

Legal Critique of Instruments of Executive Branch Administration and Modes of Government Policy Implementation in Nigeria

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Abstract

Some instruments of executive branch administration have remained controversial in Nigeria. This is especially the case with executive orders which have been perceived as instruments that encroach into the legislative powers and consequently an egregious violation of the sanctity of separation of powers which undergirds the Constitution of the Federal Republic of Nigeria 1999 (as amended) [CFRN]. Against this background, the paper undertook a legal critique of instruments of executive branch administration which by extension are the tools of government policy implementation in Nigeria. The doctrinal legal research methodology was used and the sources of data were primary and secondary sources of information. The paper found that the CFRN did not grant to the president and the governors express power to issue executive orders in the discharge of their constitutional duties of implementing the CFRN and other laws, although the CFRN and other statutes grant express power to the president and governors to issue other executive instruments, such as regulations. By way of recommendation, the paper advocated that the CFRN should be amended to incorporate the express power of the president and a governor to issue executive orders as instruments of government policy implementation and that the courts should rise up to the occasion to invalidate executive branch instruments issued in violation of the CFRN or statutes, among others.

Keywords: *Instruments, Government Policy, Executive Branch, Executive Order*

1. Introduction

Instruments of executive branch administration have remained controversial in Nigeria. This is especially the case with executive orders which have been perceived as instruments that encroach into the legislative powers and consequently an egregious violation of the sanctity of separation of powers which undergirds the Constitution of the Federal Republic of Nigeria.¹ In issuing some of the instruments of executive branch administration, the issuing authorities sometimes veer off their constitutional authority, exceed the statutory bounds of their authority and arrogate to themselves powers not assigned to them. These are situations where the executive exercises excessive powers by arrogating to itself powers that are purely legislative or judicial. It has been argued that in either of the scenarios, the exercise of executive power would upend the delicate balance of the power dynamics that undergirds the proper functioning of a constitutional democracy, which is limited government.²

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¹ 1999 (as Amended) Cap C23, Laws of the Federation of Nigeria 2004 [CFRN]

² S Amadi, 'Executive Orders and Presidential Power in Nigeria: Comparative Lessons from the United States of America' (2019) (2) (1) *NILDS Journal of Law Review*, 72-93, 92

These concerns, therefore, re-echo the apprehensions expressed by Montesquieu on the need to prevent a unification of more than one of the fundamental powers of government in any single branch.³ The aim of such separation of powers is to prevent tyranny and abuse of power, to establish limited government and to protect the liberties and fundamental freedoms of the citizens. Arising from the foregoing, therefore, this paper will undertake a critique of the modes of exercising executive power in Nigeria with a view to reinforcing the delicate balance of power in Nigeria's constitutional democracy in the interest of limited government, good governance and respect for individual liberty.

2. Instruments of Executive Power Branch Administration in Nigeria

An instrument is defined as "[A] written legal document that defines rights, duties, entitlements, or liabilities ..."⁴ An 'instrument' seems to embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters, patent, rules, regulations, bye-laws, whether in writing or in print, or partly in both, as well as any written or printed document that may have to be interpreted by the Courts.⁵ For the purpose of this paper, an instrument would be defined as any written document issued by a president, governor, authorities or subordinate officials within the executive branch of government which contains the directives for the carrying out of the will of the law-makers as expressed in statutes.

Government policies are implemented through a number of mechanisms. The executive arm of government in a presidential system implements the constitution and the laws through the exercise of discretions vested in it by the constitution or donated to it by way of delegated legislation by the legislature.⁶ In Nigeria, some statutes of the National Assembly (NASS) and the House of Assembly (HoA) specify the instruments by which both the federal and State executive branch can

<https://ir.nilds.gov.ng/bitstream/handle/123456789/407/EXECUTIVE%20ORDERS%20AND%20PRESIDENTIAL%20POWER%20IN.pdf?sequence=1&isAllowed=y> accessed 24 August 2025

³ Z Akhtar, 'Montesquieu's Theory of the Separation of Powers, Legislative Flexibility and Judicial Restraint in an Unwritten Constitution' (2023) (4) (3) *Amicus Curiae*, 552-577, 553; S N Agu, 'Separation of Powers in Baron de Montesquieu: Philosophical Appraisal' (2024) (2) (1) *Indonesian Journal of Interdisciplinary Research in Science and Technology*, 37-58, 37

⁴ B A Garner (ed), *Black's Law Dictionary* (11th edn, USA: Thomson Reuters 2019) 869

⁵ E Beal, *Cardinal Rules of Legal Interpretation* (3rd edn, 1924) 55 cited in B A Garner (n 4) 869

⁶ M T Ladan, 'The Legal Effect and Limit of Presidential Executive Orders in Nigeria and the USA: A Review of Executive Orders 1-6 of 2017-2018 in Nigeria' <https://ir.nilds.gov.ng/bitstream/handle/123456789/71/THE%20LEGAL%20EFFECT%20AND%20LIMIT%20OF%20PRESIDENTIAL%20EXECUTIVE%20ORDERS%20IN%20NIGERIA%20AND%20THE%20USA%20A%20REVIEW%20OF%20EXECUTIVE%20ORDERS%201-6%20OF%202017%20-%202018%20IN%20NIGERIA.pdf?sequence=1&isAllowed=y> accessed 12 September 2025 [adding that executive order could at times be derived from inherent or residual power theories]; C V Odoeme, 'Executive Orders in Constitutional Democracies: A Critique', 6 https://www.researchgate.net/publication/356789114_EXECUTIVE_ORDERS_IN_CONSTITUTIONAL_DEMOCRACIES_A_CRITIQUE/link/61ad3b3eca2d401f27cafb46/download?tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 accessed 23 April 2024; J A Adeyeye, 'Executive Orders in Nigeria and United States of America: Constitutionality and Comparative Analysis' (2023) (3) *Cavendish University Law Journal*, 1-27, 6

competently execute and maintain laws as well as the government policies encapsulated in such laws. These include executive orders, proclamations, regulations, notices, and administrative memoranda/circular.

