. See Act of June 28, 1870, ch. 167, 16 Stat. 168; J. Res. of Jan. 6, 1885, no. 5, 23 Stat. 516. In 1941, Congress enacted legislation making Thanksgiving a permanent national holiday. See Act of Dec. 26, 1941, Pub. L. No. 379, 55 Stat. 862 (codified at 5 U.S.C. 6103(a) (1994)). Congress enacted this legislation to fix the date of the holiday as the final Thursday in November, which had been its date by presidential proclamation from 1866 to 1938. However, in 1939 President Roosevelt's proclamation called for the celebration of Thanksgiving on the preceding Thursday. Displeased with this change, Congress took the matter out of the Chief Executive's hands. See Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2114 n.186 (1996).

¶n26. By the President of the United States of America: A Proclamation (Apr. 22, 1793), reprinted in 1 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 156-57.

¶n27. Id.

¶n28. See Bruce Stein, The Framers' Intent and the Early Years of the Republic, Hofstra L. Rev. 413, 470 (1982).

¶n29. See Staff of House Comm. on Government Operations, 85th Cong., **Executive Orders and Proclamations: A Study of a use of Presidential Powers** 17 (Comm. Print 1957) [hereinafter Study of Presidential Powers] (citing Charles M. Thomas, American Neutrality in 1793, A Study in Cabinet Government 555-56 (1931)).

¶n30. Neutrality Act of 1794, ch. 50, 2-5, 1 Stat. 381, 383-84. This act was a predecessor to the current law, which provides that "whoever, within the United States, knowingly begins ... or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state ... with whom the United

States is at peace, shall be fined ... or imprisoned ... or both." 18 U.S.C. 960 (1994).

¶n31. See Study of Presidential Powers, *supra* note 29, at 17 (asserting that presidential proclamations are legally binding when based on congressional grants of authority).

¶n32. *Id.* (stating that the President has no authority to issue proclamations "except where he is granted such power by a provision in the Constitution or by statute").

¶n33. See Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1 (1993) (discussing conceptions and bases of presidential authority).

¶n34. U.S. Const. art. II, 2, cl. 1.

¶n35. See U.S. Const. art. I, 8, cl. 11-12, 14-15; cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring) ("Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress... . No doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.").

¶n36. See *id.* at 645-46 ("We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. [However], I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

¶n37. See U.S. Const. art. II, 2, cl. 2 & 3.

¶n38. See U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (acknowledging "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as basis for its exercise an act of Congress").

¶n39. U.S. Const. art. II, 2, cl. 2.

¶n40. See H. Jefferson Powell, The President's Authority Over Foreign Affairs: An Executive

Branch Perspective, 67 Geo. Wash. L. Rev. 527, 544-55 (1999) (discussing the President's primary authority over foreign affairs).

¶n41. U.S. Const. art. II, 3.

¶n42. See Myers v. United States, 272 U.S. 52, 164 (1926); see also Public Citizen v. Burke, 843 F.2d 1473, 1477 (D.C. Cir. 1988) ("The incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretation of statutes."). See generally Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 Cardozo L. Rev. 201 (1993) (examining the extent to which the Constitution grants the President ultimate authority as a national chief executive).

¶n43. See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 659 (1994) (noting that "in fact, Washington did exercise such authority over the U.S. Attorneys. One volume of Washington's writings reveals that Washington 'instructed' the attorney for the Pennsylvania district to nol-pros an indictment against the two individuals who had been accused of rioting." (citing 32 Writings of George Washington, supra note 19, at 455 n.35)).

¶n44. U.S. Const. art. II, 1, cl. 1. For a discussion of the considerations surrounding the creation of an unitary executive (as opposed to a plural executive) by the Framers, see Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23 (1995).

¶n45. See Myers, 272 U.S. at 122 ("The power of removal is incident to the power of appointment ... , [and] the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."). The majority opinion in Myers was written by William Howard Taft, the only person to be both a Justice of the Supreme Court and President. But see Morrison v. Olson, 487 U.S. 654, 657-58 (1988) (recognizing one of the rare exceptions to at-will dismissals for independent counsels in the now expired Ethics in Government Act). I believe that Morrison was wrongly decided and that this rare exception should not exist. A detailed discussion of this area of constitutional law, however, is beyond the scope of this article.

¶n46. See Myers, 272 U.S. at 135-164. The Court explained that the President must "supervise and guide" executive officers and may exert largely unfettered "general administrative control of those executing the laws." Id. at 135, 164. Congress sometimes operates under the mistaken view that by vesting statutory authority in an agency head, it can insulate the implementation decisions from presidential control. Except for the erroneous exception carved out in Morrison this view of agency autonomy simply cannot withstand constitutional scrutiny.

¶n47. The Federalist No. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Energy in the executive is a leading character in the definition of good government.").

¶n48. The legal framework for determining whether the President's directives or actions are substantively lawful is discussed infra Part IV.

¶n49. By the President of the United States of America: A Proclamation (Aug. 7, 1794), reprinted in 1 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 158-60.

¶n50. See Act of May 2, 1792, ch. 28, 1, 1 Stat. 264, 264.

¶n51. Id.

¶n52. By the President of the United States: A Proclamation (Dec. 25, 1868), reprinted in 6 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 708.

¶n53. U.S. Const. art. II, 2, cl. 1 ("The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

¶n54. Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1871).

¶n55. See id.

¶n56. For a more complete discussion of the concepts of express, implied, and inherent authority see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 4.1 (1997).

