



**EXECUTIVE ORDERS IN NIGERIA AND UNITED STATES OF AMERICA:
CONSTITUTIONALITY AND COMPARATIVE ANALYSIS**

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Joel Adelusi Adeyeye, PhD*

Redeemer's University, Nigeria

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Abstract

This article interrogates the constitutionality of executive orders (EO) or otherwise in Nigeria and United States of America, and a comparison of both jurisdictions. Nigeria and the United State of America (USA) are chosen because both operate presidential system of government, though that of the USA is of a chequered history and that of Nigeria is nascent. One of the major principles of constitutional law is separation of powers. This principle has always been hallowed and inscribed in the constitution of many countries of the world. The Legislature, the Executive and the Judiciary, make laws, execute laws and interpret laws respectively. This is provided for under sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), for instance. EO as the name implies is like a species of law, made by the executive arm of the government and not the legislature. This article will examine critically at the appropriateness of this, considering the powers of each arm of government. It will look at the question whether an executive order can sanction violators of such an order. This also goes with the issue of delegated authority to make Laws/Rules for example, Rules of Court at various levels.

Keywords: Executive Orders, Separation of Powers, Constitutionality

* LL. B; LL.M; B.L, PhD, Solicitor & Advocate of the Supreme Court of Nigeria, Senior Lecturer and Ag. Head, Department of Private and Property Law, Faculty of Law, Redeemer's University, Ede, Osun State, Nigeria
joeladeadeyeye@gmail.com; adeyeyej@run.edu.ng



Introduction

Even though they were not meant to be EOs, presidents have issued orders under the presidential form of government that fit that description.¹ In his first few minutes in office, Joe Biden, the 46th President of the United States, signed 17 executive orders, following in the footsteps of his predecessors.² His first official act as president was a determined effort to reverse former President Donald J. Trump's pandemic response, environmental agenda, and anti-immigration laws, support the fragile economic recovery, rejoin the World Health Organisation (WHO), and reinstate seven federal initiatives to promote diversity.³ . It was used, for instance, in the United States (US) to withdraw public lands for Indian use, for military and naval reasons, to build lighthouses, and to establish, transfer, and abolish land districts and land offices.⁴ Later, they were used to create, modify, and dispose of reserves of coal, oil, gas, and timber as well as to remove public lands from the market or from public access.⁵ In contrast to these very commonplace applications of EO, President Lincoln of the US used them destructively during the Civil War.⁶ He used the EO to

¹ William Hebe, 'Executive orders and the Development of Presidential Power, [1972](17) *Vill. L. Rev.* 17 688 <<https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1937&context=vlr>> accessed on 23rd September 2022.

² Aishvarya Kavi, 'Biden's 17 Executive orders and other Directives in Details' <<https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html>> accessed 16th March, 2022.

³ Ibid.

⁴ House Comm. on Government Operations, 85th Cong., 1st Sess., Executive orders and Proclamations: A Study of a Use of Presidential Powers 35 (Comm. Print 1957) <<https://fas.org/sgp/crs/misc/95-772.pdf>> accessed 23rd September 2022.

⁵ *ibid.*

⁶ Although President Lincoln's directives were not labeled or published as EO or 'proclamations,' by contemporary definition they could be technically classified as such.



revoke the right to habeas corpus,⁷ emancipate slaves in the rebellious states,⁸ to blockade southern ports,⁹ and allow citizens to be tried in military courts.¹⁰

According to US President Theodore Roosevelt's Executive Order, "all lands in which' mineral deposits' had been discovered may be withheld from private entry."¹¹ Regardless of whether minerals had been discovered on the site, he went above this legislative authorization by removing it for wildlife preserves.¹² While President Taft, another US president, revoked several of Roosevelt's decrees, he also distanced himself from a sizable area of land in California where oil had been discovered.

On the other hand, Nigeria underwent a sequence of constitutions, much like other British Colonial possessions, often in the form of Orders in Council, Letter Patents, Royal Instructions, and so forth. These EOs were then followed by Acts of the British and Nigerian Parliaments, and so forth.¹³ However, in 1983, the Nigerian president issued what might be considered the first EO, which resulted in the repatriation of more than one million Ghanaians and other West Africans who were living in Nigeria at the time without the required residency cards. These migrants were mostly drawn to Nigeria in the 1970s due to the country's booming oil industry, but in 1983, when the "Ghana Must Go" uprising began, the economy had collapsed and was quickly disintegrating and it was also an election year.¹⁴ EOs did not emerge until around 2002 as a result of the military

⁷ The US Constitution provides, in article I, section 9, that 'the privilege of the *Writ of Habeas Corpus* shall not be suspended, unless when in cases of rebellion or Invasion the public safety may require it'.

⁸ The Emancipation Proclamation was issued by President Lincoln on January 1, 1863. He found authority for the Proclamation in his powers as Commander-in-Chief, and as warranted by the Constitution upon military necessity; James Randall, *Constitutional Problems under Lincoln* (rev. ed University of Illinois Press, 1964) 513. <<https://libsysdigi.library.illinois.edu/oca/Books2009-06/constitutionalpr00rand/constitutionalpr00rand.pdf>> accessed 24th September 2022.

⁹ibid.

¹⁰ ibid. 231. In the case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

<<https://supreme.justia.com/cases/federal/us/71/2/>> accessed 24 September 2022, the Supreme Court restricted the power of the President to order the trial of civilians by Military Commissions.

¹¹ ibid.

¹² ibid.

¹³ B.O Nwabueze, *A Constitutional History of Nigeria*(Hurst, 1982) 272.

<<https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/abs/constitutional-history-of-nigeria-by-b-o-nwabueze-london-hurst-1982-pp-xiii-272-1250-575-paperback/0F39894EFBE19ECDECEF646BDB62D29A>>accessed 4th June, 2021.

¹⁴Aremu Johnson Olaosebikan 'Response to the 1983 Expulsion of Aliens from Nigeria: A critique', [2013] (73) *African Research Review*340-352<doi.org/10.4314/afrrve.v73.24> Rasheed Olaniyi, 'The 1969 Ghana Exodus:

interregnum in Nigeria in 1983 that lasted until 1999. These EOs dealt with the preservation of suspected assets in Nigeria as well as the development of local content in the manufacturing sector and ease of doing business.

Conceptualization of Executive orders

Only a small number of studies have examined the use and significance of EO despite their significance. The limited political science literature that is currently available¹⁵ is either descriptive¹⁶ or discusses the effects of particularly significant orders.¹⁷ Similar to this, political scientists have found that the literature on public administration "virtually ignores EO" and is much more intriguing to legal scholars.¹⁸ Although there is a large body of legal research, there are restrictions on what these investigations can reveal about more general patterns of presidential behaviour. The majority of legal studies focus on specific issues related to the constitutional concerns that EO frequently raises;¹⁹ although there are notable exceptions, such as Sunstein and Fisher, they often do not link EO to the theoretical questions that develop our substantive understanding of the presidency.²⁰ The legal position does not lend itself to explanation, according to Edward and Wayne, despite the need for careful examination.²¹ The majority of the concerns

Memory and Reminiscences of Yoruba Migrants' <https://www.migrationinstitute.org/files/events/olaniyi.pdf/@@download> accessed 22nd September 2022.

¹⁵ Joseph Cooper & West F Williams 'Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules' [1988](50) *Journal of Politics*864-95.