¶n57. See id.; see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring) (implying that absent a statutory grant of power, the President may only be able to exercise authority in the wake of "congressional inertia," but such power may no longer exist when Congress chooses to act).

¶n58. Cf. United States v. Nixon, 418 U.S. 683, 705-13 (1974) (recognizing constitutional protections for the executive branch deliberative process); In re Sealed Case, 121 F.3d 729, 743 (D.C. Cir. 1997).

¶n59. In a governmental system composed of three equal branches, such a conclusion follows logically from Justice Jackson's statement in Youngstown, 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson stated, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. Just as the President's power is at "its lowest ebb" when acting in ways that border on the congressional sphere of authority, so congressional authority is at its "lowest ebb" when treading on areas of presidential authority.

¶n60. President Clinton's **executive orders** are discussed in more detail below. See discussion infra Part V.

¶n61. See Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1332-37 (D.C. Cir. 1996) (striking down **Executive Order** 12,954).

¶n62. See Youngstown, 343 U.S. at 645 (Jackson, J., concurring) (discussing the "lawful role of the President as commander-in-chief").

¶n63. For a thoughtful discussion of what Congress can and cannot do to limit the President's powers to issue **executive orders**, see The Impact of **Executive Orders** on the Legislative Process: Executive Lawmaking?: Hearing Before the Subcomm. on Legis. and Budget Process of the House Comm. on Rules, 106th Cong. 144-46 (1999) (testimony of Douglas R. Cox, Principal Deputy Assistant Attorney General, U.S. Department of Justice, 1988-1993), available at http://www.house.gov/rules/rules_hear08.html.

¶n64. INS v. Chadha, 462 U.S. 919 (1983) (holding that Congress's attempt to retain a veto over the statutory discretion of the executive branch violated the constitutional separation of powers).

¶n65. See, e.g., By the President of the United States: A Proclamation (Apr. 15, 1861), reprinted in 6 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 13-14 (calling forth the militia).

¶n66. Id.

¶n67. E.g., Message to the Senate and House of Representatives from Abraham Lincoln (May 26, 1862), reprinted in 6 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 77 (procuring warships); By the President of the United States: A Proclamation (May 3,

1861), reprinted in 6 Messages and Papers of the Presidents: 1789-1897, supra note 23, at 15-16 (expanding the army and navy).

¶n68. See supra notes 65-67.

¶n69. See The Impeachment Trial of President Abraham Lincoln, 40 Ariz. L. Rev. 351 (1998). Apparently, Lincoln may have viewed his own actions as unconstitutional. See J. Gregory Sidak, The President's Power of the Purse, 1989 Duke L.J. 1162, 1189 (1989) (referencing a letter from President Lincoln in which Mr. Lincoln concludes that "measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." (quoting Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), reprinted in 10 Complete Works of Abraham Lincoln 130 (J. Nicolay & J. Hay eds., 1894))).

¶n70. See Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 155 (1999).

¶n71. For example, **Executive Order** No. 9066 authorized the military internment of many Japanese-Americans during World War II. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). The Supreme Court upheld this **executive order**, based in part on the discretion the Court gave to the Commander in Chief. See Korematsu v. United States, 323 U.S. 214 (1944). Some scholars cite the Court's opinion as proof that the internment was constitutional. Nevertheless, I submit that the Supreme Court was wrong (whereas deportation of certain non-citizens and non-permanent alien residents may have been legal if they were accorded due process of law). In any event, the order certainly reflects an extreme and unprecedented claim of authority over the lives of ordinary Americans based on a tenuous link to the President's inherent military authority.

¶n72. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

¶n73. Exec. Order No. 10,340, 3 C.F.R. 861 (1949-1953).

¶n74. 343 U.S. 579 (1952).

¶n75. Id. at 635 (Jackson, J., concurring) ("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.").

¶n76. Id. at 637.

¶n77. U.S. Const. art. 1, 8, cls. 12-13, 15-16.

¶n78. Id. art. I, 8, cl. 14.

¶n79. See, e.g., 10 U.S.C. 520, 1251 (Supp. V 1999) (setting induction standards and age restrictions for retirement).

¶n80. See, e.g., id. 1251 (setting the retirement age at 62 years of age).

¶n81. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948). Enacted on July 26, 1948, the Order states, "It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." Id.

¶n82. The Supreme Court has determined that this constitutional command applies to the federal government even though the Fourteenth Amendment's equal protection clause prohibits only state discrimination. See Bowling v. Sharp, 347 U.S. 497 (1954). Although some still question the proper font of this constitutional obligation, it is now well established that the federal government is equally bound by the same nondiscrimination principle.

¶n83. See John A. Sterling, Above the Law: Evolution of **Executive Orders** (Part II), 31 UWLA L. Rev. 123, 123 (2000) (noting that "President Clinton has so far pushed the envelope with regard to **executive orders**, that twice the Supreme Court has ruled against him," and that, except for President Clinton's orders, the Supreme Court has only overturned one **executive order** in its history).

¶n84. President Clinton issued 364 **Executive Orders** during his two terms in office. Federal Register, **Executive Orders** Disposition Tables, National Archives and Records Administration, at <http://www.nara.gov/fedreg/eo.html&number;top> (last visited May 16, 2001) [hereinafter **Executive Orders** Disposition Tables].

¶n85. See Exec. Order No. 12,954, 3 C.F.R. 329 (1995), reprinted in 40 U.S.C. 486 (Supp. IV 1998). The United States did not even seek certiorari review of the appellate ruling striking down the order.

¶n86. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

¶n87. See H.R. 5, 103rd Cong. (1993) (amending NLRA); H.R. amend. 94, 103rd Cong. (1993) (substituting for H.R. 5 and amending NLRA); S. 55, 103rd Cong. (1993) (amending NLRA). All three bills stalled in Congress.

¶n88. Exec. Order No. 12,954, 3 C.F.R. 329 (1995), reprinted in 40 U.S.C. 486 (Supp. IV 1998).

¶n89. 40 U.S.C. 471-514 (1994).

¶n90. Exec. Order No. 12,954, 3 C.F.R. 329 (1995), reprinted in 40 U.S.C. 486 (Supp. IV 1998).

¶n91. 74 F.3d 1322 (D.C. Cir. 1996). For the implementing regulations issued by the Secretary of Labor, see Obligations of Federal Contracting Agencies: Permanent Replacement of Lawfully Striking Employees by Federal Contractors, 29 C.F.R. 270 (1995).

¶n92. Reich, 74 F.3d at 1329.

¶n93. Id. at 1333.

¶n94. Id. at 1338-39.

¶n95. Id. at 1333.

¶n96. E.g., Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873, 884-87, 941; see also, e.g., Comment, Executive Abuse of the Procurement Power, Chamber of Commerce v. Reich, 84 Geo. L.J. 2573 (1996).

¶n97. As explained below, this categorization may provide a better understanding of the uses and functions of presidential directives, but it does not follow from any particular legal distinction.

¶n98. Professor Calabresi and Christopher Yoo argue that President Washington exhibited his determination to take firm control of the administration of the executive branch early in his term. Steven G. Calabresi & Christopher S. Yoo, *The Removal Power: The Unitary Executive During the First Half-Century*, 47 *Case W. Res.* 1451, 1476 (1997). Within five days of his inauguration, President Washington had already asked Acting Secretary of War Henry Knox to provide a report on the status of the treaty with the Cherokee Indians. *Id.* Soon afterwards, he asked the Board of Treasury, the Acting Postmaster General, and the Acting Secretaries of War and Foreign Affairs to prepare a written report on the status of "the affairs of the United States" *Id.* (citation omitted).

¶n99. E.g., Proclamation: A National Thanksgiving (Oct. 3, 1789), reprinted in 1 *Messages and Papers of the Presidents: 1789-1897*, supra note 23, at 64. President Washington's Neutrality Proclamation serves as another good example of this type of directive. See supra note 26 and accompanying text.

¶n100. See infra note 115 and accompanying text.

¶n101. See generally Harold C. Relyea, Congressional Research Service, *Presidential Directives: Background and Overview* (2001) (CRS Report No. 98-611) (listing and defining various types of **executive orders**).

¶n102. See *By the President of the United States: A Proclamation*, supra note 65, at 13-14 (calling forth the militia).

¶n103. See, e.g., Exec. Order No. 13,120, 3 C.F.R. 176 (1999), reprinted in 10 *U.S.C.A.* 12,304 (West Supp. 2000) (ordering reserve units into active duty in NATO's campaign in Yugoslavia); see also Exec. Order No. 13,119, 3 C.F.R. 175 (1999) (designating Yugoslavia and Albania as war zones); Exec. Order No. 13,088, 3 C.F.R. 191 (1998), reprinted in 50 *U.S.C.* 1701 (Supp. IV 1998) (prohibiting trade with Yugoslavia, Serbia, and Montenegro).

¶n104. See John A. Sterling, *Above the Law: Evolution of Executive Orders* (Part I), 31 *UWLA L. Rev.* 99, 100 (2000).

¶n105. *By the President of the United States of America: A Proclamation* (Sept. 22, 1862), reprinted in 6 *Messages and Papers of the Presidents: 1789-1897*, supra note 23, at 96-98 (original Proclamation); see also *By the President of the United States of America: A Proclamation* (Jan. 1, 1863), reprinted in 6 *Messages and Papers of the Presidents: 1789-1897*, supra note 23, at 157-159 [hereinafter *Final Proclamation*]. The Emancipation Proclamation ordered the "executive government of the United States, including the military and naval authorities thereof, [to] recognize and maintain the freedom of" those set free by the Proclamation. *Final Proclamation*, supra, at 158.

¶n106. For examples of presidential signing statements, see Statement upon Signing the Treasury, Postal Service and General Government Appropriations Act, 25 Weekly Comp. Pres. Doc. 1669, 1670 (Nov. 3, 1989), and Statement upon Signing the Transportation Equity for the 21st Century Act, 1998 Pub. Papers 924, 924-926 (June 9, 1998).

¶n107. Presidents since John Tyler have claimed this power and increasingly have exercised it during the past 50 years. See Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 Cardozo L. Rev. 337, 347-59 (1993).

¶n108. Although there is controversy surrounding this practice, it should be defended in appropriate circumstances. The President has an obligation not to enforce a particular provision of a law that is unconstitutional, although the President can sometimes interpret that statute to avoid the constitutional infirmity. See *id.* at 347. See generally The Federalist Society for Law & Public Policy Studies, *Who Speaks for the Constitution, The Debate Over Interpretive Authority* (1992) (on file with author). The President has a duty to try to defend the constitutionality of congressional acts if reasonably possible, but his ultimate oath is to defend the Constitution. When no reasonable defense of a provision is possible, the President is obliged to disregard the unconstitutional provision without waiting for a court to confirm his view. See Kmiec, *supra* note 107, at 350-52. When only one provision or section of a statute is in question and it is "severable" from the rest, the President's position is analogous to that of a court which must treat an unconstitutional provision as null and void but may sign and enforce (or uphold, in the case of a court) the remainder of the statute. See *id.*

¶n109. The degree of deference that should be given such a statement is a separate issue beyond the scope of this article. The essential point is that such orders should be given the same amount of deference regardless of what level of deference that may be.