<https://www.journals.uchicago.edu/doi/abs/10.2307/2131383> accessed 18th September, 2022; A G Krause & Cohen B David 'The American Presidency and the Power of the Purchaser', 1953-1994 [1997][1997][254]

*Presidential Studies Quarterly*58-71 <https://www.jstor.org/stable/43286718?seq=1> accessed 30th March, 2022.

¹⁶ Kenneth R Mayer 'Executive orders and Presidential Powers' [1999] (61) (2), *Journal of Politics*445-466.doi.org/10.2307/2647511 accessed 19th March, 2021.

¹⁷Ruth P Morgan, *The President and Civil Rights: Policy-Making by Executive order*. New York.

<https://www.amazon.com/President-Civil-Rights-Policy-Making-Executive/dp/0819164755> accessed 18th September, 2022.

¹⁸Ibid.

¹⁹ Phillips J Cooper 'By Order of the President: Administration by Executive order and Proclamation' [1986](18)*Administration and Society*233-62 doi.org/10.1177/009539979702900502 accessed 19th March 2021.

²⁰ Louis Fisher *Constitutional Conflicts Between Congress and the President* (3d ed. Lawrence University Press of Kansas 1991) <https://kansaspress.ku.edu/978-0-7006-1997-9.html> accessed 18th September, 2022.

²¹ Edward, III George C & Wayne Stephen J *Presidential Leadership: Politics and Policy Making*, (3d ed St Martin's Press 1994) <https://www.amazon.com/Presidential-Leadership-Politics-Policy-Making/dp/0840030126> accessed 18th September, 2022.

that compel researchers to examine the president are not addressed although studies that take a legal perspective significantly advance our knowledge of American politics; they largely fail to address the problems that motivate such research.²²

While Shane and Bruff contend that "presidents use EOs to implement many of their most important policy initiatives, basing them on any combination of constitutional and statutory power that is thought to be available," the legal scholarship nevertheless recognizes EO as a significant instrument of presidential power.²³ Fisher acknowledges that "the President's role in making laws is significant, ongoing, and frequently troubling."²⁴ The term "EO" is not defined nor construed in any laws passed by the National Assembly or House of Assembly of any State, as stated in the Federal Republic of Nigeria's 1999 Constitution (as amended).²⁵ In fact, the very few Acts of the Legislature that use the term "executive order" don't define or explain what it means.²⁶ Furthermore, there is no definition of the term under the Interpretation Act.²⁷ Consequently, it is crucial to begin this paper with a working definition of an executive order. Although executive orders have gained a lot of popular and academic attention in the US, they have not yet attracted any scholarly interest in Nigeria.²⁸ An EO, on the other hand, is described by Mayer as "a presidential directive that requires or authorises some action within the executive branch."²⁹ The fact that not all presidential directives are executive orders (EO) calls into question the aforementioned definition. For instance, it is not exactly constitutional law that determines whether to terminate someone's employment. A directive like that wouldn't qualify as an EO.³⁰ "EO has legal force only when it is based on the president's constitutional or statutory authority,"

²² *ibid.*

²³ Peter M Shane & Harold H Bruff *Separation of Powers Law*. (Carolina Academic Press 1996) <<https://cap-press.com/books/isbn/9781594607417/Separation-of-Powers-Law-Third-Edition>> accessed 18th September, 2022.

²⁴ Fisher (n 20).

²⁵ Elijah Oluwatoyin Okebukola and Abdulkarim A Kana 'Executive orders in Nigeria as Valid Legislative Instruments and Administrative Tools' [2012] *NAUJILT* <<https://www.ajol.info/index.php/naujilj/article/view/136320>> accessed 23rd September 2022.

²⁶ See for example Section 5, Appropriation Act No 4 2006 and Section 5 Appropriation Act No 3 2007 which expressly mentions "Executive order", but do not contain any interpretation or explanatory provisions as to the meaning of the word.

²⁷ Interpretation Act CAP I23 LFN 2004

²⁸ *ibid*

²⁹ Mayer (n 16).

³⁰ An example of such power to terminate employment is contained in section 2(4) of the Agriculture and Rural Management Training Institute Act CAP A10 LFN 2004. See also section 5(2), Citizenship and Leadership

the president said of the political and policy matters that are taken into consideration.³¹ Only when presidents operate "within the bounds of their constitutional or statutory authority" are they valid.³² There are, however, some circumstances where the Legislature requires the president to issue an order.³³ In this case, the President is compelled by law to issue the order. The president's lack of the British-style crown prerogative is instructive. The United States and Nigeria both have presidential federal systems, and after the Revolutionary War, "the very idea of crown prerogative was anathema to the American people."³⁴

On the one hand, it would appear that the president can only issue an EO when the legislative or the Constitution clearly grants him the authority to do so. The president may also employ additional instruments in addition to the EO, such as presidential memoranda,³⁵ to convey his direction and directives to the organizations and departments that make up the executive branch of government. As opposed to legislative acts, which may only be amended through legislation.³⁶ However the 1999 Constitution did not intend to establish the presidency as a legislative branch competing with the Legislature.³⁷ Legislative authority for the Federal Republic of Nigeria is, in fact, expressly granted to the National Assembly under the Constitution.

Despite being used for a very long time in the US, EO has never been given a statutory or constitutional definition. The Federal Register Act,³⁸ calls for the publication of all EO, but fails to define them.³⁹ None of the tens of thousands of EO that have been issued in the US explain the word, in addition to the lack of a formal definition. Unquestionably, various EO have given

³¹Mayer (n 16) 448.

³²ibid. 445. For example, see section 5(2) of the International Financial Organization Act CAP I21 LFGN 2004

³⁴R Mious 'Inherent War and Executive Powers and Prerogative Politics' [2007] (37) *Presidential Studies Quarterly* 67.

³⁵V Gordon 'The Law Unilaterally Shaping U.S. National Security Policy: The Role of National Security Directives' [2007] (37) *Presidential Studies Quarterly* 349-367, 366.

³⁶It may be noted that some provisions of an Act may be adjudged invalid by the judiciary without nullifying the entire Act. This is a form of judicial modification of the Act.

³⁷For an American perspective see, Morgan, Ruth P 'The President and Civil Rights: Policy-Making by Executive order' (New York). <<https://www.amazon.com/President-Civil-Rights-Policy-Making-Executive/dp/0819164755>> accessed 18th September, 2022, where it is observed that the framers of the Constitution of the USA did not intend the presidency to be an institutional competitor to the Congress

³⁸ Federal Register Act of 1935, 49 Stat. 501 (1935), 44 U.S.C 1505 (1970)

³⁹Joel L Fleishman and Arthur H Aufes 'Law and Orders: The Problem of Presidential Legislation' [1976](405) *Law & Contemporary Problems*. <<https://scholarship.law.duke.edu/lcp/vol40/iss3/1/>> accessed 30th March, 2021.



guidance on how to publish orders and proclamations,⁴⁰ but none endeavours to give a definition.⁴¹ It is interesting to note that an EO led to the outcome of *Marbury v Madison*⁴² the first decision in contemporary US constitutional law. Despite this early interaction with the legal system, EO has no explicit judicial definition. When there is no executive, legislative, or judicial definition available, the enquirer must look to academia for an unofficial but significant explanation. Even though EO have garnered a lot of public and academic interest in the US, they have not yet attracted any academic attention.⁴³ In the US, they have till now received no scholarly attention, so also in Nigeria. An EO is "a presidential directive that requires or authorizes some action within the executive branch," according to American author Mayer.⁴⁴ To Raven-Hansen, 'EO is presidential policy directives to the federal bureaucracy'.⁴⁵ Despite the scholarly attention in the US, they also do not have a precise definition of EO.⁴⁶ The claim that not all presidential instructions are EO challenges the first definition given above.