¶n110. See generally Relyea, *supra* note 101 (listing and defining various types of presidential directives).

¶n111. Most of these are listed in Relyea's *Presidential Directives: Background and Overview*, but no scholar appears to have an exhaustive list - for good reason. As explained below, a presidential directive can take almost any form and characterizing them into distinct "types" is at least somewhat subjective.

¶n112. Edwin Meese III, former Counselor to President Reagan in his first administration, informed me in an interview that the National Security Council changed the name and form of several of its presidential directives simply to differentiate them from those of Reagan's predecessors. Interview with Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy, The Heritage Foundation, in Washington, D.C. (Feb. 5, 2001).

¶n113. We can imagine a hypothetical military command to disregard any subsequent order unless it is delivered in a particular way or accompanied with a secret code. But in such cases, the President himself has attempted to limit his future options to ensure the authenticity of future orders. That does not undermine the normal validity of any particular type of order. As an aside, it is also far from clear in the hypothetical above whether a subsequent order that appears to be authentic but violates the protocol should always be disregarded. For examples of how Hollywood has portrayed this dilemma (which is a lot more fun than a legal discussion), compare *Fail-Safe* (Columbia Pictures Co. 1964) (in which the refusal to follow the President's nonconforming oral command to abort a bombing run leads to the nuclear annihilation of Moscow and New York City) with *Crimson Tide* (Hollywood Pictures 1995) (in which Denzel Washington's arguably mutinous act to disregard the firing protocol saves the world from nuclear holocaust).

¶n114. 44 U.S.C. 1505(a) (1994).

¶n115. 19 U.S.C. 2253(a)(3) (1994) (describing circumstances under which the President must issue a proclamation after determining the existence of an import injury); see also 36 U.S.C. 104(b) (Supp. IV 1998) (requiring the President to issue a proclamation calling on the people of the United States to observe Carl Garner Federal Lands Cleanup Day); 22 U.S.C. 441 (1994) (requiring the President to issue a proclamation upon finding that there exists a state of war between foreign states).

¶n116. See William P. Barr, Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992, 15 Cardozo L. Rev. 31, 32 (1993). William Barr notes that since the creation of the Department of Justice in 1870, the Department has fulfilled what before were the sole responsibilities of the Attorney General "to give advice and opinion upon questions of law when required by the President," including advice on the President's own **executive orders** and proclamations. *Id.* (quoting Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 93 (1789) (codified as amended in scattered sections of 28 U.S.C.)).

¶n117. Exec. Order No. 11,030, 3 C.F.R. 610 (1959-1963), reprinted as amended in 44 U.S.C. 1505 (1994).

¶n118. *Id.* 2.

¶n119. See Barr, *supra* note 116, at 33-34; see also Office of Legal Counsel, About OLC, Dep't of Justice, at <http://www.usdoj.gov/olc> (last modified Mar. 28, 2001) (describing the duties of the Office of Legal Counsel) [hereinafter OLC].

¶n120. See generally OLC, *supra* note 119.

¶n121. As an attorney in the Office of Legal Counsel at the Department of Justice during the Reagan, George H.W. Bush, and Clinton administrations, I assisted in performing the functions specified in **Executive Order** 11,030, including preparing numerous such letters. In this regard, our duties included reviewing draft presidential directives and preparing the letters informing the President that a particular directive was approved as to form and legality. In my experience, this approval process was not a mere formality, with some draft orders failing to receive the OLC's approval. References to the form of these letters is drawn from my personal experience in drafting them.

¶n122. Id.

¶n123. Relyea, *supra* note 101, at 8-12. For instance, national security instruments receive the highest level of security classification and do not generally become publicly available until many years after their promulgation, usually at the official library of the President who approved them. Id. at 9.

¶n124. Id. at 12-13 (noting that routine presidential announcements do not appear in the Federal Register or the Public Papers of the Presidents of the United States).

¶n125. In recent years, there have been as many or more administrative orders issued than **executive orders** or proclamations. Cf. Congressional Limitation of **Executive Orders**: Hearing on H.R. 3131, H. Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong. 48 (1999) (prepared statement of Phillip Cooper, Gund Professor of Liberal Arts, University of Vermont) [hereinafter Statement of Phillip Cooper] (discussing the early use of presidential memoranda "largely in connection with foreign policy for the purpose of making findings where required by legislation" as contrasted with the increasing modern presidential use of "setting policy" through memoranda).

¶n126. The President's News Conference: Homosexuals in the Military, 1993 Pub. Papers 20, 20-22 (Jan. 29, 1993) (announcing certain immediate changes in the military policy toward homosexual service members and directing the Secretary of Defense to prepare a draft **executive order** on the subject). After a firestorm of protest, the Administration compromised on its position and asked the Secretary of Defense to issue a memorandum to the Service Secretaries and the Chairman of the Joint Chiefs of Staff instituting the "don't ask, don't tell" policy. See Remarks Announcing the New Policy on Homosexuals in the Military, 1993 Pub. Papers 1109, 1109-12 (July 19, 1993).

¶n127. See Robin Toner, Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush, N.Y. Times, Jan. 23, 1993, at A6.

¶n128. Thomas E. Baker, Tyrannous Lex, 82 Iowa L. Rev. 689, 710 (1997) (stating that "over 6000 presidential proclamations" had been issued as of 1994).

¶n129. Frank B. Cross, **Executive Orders** 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies, 4 J.L. & Pol. 483, 484 n.5 (1998).

¶n130. See Baker, *supra* note 128, at 710 (stating that as of 1994 there have been "12,698 **executive orders** issued"). Proclamations and **executive orders** were not numerically designated before 1907. In that year, a numbering convention was adopted. Existing proclamations and **executive orders** on file were numbered retroactively. In a few cases, **executive orders** discovered later were designated in the appropriate sequence with an extra letter or number, such as 1A or 28-1. Subsequent proclamations and **executive orders** have been numbered sequentially upon issuance. Olson & Woll, *supra* note 5, at 13 tbl.1.

¶n131. See **Executive Order** Disposition Tables, *supra* note 84, at <http://www.nara.gov/fedreg/eo.html>. Though some Presidents in the first half of the twentieth century may appear at first glance to have issued more **executive orders** than their late-twentieth century counterparts, such comparisons are often misleading because **executive orders** are not the only category of directives available to a President today. For example, many of those directives identified as "**executive orders**" under President Roosevelt would probably carry a different designation under contemporary Presidents, such as that of "presidential decision directive" or "national security instrument." Roosevelt might therefore appear to have issued more **executive orders** than President Clinton, even though Clinton may have promulgated a larger total number of directives of all types. For this reason, the most meaningful comparisons are those made between and among Presidents whose terms are essentially contemporaneous with each other. See generally *id.*

¶n132. President Roosevelt issued on average nearly 311 **executive orders** per year. President Herbert Hoover averaged 252 **executive orders** per year, the second-highest number issued annually by any President. *Id.*

¶n133. Since the formation of the National Security Council (NSC), American Presidents frequently have issued directives through the NSC to direct their foreign policy agenda. Although these directives are not counted as **executive orders**, their effect can be the same. Different Administrations have given such directives different names: NSC policy papers (Truman and Eisenhower), National Security Action Memoranda (Kennedy and Johnson), National Security Decision Memoranda (Nixon), Presidential Directives (Carter), National Security Decision Directives (Reagan), National Security Directives (George H.W. Bush), and Presidential Decision Directives (Clinton). Regardless of their name, these presidential directives are usually classified, and Congress is rarely notified of their existence, although there is some precedent for providing copies or briefings when specifically requested. See *Statement of Phillip Cooper*, *supra* note 125, at 47.

¶n134. See **Executive Order** Disposition Tables, *supra* note 84, at <http://www.nara.gov/fedreg/eo.html>. President Carter issued 320 **executive orders** during his four years in office. *Id.*

¶n135. President Clinton averaged around 46 **executive orders** per year, as compared to around 42 per year for President Bush and around 48 per year for President Reagan. See id.

¶n136. The review of President Clinton's proclamations and **executive orders** and the text in this section of the article were originally a collaborative effort supported by The Heritage Foundation, which included substantial contributions by Angela Antonelli (project management and review of environmental orders and proclamations), Dan Fisk (foreign affairs and national defense issues), Mark Wilson (labor issues), Roger Clegg (racial and ethnic preferences), and Rick Otis (environment and regulatory review).

¶n137. President Clinton issued a total of 364 **executive orders**. **Executive Order** Disposition Tables, supra note 84, at <http://www.nara.gov/fedreg/eo.html>.

¶n138. E.g., Proclamation No. 6528, 3 C.F.R. 8 (1993), reprinted as amended in 36 U.S.C. 169b (1994) (recognizing American Heart Month).

¶n139. See 147 Cong. Rec. S424-425 (daily ed. Jan. 22, 2001) (statement of Sen. Nickles) (reporting that President Clinton used the Antiquities Act 21 times in turning 5,683,838 acres of federal land into protected monuments).

¶n140. Proclamation No. 6920, 3 C.F.R. 64 (1996), reprinted as amended in 16 U.S.C.A. 431 (West 2001).

¶n141. U.S. Const. art. IV, 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

¶n142. 16 U.S.C. 431 (1994).

¶n143. Proclamation No. 4625, 3 C.F.R. 98 (1979), reprinted as amended in 16 U.S.C. 431 (1994).

¶n144. Congress amended various land management laws in 1976 and significantly narrowed the President's power to withdraw land from public use. E.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701(a)(4), 1714(c) (1994) (declaring a policy that "Congress delineate the extent to which the Executive may withdraw lands without legislative action" and requiring Congressional approval for withdrawals by the Secretary of the Interior

of greater than 5,000 acres of federal lands).

¶n145. National Environmental Policy Act, 42 U.S.C. 4321-4370d (1994).

¶n146. E.g., Carol Hardy Vincent & Pamela Baldwin, Congressional Research Service, National Monuments and the Antiquities Act (2000) (CRS Report No. RL30528), available at <http://www.cnle.org/nle/pub-15.html> (citing President Clinton's remarks about the need to restrict mineral development as a justification for the creation of the Grand Staircase-Escalante and Grand Canyon-Parashant monuments).

¶n147. Id. (reviewing possible legal challenges against President Clinton's use of the Antiquities Act and discussing cases that have already been filed).

¶n148. Id. The case brought by the Utah Schools and Institutional Trust Lands Administration has been settled and dismissed, but the other cases are still pending. Id.