For instance, a decision to terminate someone's employment is not technically a constitutional law issue. Such directive would not qualify as an EO.⁴⁷ The second definition can also be challenged with the remark that policy sometimes dictates directives, therefore not all EO are presidential policy.⁴⁸ The second definition can also be disputed with the argument that not all executive orders represent presidential policy because sometimes policy dictates directives. However, according to Okebukola and Kana, "EO is a direct order given by the President to an executive agency, class of people, or body under the executive arm of government". This definition is hereby adopted for the purposes of this write-up.

⁴⁰ See for example Exec. Order No. 11030, 3 C.F.R. 610 (1959-1963 compilation).

⁴¹ Ibid.

⁴² 5 U.S. (1 Cranch) 137 (1803).

⁴³ Fleishman and Aufes (n 39) 6.

⁴⁴ Mayer (n 16).

⁴⁵ P Raven-Hansen 'Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive order 12,291' [1983] *Duke Law Journal* 285-353, 286.

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2836&context=dlj>> accessed 24th September 2022.

⁴⁶ Fleishman and Aufes (n 39) 8.

⁴⁷ An example of such power to terminate employment is contained in section 2(4) of the Agriculture and Rural Management Training Institute Act Cap A10 LFN 2004. See also section 5(2), Citizenship and Leadership Training Centre Act CAP C12 LFN 2004.

⁴⁸ Okebukola and Kana (n 25).

Legal Framework for Executive orders

Although there is no clear authorization for the use of EO in the Constitution or in early federal statutes, the practice gained traction under George Washington's presidency.⁴⁹ When Washington sent identical letters to the leaders of numerous administrative agencies in 1789, urging that they give him a report with "a full, precise, and distinct general idea of the affairs of the United States," many observers credit him with issuing the first executive order.⁵⁰ These letters are recognised as a sort of EO even though they bear little resemblance to the public, officially published declarations we recognize as EO today and because their primary purpose was the same as that of the modern EO⁵¹ that is, giving the President a way to tell lower-level executive officials what to do in order to fulfil their obligations under Article II of the US Constitution. In addition, Nigeria is mentioned by virtue of Section 5 of the 1999 Constitution (as amended), which states:

Subject to the provisions of this Constitution, the executive powers of the federation-

- a) Shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-president and Ministers of the Government of the Federation or officers in the public service of the Federation; and
- b) Shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.⁵²

Also, the US Constitution provides:

⁴⁹ New York University Law Review Online, 'Source of Law (Part One): Executive orders, Unilateral Executive Action and Faithful Execution of the Laws' <<https://www.nyulawreview.org/online-features/sources-of-law-part-one-executive-orders-unilateral-executive-action-and-faithful-execution-of-the-laws/>> accessed on 24 September 2022.

⁵⁰See, for example, T V Di Bacco, 'George Washington Had a Pen, but No Phone, for Executive orders', *Washington Times* (Feb. 6, 2017), <<http://www.washingtontimes.com/news/2014/aug/14/dibacco-the-first-presid...>> accessed 28 September 2022.

⁵¹ Gary J Schmitt 'Washington's Proclamation of Neutrality: Executive Energy and the Paradox of Executive Power' [2000](29)*Political Science Reviewer*, 121.<<https://politicalsciencereviewer.wisc.edu/index.php/psr/article/view/390>> accessed 28th September 2022.

⁵² S. (1)(a)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) <https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Nigeria_Constitution_1999_en.pdf> accessed 24th September 2022.



The executive power shall be vested in a President of the United States of America. He shall hold this office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected as follows:⁵³

Thus, Article II of the US Constitution serves as the fundamental legal foundation for executive orders; an executive order is valid if the President uses it to promote and within the bounds of his or her Article II duties.⁵⁴ The problem with this EO legality tale, though, is that the extent of presidential power is frequently hotly debated and, to be honest, uncertain. Think about the debate around George Washington's first presidential proclamation as an illustration. In 1793, as the French Revolutionary War expanded internationally, the Washington administration sought to maintain American neutrality.⁵⁵ Washington considered calling Congress back into session so that the position could be declared by the legislative, rather than the executive, power, which James Madison notably supported. Despite a broad reading of the President's Article II "executive power" (advocated by Alexander Hamilton) suggesting that Washington could make this policy decision unilaterally, Washington actually considered doing so. According to Madison, the President's primary responsibility is to faithfully carry out the laws passed by Congress. As a result, they believed that any presidential action that was not expressly approved by the President would be met with scepticism because it not only exceeded the scope of the constitutionally enumerated powers of the president but also had striking similarities to the type of executive branch legislation that the Constitution's separation of powers was intended to prevent.⁵⁶

Washington ultimately decided to not interfere with Congress's break and declared his country's neutrality on April 22, 1793. The proclamation instructed federal law enforcement to penalize anybody who violated the country's directive to maintain "friendly and impartial" behaviour toward the warring parties. It also forbade Americans from doing any actions that would compromise American neutrality. Under an assumed name, Madison defended the constitutionality of the proclamation, claiming that the president's declaration of neutrality merely

⁵³ Article II of the United States of America. <<https://constitutioncenter.org/interactive-constitution/article/article-ii>> accessed 24th September 2022.

⁵⁴Di Bacco (n 50).

⁵⁵Schmitt (n 51).

⁵⁶ibid.



stated a position on international affairs that Congress had already adopted and that its instructions to American citizens and law enforcement officials were necessary to ensure that this law of Congress would be faithfully carried out.

However, as Washington started to carry out the neutrality policy, his administration got involved in what appeared to be very legislative action. For instance, in July 1793, Washington's cabinet produced a set of "Rules Governing Belligerents" that outlined the proper protocol for Americans to follow while dealing with foreign naval warships in American ports.⁵⁷ Although the goal of these regulations was to uphold American neutrality, they showed how "faithful execution of the law" can allow for some executive "law-making" in the form of discretionary decisions regarding how the law will be applied. Washington was accused of overstepping his Article II powers and interfering with Congress's legislative power as a result. However, Congress's 1794 enactment of the Neutrality Act, which allowed the administration to pursue those who disobeyed the proclamation, gave Washington's legal foundations a congressional stamp of approval. The debate surrounding Washington's neutrality declaration serves as an example of why it can be difficult to determine the precise legal basis for executive orders. The Constitution leaves the right balance of power between the president and Congress up for interpretation. In his concurrence to the Supreme Court's ruling in *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁸

In the aforementioned case, the Court declared President Truman's seizure of American steel mills as unlawful. This action was carried out under the authority of Truman's own executive order, which set forth the action. Justice Jackson acknowledged that the president is using all of his or her authority when acting in accordance with an express or inferred delegation of authority from Congress. However, when the president takes a decision that is obviously against the express or implied desire of Congress (as Truman did with his seizure of the steel mill), the president's intentions are still unclear. 'Any practical test of authority is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law,' warned Jackson in this regard.⁵⁹ Jackson's prognosis seems to be supported by the history of EO, from

⁵⁷ibid.

⁵⁸ 343 U.S. 579 (1952) <<https://www.oyez.org/cases/1940-1955/343us579>> accessed 24 September 2022.

⁵⁹Youngstown, 343 U.S. at 637 (Jackson, J. concurring)

Washington's declaration of neutrality to President Trump's travel restrictions. Sometimes, a president's use of his or her authority in the "zone of twilight" is unopposed or is restrained by political blowback. The legality of executive orders issued in the "zone of twilight" is still up for discussion, just like the extent of presidential power.⁶⁰

Theory of Separation of Powers

In his work *L'Esprit des Lois* (The Spirit of the Laws), which was published in 1748, French jurist Baron Montesquieu completely developed and promoted the notion of separation of powers.⁶¹ Montesquieu, a keen observer and insightful writer, carefully examined the English system of government in the eighteenth century and paradoxically came to the incorrect conclusion that it was based on a strict division of powers between the legislative, executive, and judicial branches of government. Political liberty, in the opinion of Montesquieu, is a reliable way to protect citizens' natural rights. According to him: Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the legislative and executive powers are united in the same person or body, there can be no liberty... Again, there is no liberty if the judicial power is not separated from the legislative and the executive...⁶²

According to Montesquieu, political liberty can only be protected if and only if the three branches of government are distinct from one another in terms of their people and job responsibilities, and they each serve as a check on one another's excesses. He believed that the British government of the eighteenth century provided a complete manifestation of this philosophy. However, as we shall see below, this was not an accurate portrayal of the British form of governance at the time and is most definitely not applicable today. Sections 4, 5, and 6 of the Federal Republic of Nigeria's 1999 Constitution (as amended) allocated the federation's powers among the three branches of

⁶⁰ New York University Law Review Online , source of law (part one): Executive orders, Unilateral Executive Action, and Faithful Executive of the Laws

⁶¹ E O Okoli and F C Okoli *Foundations of Government and Politics*, (African-FEP Publishers Ltd1990), 115.

⁶²Sharon Krause*The Spirit of Separate Powers in Montesquieu*, (Cambridge University Press,2000)
<<https://www.jstor.org/stable/1408037?seq=1>> accessed 28th September 2022.



government: the legislative, executive, and judicial branches. By doing this, the Constitution formalized the revered principle of separation of powers. Thus, in *Attorney General of the Federation v Guardian Newspapers Ltd.*⁶³ Karibi-Whyte, J.S.C:

A notable feature of the amended Constitution of 1979 is the distribution of the exercise of government functions among the three principal and separate departments of the Legislature, the Executive and the Judiciary. The Constitution also prescribed scope and limits for each department and that within its jurisdiction; the exercise of power is supreme. Accordingly, implicit in the power so vested, the one was not to interfere in the exercise of power of the other, except to the extent to which the Constitution confers such power of interference. This is the hallowed principle of the separation of powers first formulated by Montesquieu and now nearly perfected in the Constitution.⁶⁴ When discussing the powers conferred by sections 4, 5, and 6 of the 1999 Constitution, it is important to remember this lengthy dictum on the doctrine of separation of powers, which his lordship delivered under the heading: "The Nigerian Constitutional Structure." This is because the dictum established a general framework for the interpretation and comprehension of Part II of Chapter I of the Constitution, which is devoted to "Powers of the Federation."

In the case of *Inakoju v Adeleke*,⁶⁵ his lordship, Musdapher, J.S.C., as he was then known, enumerated the benefits of separation of powers as follows:

The principle of separation of powers under the Constitution is meant to guarantee good governance and development and to prevent abuse of power. Also, in the *Attorney General of Abia State v Attorney General of the Federation*, Belgore, J.S.C., as he then was, after outlining the basic principles of separation of powers, concluded thus: 'The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent

⁶³ (1999) 5 SCNJ 324

⁶⁴ See, also, *Ugba v Suswam* [2014] All FWLR (Pt. 748) 825 at 863 S.C.; *Ugwuanyi v NICON Insurance Plc* [2013] 11 NWLR (Pt. 1366) 546 S.C.; *Ugwu v Ararume* [2007] All FWLR (Pt. 377) 807 at 897 S.C.; *Adamawa State House of Assembly v Tijjani* [2012] All FWLR (Pt. 615) 300 C.A and *Omoworare v Omisore* [2011] All FWLR (Pt. 582) 1670 at 1723, per Ogunbiyi, J.C.A., as he then was.

⁶⁵ [2007] All FWLR (Pt. 353) 3 at 146 S.C.

friction.’⁶⁶ It is this strategic importance that has made Nigerian Courts to, in several decisions, hold as being unconstitutional actions by any of the three arms of government, which tend to undermine the doctrine of separation of powers.⁶⁷ The courts have also resisted attempts to make it infringe on this doctrine.⁶⁸ From the above therefore, law making clearly or legally belongs to the legislative arm of government, however, there are some gaps that are traditionally filled up by the executive arm of government referred to as EO.

Some past EO in the United States

When a president first assumes office, they typically work to immediately impose their will on the procedures and directives of the executive branch. Using EO is a great technique to accomplish this because they give presidents the power to change organizational dynamics and administrative procedures. Presidents have issued numerous noteworthy orders in the early stages of their administrations, notwithstanding Krause and Cohen's finding that there is no pattern to executive order frequency across a president's term.⁶⁹ Reagan's Executive Order 12291, which he released three weeks into his first term, and Clinton's EO 12836, which was issued in his second week in office and which revoked two Bush-era decrees that were unpopular with labour organizations, serves as stark examples of this approach.⁷⁰ Changes in party control of the White House will increase the motivation to implement reforms since incoming presidents will be more motivated to 'hit the ground running' and set themselves apart from their predecessors.⁷¹

Presidents should use EO at the conclusion of their terms just as they did at the beginning to leave a legacy. Making nominations, establishing new departmental policies, and carrying out

⁶⁶ [2003] FWLR (Pt. 152) 131 at 158 S.C.

⁶⁷ See *Kayii v Yilbuk* [2015] 7 NWLR (Pt. 1457) 26 S.C.; *Okumagba v Egbe* [1965] 1 All NLR 62 and *Atolagbe v Awuni* [1997] 9 NWLR (Pt. III) 1 at 35.

⁶⁸ See *Amoshima v State* [2011] 6-7 SC (Pt. III) 1 at 35

⁶⁹ Colin Provost and Brian J. Gerber *Political Control and Policy-Making Uncertainty in Executive orders: the Implementation of Environmental Justice Policy* (Cambridge University Press 2018) <<https://www.cambridge.org/core/journals/journal-of-public-policy/article/political-control-and-policy-making-uncertainty-in-executive-orders-the-implementation-of-environmental-justice-policy/01F8E1BB65AC836C6579062083DFBA7F>> accessed 28th September 2022.

⁷⁰ *ibid.*

⁷¹ James P Pfiffner *The Strategic Presidency: Hitting the Ground running* (2nd ed. Lawrence University Press 1996) <<https://kansaspess.ku.edu/978-0-7006-0769-3.html>> accessed 28th September 2022.



implementation responsibilities are all ways that outgoing presidents might use EO to bind their successors. The new president may decide to change course, but this pattern should be noted particularly when a president is handing the reins over to a rival party's candidate because that is when the pressure to finish an activity is greatest. A thorough pattern of last-minute directives given on a president's final days in office is revealed by even a basic inquiry. The White House handled executive orders during the final few months of the Ford administration without following the customary review procedures. Normally, EO requires approval from the Department of Justice's Office of Legal Counsel as well as OMB. However, for a few orders that administration officials sought to issue before January 20, 1977, this procedure was omitted.⁷² Ford, who placed seven orders on his final full day in office, was far from an outlier. In his final week, Carter issued 22 commands, including 10 on his final day.