¶n149. Pamela Baldwin, Congressional Research Service, Authority of a President to Modify or Eliminate a National Monument (2000) (CRS Report No. RS20647), available at <http://www.cnle.org/nle/rsk-46.html> (concluding that case law and statutory authority is inconclusive on whether the President may eliminate a national monument).

¶n150. E.g., National Monument Public Participation Act of 1999, S. 729, 106th Cong. (1999); H.R. 1487, 106th Cong. (1999).

¶n151. See supra note 136.

¶n152. See id.

¶n153. E.g., 28 U.S.C. 508 (1994); 28 C.F.R. 0.130-0.132 (2000) (outlining the order of succession for officials in the Department of Justice).

¶n154. 28 U.S.C. 508; 28 C.F.R. 0.130-0.132.

¶n155. Dave Boyer, Congress Calls On Lessons Learned from Watergate Days, Wash. Times, Dec. 7, 1998, at A12 (providing a chronology of the most important events of the Watergate

era).

¶n156. Although the appointment of the Assistant Attorney General for OLC should be one of the Administration's top priorities, the senior career attorneys who have been through a number of transitions prior to the Clinton Administration can be counted on to provide professional advice on a number of arcane legal doctrines relating to temporary delegations and acting appointments.

¶n157. For example, President Clinton attempted to use the government's procurement power to advance certain labor, environmental, and civil rights objectives, and invoked various emergency powers to achieve military and foreign policy goals as well as some domestic policy ends.

¶n158. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), repealed by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994).

¶n159. Exec. Order No. 12,612, 3 C.F.R. 252 (1987), repealed by Exec. Order No. 13,083, 3 C.F.R. 146 (1999), reprinted in 5 U.S.C. 601 (1994); see also Exec. Order No. 13,132, 3 C.F.R. 206 (2000), reprinted in 5 U.S.C.A. 601 (West Supp. 2000).

¶n160. Exec. Order No. 12,606, 3 C.F.R. 241 (1988), repealed by Exec. Order No. 13,045, 3 C.F.R. 198 (1998), reprinted in 42 U.S.C. 4321 (Supp. IV 1998).

¶n161. Exec. Order No. 12,630, 3 C.F.R. 554 (1989), reprinted in 5 U.S.C. 601 (1994).

¶n162. Exec. Order No. 12,778, 3 C.F.R. 359 (1991), reprinted in 28 U.S.C. 519 (1994).

¶n163. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994).

¶n164. Exec. Order No. 13,083, 3 C.F.R. 146 (1998), reprinted in 5 U.S.C. 601 (Supp. IV 1998).

¶n165. Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C.A. 601 (West Supp. 2000).

†n166. E.g., Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001) (protecting migratory birds); Exec. Order No. 13,148, 65 Fed. Reg. 24,595 (Apr. 21, 2000) (addressing environmental leadership in government); Exec. Order No. 13,045, 3 C.F.R. 198 (1997), reprinted in 42 U.S.C. 4321 (Supp. IV 1998) (protecting children from environmental health risks).

†n167. See Special Message to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, 1971 Pub. Papers 578-86 (July 9, 1970).

†n168. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994). (revoking Exec. Order No. 12,291, 3 C.F.R. 127 (1982)).

†n169. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994); Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C.A. 601 (West Supp. 2000).

†n170. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994).

†n171. See Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C.A. 601 (West Supp. 2000).

†n172. One of the first **executive orders** issued by President Clinton dealt with union-only federal contracts and union dues. Exec. Order No. 12,836, 3 C.F.R. 588 (1993), reprinted in 41 U.S.C. 254 (1994).

†n173. E.g., Exec. Order No. 12,953, 3 C.F.R. 325 (1995), reprinted in 42 U.S.C. 659 (Supp. IV 1998).

†n174. E.g., Exec. Order No. 13,164, 65 Fed. Reg. 46,565 (July 26, 2000).

†n175. E.g., Exec. Order No. 13,145, 65 Fed. Reg. 6877 (Feb. 8, 2000).

†n176. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(a) (Supp. IV 1998).

¶n177. 487 U.S. 735 (1988).

¶n178. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (May 24, 1999) (to be codified at 20 C.F.R. pt. 604).

¶n179. 515 U.S. 200 (1995).

¶n180. Id. at 227 ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny... . Such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); Id. at 239 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").

¶n181. The executive branch "deliberative process" is also constitutionally protected for reasons founded in the President's executive authority and the separation of powers. See United States v. Nixon, 418 U.S. 683, 705, 708 (1974) (holding presidential communications to be "presumptively privileged," as confidential executive communications "flow from the nature of enumerated powers," are "fundamental to the operation of Government," and are "inextricably rooted in the separation of powers").

A distinction is made by the Court between the presidential communications privilege and the deliberative process privilege, which are "closely affiliated" but "distinct and ... different [in] scope[]." In re: Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997). As the D.C. Circuit has explained,

Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege.

Id. Either privilege can be overcome by "a sufficient showing of need." Id. at 737. The presidential communications privilege is more difficult to overcome than the deliberative process privilege. Id. at 746.

¶n182. For a good discussion of this topic, see Bryan A. Liang, National Legal Center for the Public Interest, *A Zone of Twilight: **Executive Orders** in the Modern Policy State* (1999).

¶n183. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 2.15, at 106-17 (5th ed. 1995).

¶n184. Id. 2.15(c)(1), at 110-11.

¶n185. Id.

¶n186. U.S. Const. art. II, 2, cl. 1; United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

¶n187. See, e.g., Dumas Malone, 3 *Jefferson and His Time: Jefferson and the Ordeal of Liberty* 403 (1962).