Carter's final directives emphasize the solitary authority they can display. The agreement with Iran to obtain the release of the American hostages imprisoned there since November 4, 1979 was the subject of all 10 of the orders Carter issued on January 19, 1981. With minimal assistance from the incoming administration, negotiations had gone on throughout the campaign and into the transition period. On his final day in office, Carter declared that the Iranian government had agreed to free the hostages in exchange for the unfreezing of Iranian assets that had been held in the US and the formation of an arbitration process to resolve individual claims against Iran. Legal scholars speculated that any agreement. Legal experts predicted that any deal with such a broad influence on private interests would require legislation to enact; yet, Carter carried out the agreement entirely by the use of the executive power.⁷³ Carter's authority to unilaterally make and carry out the executive agreement with Iran and issue the implementing EO was upheld by the Supreme Court in *Dames & Moore v. Regan*.⁷⁴ Carter issued these last-minute orders as a lame-duck president who had been humiliated in a landslide defeat. Even so, he was able to write the final chapter of

⁷²The records of Ford's Domestic Council, for example, contain numerous examples of orders that were pushed through under substantial time pressure at the end of his term, without the standard reviews (Folder, Domestic Council Files, 1/18-19/77, Box 72, Robert T. Hartmann Files 1974-1977, Gerald R. Ford Library).

⁷³Clifford Lord &ors. Presidential Executive orders

<<https://archive.org/stream/presidentialExecutiveOrdersV1#page/n17/mode/1up>> accessed 1st June, 2021

⁷⁴(453 U.S. 654).

‘one of the most dramatic exercises of presidential power in foreign affairs in peacetime in United States history’,⁷⁵ with no interference from Congress, the Courts, or even the new president.

The importance of EO can be inferred from even a few cases that had profound consequences:

- i. Establishment of the Executive Office of the President (Roosevelt, EO 8248, September 8, 1939).⁷⁶
- ii. Internment of Japanese-Americans during World War II (Roosevelt, EO 9066, February 19, 1942).⁷⁷
- iii. Integration of the armed forces (Truman, EO 9981, July 26, 1948).⁷⁸
- iv. Requirement that government contractors implement affirmative action policies in employment practices (Kennedy, EO 10925, March 6, 1961; Johnson, Executive orders 11246, September 24, 1965).⁷⁹
- v. Requirement that major government regulations be justified by cost-benefit analysis (Reagan, EO 12291, February 17, 1981).⁸⁰

A national emergency can be declared via an EO, which allows for a wide range of unilateral acts. Orders do not necessarily need to have such a significant impact in order to be significant; acts with a narrow focus might nonetheless have a significant influence on specific constituencies or

⁷⁵ Harold H Koh *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Yale University Press, 1990) <<https://yalebooks.yale.edu/book/9780300044935/national-security-constitution>> accessed 28th September 2022.

⁷⁶ Executive order 8248, September 8, 1939, <<https://www.docstoc.com/documents/document/executive-order-8248-dated-september-9-1939-in-which-president-franklin-d-roosevelt-establishes-the-divisions-of-the-executive-office-of-the-president-and-defines-their-functions-and-duties>> accessed 22nd September 2022.

⁷⁷ Executive order 9066, February 19, 1942, <<https://www.history.com/this-day-in-history/fdr-signs-executive-order-9066>> accessed 22nd September 2022

⁷⁸ Executive orders 9981, July 26, 1948 <<https://www.britannica.com/topic/Executive-Order-9981>> accessed 22nd September 2022

⁷⁹ John F Kennedy ‘Executive order 10925, March 6, 1961’ <https://civilrights_movement.blogs.wm.edu/2015/02/17/john-f-kennedy-executive-order-10925-1961/> accessed 22nd September 2022; Johnson, History of executive orders 11246, September 24, 1965 <<https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history>> accessed 22nd September 2022.

⁸⁰ Executive order 12291, February 17, 1981 <[https://ballotpedia.org/Presidential_Executive_Order_12291_\(Ronald_Reagan,_1981\)](https://ballotpedia.org/Presidential_Executive_Order_12291_(Ronald_Reagan,_1981))> accessed 22nd September 2022.

interest groups. Congress frequently holds hearings and studies on executive orders as lawmakers consider the proper boundaries of the president's autonomous power.⁸¹

Some past EO in Nigeria

As previously mentioned in this book, Shehu Shagari, the president of Nigeria, issued an EO in 1983 ordering immigrants without valid immigration documents to leave the nation immediately or risk being detained in accordance with the law. The decree was allegedly issued in response to the nationwide religious unrest that erupted in Kano, Nigeria, in 1980.⁸² Most of the immigrants were West Africans and mainly Ghanaians. Over 2 million men, women and children were affected.⁸³ This is part of a recurring incident in West Africa, where immigrants are expelled for various reasons.⁸⁴ Example of such directives within West African countries include deportations from Ghana of Nigerians in 1954,⁸⁵ Côte d'Ivoire deportation of Togolese, Dahomeyans and Nigerians in 1958, and deportation of aliens (mostly Nigerians) from Ghana in 1969.⁸⁶

The main route from the West to Ghana went through Benin and Togo. The exit was constrained after the migrants arrived in Benin. Those who had already arrived in Benin were stranded in the country's major city's port of Cotonou, hoping to board a boat to Ghana. Due to a failed coup attempt the year before, Ghana's president Jerry Rawlings had to seal the main land border with Togo to prevent the unexpected arrival of more than 1 million people. After that, Togo also locked its borders with Benin. After being stranded for weeks, the Ghanaian authorities opened its

⁸¹ Peters Gerhard 'The American Presidency Project/Executive orders' <<https://www.presidency.ucsb.edu/da/ta/orders.php>> accessed 1st June, 2021.

⁸² Olaosebikan (n 14).

⁸³ M Solomonov, 'Ghana Must Go: Exodus from Nigeria Remembered' *Ghana news* <<https://yen.com.gh/16384-ghana-must-go-exodus-nigeria-remembered.html>> accessed on 22nd September 2022.

⁸⁴ M Peil 'The Expulsion of West African Aliens', [1971] (9) *The Journal of Modern African Studies* 205-229 <<https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/expulsion-of-west-african-aliens/6BEC1F3D10FDC8920098E1C74AA4BC21>> accessed on 22nd September 2022.

⁸⁵ Alien Compliance Order of 1954. <<https://www.britannica.com/topic/Alien-Compliance-Order>> accessed on 22 September 2022. M Peil (1974) 'Ghana Aliens' *The International Migration Review* Vol 8 3 367-381 <<https://journals.sagepub.com/doi/10.1177/019791837400800303>> accessed 22nd September 2022; T A Bosiakoh, 'The Role Of Migrant Associations In Adjustment, Integration And Development: The Case Of Nigerian Migrant Associations In Accra, Ghana' <<https://www.migrationinstitute.org/files/news/antwi-bosiakoh-1.pdf>> accessed 22nd September 2022.