¶n188. E.g., David A. Vise & Lorraine Adams, *Constitutional Clash Likely on Pardons Bill*, *Wash. Post*, Feb. 8, 2000, at A1.

¶n189. See, e.g., Gary Fields, *Ex-White House Aides Say They Advised Clinton Not to Pardon Rich and Green*, *Wall St. J.*, Mar. 2, 2001, at A12.

¶n190. See *supra* note 187 and accompanying text.

¶n191. The House report on the FALN pardons does raise some troubling issues regarding the President's use of his pardon power. The report also contains letters from the Attorney General and the White House asserting their immunity from congressional oversight. See H.R. Rep. No. 106-488, Ex. 1, at 93-94 (1999); see also Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) ("Congress cannot interfere in any way with the President's power to pardon.").

¶n192. That said, if a President or his advisers accepted a bribe in exchange for granting a pardon, that would be a separate crime. The person offering a bribe would be equally subject to prosecution, unless the subsequent pardon discharged that liability as well. Nevertheless, it is still unclear what role Congress should take in investigating the Marc Rich or similar pardons by the former President. Impeachment is no longer an option, and Congress cannot dictate pardon review procedures to a future President. Finally, bribery allegations are usually best left to professional prosecutors and grand jury investigations.

¶n193. U.S. Const. art. II, 2, cl. 2.

¶n194. The "dispute resolution capacity" of the Attorney General has been discussed at length by Professor Douglas Kmiec. See Kmiec, *supra* note 107, at 368-69 ("This statutory authority [to resolve legal disputes] has been embellished by two **executive orders**. **Executive Order** 2877 provides that 'any opinion or ruling by the Attorney General upon any question of law arising in any department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus or offices therewith concerned.' In addition, **Executive Order** 12,146 'encourages' all executive agencies to submit legal disputes to the Attorney General, and requires executive agencies 'whose heads serve at the pleasure of the President' to submit such disputes to the Attorney General 'prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.'") (citations omitted).

¶n195. Exec. Order No. 12,146, 3 C.F.R. 409 (1980), reprinted as amended in 28 U.S.C. 509 (1994).

¶n196. Article II of the Constitution vests in the President "the executive Power," which includes the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, 1, cl. 1, art. II, 3. Moreover, the doctrine of "coordinate branch" construction holds that the President not only may interpret the law in situations where the courts have not issued an opinion binding on the government, but also is required to render independent judgment in many such cases. His duty is derived from the clauses cited above and aspects of the constitutional separation of powers. This conclusion is also reinforced by the debate at the Constitutional Convention, at which a council of revision was rejected. See Symposium, Executive Branch Interpretation of Law, 15 Cardozo L. Rev. 21 (1993).

¶n197. See 28 U.S.C. 511-513, 521 (1994). The Attorney General subsequently delegated his statutory and **executive order** authority to issue binding legal opinions to the Department of Justice, Office of Legal Counsel. 28 C.F.R. 0.25 (2000).

¶n198. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. 601 (1994) (reprinting President Clinton's regulatory review order).

¶n199. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), repealed by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. 601 (1994).

¶n200. *Id.*

¶n201. Nowak & Rotunda, *supra* note 183, 2.12(f)(2)-(3), at 76-87.

¶n202. Id.

¶n203. Id. (noting that a "generalized interest in the enforcement of the law" is insufficient to confer standing on a litigant).

¶n204. Exec. Order No. 13,061, 3 C.F.R. 221 (1998), reprinted as amended in 42 U.S.C.A. 4321 (West Supp. 2000).

¶n205. See H. Rep. No. 105-781, at 1-3 (1997).

¶n206. Chenoweth v. Clinton, 997 F. Supp. 36 (D.D.C. 1998).

¶n207. Id. at 37.

¶n208. Id.

¶n209. Chenoweth v. Clinton, 181 F.3d 112, 117 (D.C. Cir. 1999).

¶n210. Id. at 115 (quoting Raines v. Byrd, 521 U.S. 811, 829 (1997) (rejecting a similar congressional standing theory in the first challenge to the Line Item Veto Act of 1996)).

¶n211. See, e.g., Hearings, *supra* note 2.

¶n212. H.R. Con. Res. 30, 106th Cong. (1999).

¶n213. Id.

¶n214. H.R. Res. 2655, 106th Cong. (1999).

¶n215. Id. 3(b).

¶n216. See Olson & Woll, *supra* note 5, at 19-20 (discussing Clinton's use of **executive orders** to "generate multiple concurrent states of national emergency").

¶n217. H.R. Res. 2655, 3(d).

¶n218. *Id.* 7.

¶n219. *Id.* 4.

¶n220. See Douglas W. Kmiec, *Expanding Executive Power*, in *The Rule of Law in the Wake of Clinton*, *supra* note 16, at 47, 49 (revealing that nearly one-third of President Clinton's **executive orders** relied on no statutory reference or authority whatsoever).

¶n221. H.R. Res. 2655, 6.