⁸⁶ *ibid.*

borders, which prompted Togo to do the same so the Ghanaians could return home. Since then, the relationship between Nigeria and Ghana has improved.⁸⁷

In Nigeria, these are some of the recent EOs. They are: EO 1, which deals with the promotion of Transparency and Efficiency in the Business Environment.⁸⁸ Its goals are to make doing business in Nigeria easier by fostering efficiency and openness in the commercial environment. The EO calls for extremely broad innovations across the board in Ministries, Departments, and Agencies (MDAs), which are primarily engaged in generating money for the government. This order affects more than 105 MDAs. The Corporate Affairs Commission and the Nigeria Immigration Service are two of them. For the purpose of assisting and easing the application process for both domestic and foreign investors/businesses, Federal MDAs were required to post a complete list of requirements, including fees, on their websites and to guarantee that the list is validated and updated at all times.⁸⁹

Second, EO 2, which deals with the promotion of local content in public procurement by the federal Government.⁹⁰ Its objectives are, to grant preference to local manufacturers of goods and service providers in their procurement of goods and services.⁹¹ There are eight sections in the EO. It stipulates that any request for tenders must include the eligibility requirements for local manufacturers and the priority to be given to such manufacturers during the procurement process. It also directs all MDAs at the federal level to support local content in public procurement.⁹² The Order mandates that within 90 days of the order's date, the heads of MDAs at the federal level must propose policies to make sure that the Federal Government's purchases of goods and services make the best possible use of goods made in Nigeria and services offered by Nigerian citizens operating as sole proprietors, firms, or companies held entirely or predominately by them. There are numerous clauses in this Order that mandate government Ministries, Departments, and

⁸⁷ *ibid.*

⁸⁸ Executive order NO.1, <<https://www.easeofdoingbusinessnigeria.com/images/Documents/Executive-Order---Efficiency-and-Transparency-in-Business-Environment-.pdf>> accessed on 22nd September 2022.

⁸⁹ *ibid.*

⁹⁰ Executive order No.2, <<https://www.mondaq.com/nigeria/government-contracts-procurement-ppp/974798/discourse-executive-order-on-support-for-local-contents-in-public-procurement-by-the-federal-government39>> accessed 22 September 2022.

⁹¹ *ibid.*

⁹² *ibid.*



Agencies (MDA) give preference to Made-in-Nigeria goods and services in any procurement process, up to 40%. This is done in an effort to boost local production and entrepreneurship in Nigeria and lessen over-reliance on imported commodities that are also produced locally.⁹³

Third, EO.3, which deals with timely submission of annual budgetary estimate by all statutory and non-statutory agencies, including companies owned by the Federal Government.⁹⁴ This EO, which has eight sections and uses the 2016 and 2017 budgets as perfect benchmarks, addresses the issue of the delay in the National Budget's passage and assent caused by the MDAs' tardy production and transmission of budget estimates. It requires all MDAs to plan and submit their schedule of revenue and expenditure projections for the following three fiscal years on or before the end of May each year. The Ministers of Finance, Budget, and National Planning must receive these.⁹⁵ The Order further stipulates that MDAs shall on/or before the end of July every year, prepare and submit to the Ministers of Finance and Budget/National Planning their annual budget estimates, which shall be derived from the estimate of revenue and expenditure as projected in the three-years schedule earlier mentioned.⁹⁶

Fourth, EO 4 deals with the Voluntary Assets and Income Declaration Scheme (VAIDS)⁹⁷ its objectives are, to increase the level of Tax awareness and compliance, widen the tax net, and reduce incidence of tax evasion in the country. To grant tax payers (individuals and corporate entities) who have previously missed payments amnesty until March 31, 2018 (later extended to 30 June, 2018), the law has thirteen sections. In exchange for a "soft landing" that includes the waiver of fines and interest charges as well as protection from tax audit and prosecution, it grants tax payers amnesty so they can organize their tax affairs. Confidential information is likewise protected by it. The program includes all federal and state taxes, such as personal income tax, tertiary education tax, petroleum profit tax, value-added tax, capital gain tax, stamp duties, etc.⁹⁸

⁹³ *ibid.*

⁹⁴ Executive order NO.3, <<https://nipc.gov.ng/product/executive-order-no-002-of-2017/>> accessed 22nd September 2022.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Executive order NO.4, <<https://www.mazars.com.ng/Home/News/Latest-News/Voluntary-Assets-and-Income-Declaration-Scheme>> accessed 22nd September 2022.

⁹⁸ *ibid.*



For the previous six years of assessment (i.e., 2011–2016), eligible tax payers are required to report their assets, income, and gains from sources both inside and outside of Nigeria, as well as any taxes paid and unpaid. The Federal and State Government Tax Authorities will carry out the plan together.⁹⁹

EO 5, deals with the planning and Execution of Projects, Promotion of Nigerian Content in Contracts and Science, Engineering and Technology.¹⁰⁰ Its goals are the development of indigenous science and engineering talent and the promotion of technological innovation needed to boost national competitiveness, productivity, and economic activity, all of which will inevitably improve the achievement of the country's development goals across all economic sectors. Basis for Law The primary goal of the 18-section Executive Order 5 is to recognize the critical contribution that science, technology, and innovation make to the growth of the national economy, particularly in the area of promoting Made in Nigeria Goods and Services (MNGS). As a way of ensuring successful implementation of its provisions, the E.O.5 :- strategically emphasizes the importance of competence and approved codes and standards for the indigenous professionals being encouraged by its directives; prescribes collaboration between MDAs and the standard Organization of Nigeria (SON); states that punishment for any violating of its provisions shall be as stipulated in the public Service Rules and other relevant laws, including those governing Public Procurement and Professional practice in Nigeria; as well as establishes the Presidential Monitoring and Evaluation Council with the President and his Vice as Alternate Chairman to monitor progress of the implementation of the Executive order.¹⁰¹

Constitutionality or Otherwise of EO

There is no clear provision for the use of executive orders in the US Constitution. A President of the United States of America shall have the executive power, according to Article II, Section 1, Clause 1 of the Constitution. The president's many rights and responsibilities are outlined in

⁹⁹ *ibid.*

¹⁰⁰ Executive order NO.5 <https://scienceandtech.gov.ng/wp-content/uploads/2018/08/OfficialGazette_ExecOrderNo5.compressed.pdf> accessed on 22nd September 2022.

¹⁰¹ *ibid.*

Sections 2 and 3, including "he shall take care that the Laws are faithfully executed."¹⁰² The U.S Supreme Court has held¹⁰³ that all executive orders from the president of the United States must be supported by the Constitution, whether from a clause granting specific power, or by Congress delegating such to the executive branch.¹⁰⁴ Specifically, such orders must be rooted in the Article II of the US Constitution or enacted by the congress in statutes. Attempts to block such orders have been successful at times, when such orders either exceeded the authority of the president or could be better handled through legislation.¹⁰⁵

EOs have legal force only when they are based on the president's constitutional or statutory authority¹⁰⁶ yet; presidents take an expansive view of their authority. The courts typically stay out of the president's way, upholding EOs even when they are 'of -at best-dubious constitutional authority or issued without specific statutory authority'.¹⁰⁷ Between 1789 and 1956, state and federal courts overturned only 16 executive orders ;¹⁰⁸*Youngstown Sheet and Tube v. Sawyer*,¹⁰⁹ which overturned Truman's seizure of the nation's steel mills, is undoubtedly the most famous, more recently, the federal contractors, from hiring permanent replacements for striking workers, in *Chamber of Commerce v. Reich*.¹¹⁰ This is the exception, though, and in practice presidents have wide latitude in issuing orders. The attitude of the Supreme Court toward these excessive executive actions can be seen in *United States v. Midwest Oil Co.*,¹¹¹ in which the Court upheld President Taft's withdrawal on the ground that the long- continued practice of Presidents withdrawing land from public sale, coupled with the acquiescence of Congress, raised the

¹⁰²*Myers v United Sates*, 272 US 52 (1926), <<https://supreme.justia.com/cases/federal/us/272/52/>> accessed 1st June, 2021

¹⁰³ Southern Reporter: Cases argued and determined in the courts of Alabama, Florida, Louisiana, Mississippi <<https://catalogue.nla.gov.au/Record/1595477/Copyright?>> accessed 1st June, 2021

¹⁰⁴ James C Antieau and J William Rich, *Modern Constitutional Law*, (West Group, 199)5., <<https://books.google.com/books?id=hjdDAQAAIAAJ>> accessed 1st June, 2021.