¶n222. E.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Source: All Sources > Secondary Legal > **Law Reviews, Combined** 

Terms: "executive order" and president and legislation and "presidential directive" and date(aft 1996) (Edit Search)

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FEDERAL LABOR RELATIONS AUTHORITY
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FACSIMILE TRANSMITTAL RECORD

TO:

Tim Flanagan
fax - 202 - 456 - 6279

FROM:

Dale Cabanis

TELEPHONE NUMBER:

482-6500

NUMBER OF PAGES:

5

(INCLUDING TRANSMITTAL PAGE)

REMARKS:

Tim - I hope this is of some
help to you all. Please call if I
can do anything.
Dale



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

OFFICE OF THE CHAIRMAN

October 2, 2001

Memorandum To: Tim Flanigan, Deputy White House Counsel
From: Dale Cabaniss, Chairman, Federal Labor Relations Authority
Subject: Federalization of Airport Personnel

As you know the Federal Labor Relations Authority has responsibility for adjudicating labor disputes between federal agencies and unions, including numerous cases involving the FAA, the Department of Transportation and the Justice Department. As such we have subject matter expertise relating to the issue of federalization of employees involved in airport security. We've identified several issues raised by this question such as factors to be considered to provide flexibility for removing nonperforming employees, as well as the availability of national security exemptions pertaining to certain employees, through legislation as well as executive order.

If we can be of any assistance to your office in this process, please let me know. My number is 202-482-6500.

A handwritten signature in cursive script that reads "Dale Cabaniss".
Dale Cabaniss
Chairman

If these employees are to be federalized, there must be a finding that the employees are engaged in national security to allow for more efficient removal of nonperforming employees. This would allow them to be removed under the adverse action procedures outlined in 5 U.S.C. 7532(b) and (c), which allow suspension without pay pending termination, limited appeal rights, and the determination by the agency head whether or not removal is necessary or advisable in the interest of national security is final. This would provide the most flexibility on removal, however, it does not address the issue of exempting employees from representation by a union.

1. Lengthening probationary period under 5 U.S.C. 3321 to permit an agency a greater period of time in which to remove employees more quickly with a more limited review of the removal action. Extend probationary period from current one-year period to three to five-year.
2. Making employees subject to national security procedures set out at 5 U.S.C. 7531-7533, allowing suspension without pay pending termination.
3. Statutorily define certain employment requirements as being mandatory, such as physical requirements and maintenance of security clearance, the failure of which to comply with thereby permitting removal. Define "cause" and "efficiency of service" under 5 U.S.C. 7513(a).
4. For any agency determinations made pursuant to any statutory grant of authority, providing the agency with the "sole and exclusive authority" to make such determination limits the ability of a party to come in and challenge the determination. For example, giving agency sole and exclusive authority to determine an individual's right to hold a security clearance.
5. Statutorily determine that these employees are engaged in "national security".
6. Use of presidential authority under 5 U.S.C. 7103(b)(1) to issue an executive order exempting from 5 U.S.C. Ch. 71 (5 U.S.C. 7101-35) any agency or subdivision thereof where the agency or subdivision has "as a primary function intelligence, counterintelligence, investigative, or national security work," and application of bargaining rights, etc. is not "consistent with national security requirements and considerations."

ISSUES PAPER FEDERALIZATION OF AIRPORT PERSONNEL

1. COVERAGE UNDER 5 U.S.C. CH. 71 (5 U.S.C. 7101-7135)

a. Requirement to bargain with union prior to Implementation on proposed agency actions affecting "conditions of employment" (7103(a)(14)), even actions based on law enforcement/internal security (expansive bargaining obligation asserted, see *GSA v. FLRA*, 86 F.3d 1185 (D.C. Cir. 1996)), with limited right to implement immediately if matter needed for "necessary functioning of the agency," or in "emergencies" (7106(a)(2)(D)), although FLRA took position that Desert Storm was not an "emergency" (*MacDill Air Force Base*, 43 FLRA 1565, 1574 (1992). All agency retained rights, even statutory, subject to required "impact and implementation" bargaining (7106(b)(2) & (3)).

b. Unfair labor practice litigation, to include judicial temporary restraining orders, where union claims failure to bargain/complete bargaining (7118 & 7123(d)).

c. To the extent not otherwise specifically reserved to agency or provided by statute, pay, procedures for hiring/firing are negotiable (7103(a)(14)).

d. Presidential executive order exclusion for agency, subdivisions for some intelligence, counterintelligence, investigative or national security work (7103(b)(1)) (national guard and reserve technicians still covered, e.g., *ACT v. FLRA*, 250 F.3d 778 (D.C. Cir. 2001)).

2. COVERAGE UNDER 5 U.S.C.

a. Who "owns" employees, FAA, DOD, new Homeland Security Agency?

b. Employees covered by "national security" procedures (7531-33)?

c. If "law enforcement" employees, overtime & retirement program issues?

d. Possible new "probationary employee" status/issues/requirements (3321)?

3. OTHER STATUTORY ISSUES

a. Fair Labor Standards Act overtime issues (29 U.S.C. 201 *et seq.*)?

b. Possible Americans with Disabilities Act issues with employees unable to meet physical, age requirements (42 U.S.C. 12101 *et seq.*)?

c. Possible "inherently governmental" issues in terms of whether this work is subject to contracting out under OMB Circular A-76?

d. Possible problem with necessary direct Federal supervision of/"personal services" contracts under Federal Acquisition Regulation (FAR)?

4. TRANSITION ISSUES

a. Convert former private employees to Federal status, but give temporary appointments pending background checks, necessary training?

b. Use other Federal employees/military/national guard to perform work while former private employees go through application/background checks/training?

5. ALTERNATIVES TO FEDERALIZATION OF AIRPORT PERSONNEL

a. Use of contracting out procedures to accomplish work by contractors, in whole or in part (possible Federal managers, supervisors, note 3.d., *supra*?).

b. Use of military personnel/national guard. National Guard personnel when "called out" by state governor are state employees, become part of national military when activated by President.