¹⁰⁵ M Frank Wozencraft, 'OLC: the Unfamiliar Acronym' <<https://books.google.com/books?id=30rbDw5o8C&PG=PF35>> accessed 1st June,2021.

¹⁰⁶Fisher (n 20).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹*Youngstown Sheet and Tube v. Sawyer*(n 57)

¹¹⁰ (74 F. 3d 1322, 1996)

¹¹¹ 236 U.S. 459 (1915) <<https://supreme.justia.com/cases/federal/us/236/459/>> accessed 24th September 2022.



presumption that the withdrawals has been made pursuant to congressional consent to a recognized administrative power of the executive.¹¹²

One of the most important cases on Presidential EO in Nigeria is that of *A.-G., Abia v A.-G., Federation*.¹¹³ The Supreme Court ruled in that matter that the President behaved in accordance with section 315 of the 1999 Constitution when it came to the constitutionality of the Revenue Allocation (Federal Account, Etc.) (Modification) Order (Statutory Instrument No. 9 of 2002). As a result, it was determined that the published order complied with the Constitution and was therefore lawful. The contested order went into effect retroactively on May 29, 1999.

Also in Nigeria, EO 10, for example, has its roots in the Constitution of the Federal Republic of Nigeria, 1999 (Fourth Alteration, No. 4) Acts, 2017.¹¹⁴ The Act, which was a component of the Fourth Amendment to the Constitution, was approved by a majority of more than two-thirds of the State House of Assembly and passed in the closing hours of the Fifth Assembly. In contrast to Section 81 of the 1999 Constitution, which granted financial autonomy to the National Assembly and Judiciary at the Federal Level, Section 121 (3) of the Constitution did not fully cascade this autonomy to the state Level, according to a review of the provisions of Section 121 (3) prior to the amendment.¹¹⁵

In an attempt to correct this anomaly, the 4th Amendment to the Constitution amended section 121 (3) as follow – ‘Any amount standing to the credit of the (a) House of Assembly of a state; and (b) Judiciary, in the Consolidated Revenue Fund of the State shall be paid directly to the heads of courts concerned of the Act, which itself did not provide for the framework for the implementation of the Act. The allocation of funds to the other branches of government, despite the fact that the 4th Amendment was passed in 2017, continued to be completely under the control of the federal government, which blatantly disregarded the Act's provisions because it did not itself set up a

¹¹² Ibid, 474. Thus the Court seems to have recognized a rather unique source of Presidential power – long standing executive action coupled with congressional acquiescence.

¹¹³ *Attorney General of Abia State v Attorney General of the Federation* [2002] 3 SCNJ 158 AT 312; *Unongo v Aku*[1983] 2 SCNLR 332.<<https://www.judiciary.gov.ng/cases/attorney-general-abia-state-v-attorney-general-federation-d6d3a882-623d-4eb9-a3c0-bc1de4ef0773>> accessed 1st June, 2021.

¹¹⁴ The 4th Amendment, Act, 2022.

¹¹⁵ C Ozor ‘Revisiting the Legality of Executive order No. 10 of 2022’ *Business Day* <<https://businessday.ng/opinion/article/revisiting-the-legality-of-executive-order-no-10-of-2022/>>accessed 30th September, 2022.



framework for its implementation. A directive that would support the 4th Amendment while outlining clear modalities for its implementation was required because there was no implementation mechanism and state executives continued to disregard the requirements of the 4th Amendment.¹¹⁶

The purpose of EO 10 was to further ingrain strong democratic ideals in state governance and to establish a framework for the application of the 4th Amendment. In order to ensure compliance with the Act, EO 10 among other things grants the Accountant-General of the Federal the authority to approve the deduction from source from the funds allocated to any State of the Federation that fails to release funds intended for the State Legislature to any State Judiciary in accordance with the financial independence guaranteed by Section 121(3) of the constitution.

Ordinarily, laws do not specify how they will be implemented. As a result, guidelines that are more precise in their application and interpretation are needed. Regarding this, Section 315(2) of the CFRN 1999 (as amended) grants the appropriate authority (in this case, the Executive) the power to, at any time, by order, make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into compliance with provisions of the constitution. This is where executive orders in governance are most useful. EO 10 would have been completely unnecessary if the State Government had complied with Section 121(3) of the Constitution as Amended by ensuring that allocations due to the State Legislature and Judiciary were charged to the Consolidated Revenue Fund of the State as a First Line Charge and remitted to them in accordance with budgetary provisions.¹¹⁷

Comparison

The following differences between EO in the US and Nigeria can be seen. Firstly, the U.S. Constitution (Article 2, subsection 3), which, as already mentioned, incorporates the law of the constitution, refers to the execution of "laws." Article 3 Section 8 of the Constitution directly incorporates international treaties into municipal law, making them part of the laws to be carried

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

out by the president. Thus, the term "laws" in this context does not only refer to those made by the Congress and the Constitution.¹¹⁸ Contrarily, Section 5(1) (b) of the Nigerian Constitution makes it clear that the president may only carry out laws passed by the National Assembly and the constitution, and not treaties. This is supported by Section 12 (1), which states that "no treaty between the Federation and any other country shall have the force of law except to the extent that any such treaty has been enacted into law by the National Assembly," adopting the position in English law as well as the constitutions of other nations in former British Africa.

Secondly, both countries operate presidential system of government.¹¹⁹ Thirdly, whereas Nigeria has no prior experience in making EO because to its history of colonial and military rule, the US has done so since its early years of freedom. Fourth, both countries' courts have examined the validity of EO and given acceptable interpretations of its legitimacy or lack thereof. Fifth, based on all indications, both countries will keep using EO due to its convenience. Finally, none of the nations have used the EO as a means of criminal punishment for those who violate it.

Public Perception and Reactions to Executive Order

Opinions and reactions of the public to EO differ in both countries. In the US, Increasingly presidents have used executive order to obtain their national or foreign policy goals.¹²⁰ Presidents can only utilize one of their many weapons to take unilateral action by avoiding Congress by utilizing executive orders. The impact of executive orders on a president's approval ratings has not been scientifically studied in the literature. According to several studies, there is a negative implicit association between executive orders and presidential approval ratings.¹²¹ This thesis proposes a theory and set of hypotheses, tested at the aggregate and individual-level, posting a negative

¹¹⁸ Ben Nwabueze, *Constitutional Democracy in Africa* (1) (Spectrum Books Limited, 2003) 217.

<<https://www.scirp.org/%28S%28czeh2tfqyw2orz553k1w0r45%29%29/reference/ReferencesPapers.aspx?ReferenceID=2303155>> accessed 4th June, 2021.

¹¹⁹ *ibid*.

¹²⁰ T M Moe and G H William, 'Unilateral Action and Presidential Power: A Theory *presidential Studies Quarterly* (1996) (29) 850 – 872 < <https://home.uchicago.edu/~whowell/papers/UnilateralAction.pdf>> accessed 15 September, 2023.

¹²¹ K R Mayer and P Kevin, 'Unilateral Presidential Powers: Significant Executive Orders, 1949 – 1999', *Presidential Studies Quarterly* (2002) 32 (2) <https://www.researchgate.net/publication/227662383_Unilateral_Presidential_Powers_Significant_Executive_Orders_1949-99> accessed September 15, 2023.

relationship between the number of executive orders that a president issues and their subsequent presidential job approval ratings. According to Ouyang (2012), presidents are limited in the amount of executive orders they can issue due to diffuse support presidential approval ratings at an aggregate level. They are concerned that releasing too many executive orders may lead these ratings to decline.¹²² Although Ouyang (2012) does not discuss why president fear issuing too many executive orders and how this lowers diffuse support presidential approval ratings, this is the case because a majority of the public does not, generally, approve of the president's acting unilaterally in the form of executive order and issuing executive order may lower presidential approval rating in the aggregate.¹²³ Members of the public may disapprove of the use of executive orders because orders often bypass Congress,¹²⁴ or members of the public may disapprove of the president's acting unilaterally for ideological difference. Ouyang (2012) argues presidents constrain themselves because the use of executive order may lower the level of diffuse support the institution currently enjoys by negatively affecting the president's image in the public's view, and, during times of high diffuse support president would not want to do this.¹²⁵ There is a strong link between presidential job approval and rating and a president's 'image'.¹²⁶ McAvoy (2008) reports that Gallup's presidential approval question is unable to differentiate between image or surface and substance or depth, and therefore, anything that effects a president's image is lowered because the public reacts negatively to the use of unilateral powers by the president in form of issuing executive orders, as I theorize, then presidential approval rating may also act accordingly.¹²⁷ According to Reeves and Rogowski, who used data from five national representative surveys conducted between 2013 and 2015, public support for the deployment of direct presidential power

¹²² Y Ouyang, 'How Public Opinion Constrains Presidential Unilateral Action' Paper presented at the Annual Meeting of the American Political Science Association, *New Orleans, Louisiana, 2012* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2108245> accessed September 15, 2023 .

¹²³ Ibid.

¹²⁴ W G Howell, 'Unilateral Powers: A Brief Overview' *Presidential Studies Quarterly*, (2005) 35 (3); 417-39 <<https://voices.uchicago.edu/williamghowell/files/2017/05/Unilateral-Powers-A-Brief-Overview-15y8khw.pdf>> accessed September 15, 2023.

¹²⁵ (Ouyang n 122).

¹²⁶ G E McAvoy, 'substance Versus Style: Distinguishing Presidential Job Performance from Favorability', *Presidential Studies Quarterly* (2008) (38) 2: 284 – 289 <https://www.researchgate.net/publication/229932741_The_Polls_Presidential_Traits_and_Job_Approval_Some_Aggregate-Level_Evidence> accessed September 15, 2023.

¹²⁷ Ibid.

through executive orders is low but context-dependent.¹²⁸ The public disapproves of direct unilateral action; however, if the president act unilateral for the sake of national security or because Congress is in state of gridlock approval for unilaterally for the sake of gridlock approval for unilateral power use increases by 20 percent point.¹²⁹ Executive orders should be adversely correlated with presidential job approval ratings because the public often expresses low levels of approval for unilateral measures (including executive orders). Reeves and Rogowski suggest that if the public generally disapproves of the president using his or her unilateral power, particularly by issuing executive orders, this could have a negative effect on the president's job approval ratings.¹³⁰ On the other hand, popular sentiment and response in Nigeria varies slightly from those in the US. The majority of individuals here believe that the application of rules and regulations, including executive orders, is more important than their creation. Ayo Teriba, the chief executive officer of Economic Associates, responded to an executive order by saying that while it is a step in the right direction, it shouldn't be limited to the economy's scientific, engineering, and technology sectors alone.¹³¹ It is a policy that is going in the right direction, he added, but it shouldn't be limited to the sectors that the executive order is covering. It ought to be bigger. No foreigner should perform any tasks that a Nigerian is capable of doing. President Buhari has performed admirably, but they ought to broaden the scope of such executive decrees to protect Nigerians' access to employment, he said.¹³² The decree is a welcome development, according to Eze Onyekpere, another commentator at the Centre for Social Justice, but only if the government is prepared to put it into effect. It is a positive development, but is the federal government prepared to carry out the order? he remarked.” Remember that the vice president, Yemi Osinbajo, also issued an executive order on the topic of local content while he was serving as acting president.

¹²⁸ A Reeves and J C Rogowski, 'Unilateral Powers, Public Opinion and the Presidency', *Journal of Politics* (2016) 78 (1): 137 – 151 < https://www.researchgate.net/publication/283683140_Unilateral_Powers_Public_Opinion_and_the_Presidency> accessed September 15, 2023.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ifeoluwa Adeyemo, 'Experts citizens react to Buhari Executive Order on Local Content', *Premium Times*, February 6, 2018 < <https://www.premiumtimesng.com/news/top-news/257774-experts-citizens-react-buharis-executive-order-local-content.html>> accessed September 15, 2023.

¹³² Ibid.



I'm not sure how much of that order was executed before the release of the new one, though. If the administration is simply willing to put it into action, it is a welcome development. The Public Relations Consultants Association of Nigeria, or PRCAN, praised the President for signing the Executive Order in a press release that was given to Premium Times on Tuesday and was signed by John Ehiguese, its president, and Israel Opayemi, its publicity secretary. According to the group, doing so would make it illegal to grant foreign nationals visas to enter Nigeria in order to perform professional services that would otherwise be performed by Nigerian nationals. In their words, the organization, the president's decision was "exceptional, courageous, and an act of nationalism that puts our country first over and above the popular penchant of government officials for all things foreign, and particularly Caucasian." In addition, PRCAN assured President Buhari that it was prepared to act as a watchdog for the public relations and marketing communications sector, promising to provide the Presidency with information about foreigners running agencies illegally in defiance of the regulations governing the sector in Nigeria. Olayera Oluwaseyifunmi agreed, saying that while the executive order was admirable, it wasn't cause for celebration. Additionally, Danladi Mammani said the action will benefit regional job seekers in a remark on the matter on the Premium Times website. 'No country is an Island, the foreigners here already should remain but priority should be given to indigenous job hunters,' he said.¹³³

Conclusion

The history of EO has been traced in this work, and it has been made quite obvious that it is constitutional and has had a troubled past. In conclusion, executive orders (EO) are crucial to presidents, and their use reveals much more than regular behaviour or haphazard application. However, it is advised that EO not be used carelessly to usurp the authority of parliament or to replace law; they can be used as an effective weapon for social engineering and re-direction. The enactment of the EO is not only within the president's constitutional authority, but it is also a positive development that would break the haughtiness of State Executives who withhold funds from lower levels of government that would enable them to deliver the elusive "dividend of

¹³³ Ibid.



democracy" and give the judiciary the independence and autonomy that it sorely needs. The legislative branch of government would be usurped if the EO contained punitive or punishment provisions.