2.1 Executive Orders

The exact definition of executive order is not offered in the CFRN or in any other statute in Nigeria.⁷ It has been contended that no definition is offered of the concept even in the United States Constitution [US] or any congressional statute.⁸ Despite the regularity and the rich historical heritage enjoyed by the application of executive orders in the US, it is surprising that the term is neither directly captured in the Constitution nor generally provided for in any US statute.⁹ Thus, there is no statutory definition of the term and this has made resort to scholarly opinions on the subject inevitable. Okebukola and Kana offer what would appear to be a comprehensive explanation of the term 'executive order'. According to them, an executive order is:

A command directly given by the President to an executive agency, class of persons or body under the executive arm of government. Such a command is in furtherance of government policy or Act of the legislature. The executive order may require the implementation of an action, set out parameters for carrying out specific duties, define the scope of existing legislation or be a subsidiary instrument within the contemplation of section 37 of the Interpretation Act.¹⁰

In this paper, the term 'executive order' will be used to denote a written directive issued by a head of the executive branch of government at any level of governance intended to guide or instruct persons or bodies within the relevant executive branch on the implementation of government policies.

2.2 Proclamations

A Proclamation is an official declaration issued by a person, usually the head of the executive branch of government to make certain announcements.¹¹ It is an instrument used in making public announcements relating to certain national issues, such as the proclamation of a state of emergency, the declaration of public holidays, the commemoration of anniversaries, and the celebration of important national festivities or events. Proclamations constitute one of the instruments employed

⁷ E O Okebukola and A A Kana, 'Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools' (2012) *NAUJILJ*, 59-68; C V Odoeme (n 6) 2; J A Adeyeye (n 6) 5

⁸ A A Graber, 'Executive Orders: An Introduction' (2021) *Congressional Research Service*, 1-21, 1 <<https://crsreports.congress.gov/product/pdf/R/R46738>> accessed 21 August 2025

⁹ J C Duncan, 'A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role' (2010) (35) *Vermont Law Review*, 333-411, 333; Congressional Research Service, 'Executive Orders: Issuance, Modification, and Revocation' (Report of the US Congressional Research Service, updated 29 March 2021) 1 <https://www.congress.gov/crs_external_products/R/PDF/R46738/R46738.1.pdf> accessed 5 November 2025

¹⁰ Okebukola and Kana (n 7) 61

¹¹ Library of Congress, 'Executive Order, Proclamation, or Executive Memorandum?' <<https://guides.loc.gov/executive-orders/order-proclamation-memorandum>> accessed 1 September 2025

by the executive branch of governments to implement government policies in Nigeria. A proclamation is a formal public statement or a formal act of giving public notice.¹² For instance, the president or a governor can issue proclamation to grant amnesty or State pardon. Also, the CFRN empowers the president to declare a state of emergency in the federation or any part of it through the issuance of proclamation.¹³ Similarly, the CFRN empowers the president to proclaim the commencement of the first session of the National Assembly (NASS) and to proclaim its dissolution at the end of its four-year term, by means of a proclamation.¹⁴ The governor of a State has similar powers in relation to a House of Assembly (HoA).¹⁵

2.3 Regulations

Regulations are species of subsidiary instruments made as a result of delegated power or authority and they are veritable tools utilised by the executive branch in the implementation of government policies in Nigeria. In Nigeria, virtually all Acts of the NASS and Laws of States' Houses of Assembly contain express provisions delegating the power to make subsidiary legislation, in the form of regulations, orders, rules or bye-laws to relevant agencies, persons and authorities within the executive and judicial arms of government in relation to the express powers so donated. Examples of principal statutes that delegate power to non-legislative bodies to make subsidiary legislation include: the Terrorism (Prevention and Prohibition) Act,¹⁶ the Armed Forces Act,¹⁷ the National Security Agencies Act,¹⁸ the Quarantine Act,¹⁹ and Section 46(2) of the CFRN.²⁰ The delegation or donating clause of the principal statute usually stipulates the exact scope and subject-matter of the delegated legislation. Regulations and rules of courts are the most common forms of subsidiary instruments that are used in Nigeria. It should be noted that it is the specific principal legislation that determines the form of subsidiary legislation that should be made in any given case or under a given statute.

2.4 Notices

Notices are another set of instruments used in the implementation of government policies in Nigeria. There are instances where statutes expressly require that the executive branch is to carry out an action or implement a government policy by notice published in the Government Gazette.

¹² T Waller, 'The Constitution, Executive Orders, Memo's, and Proclamations' (28 February 2025) <<https://thinkequitable.com/constitutionandexecutive-orders/>> accessed 2 September 2025

¹³ CFRN, s 305(1)

¹⁴ Ibid, s 64(3)

¹⁵ Ibid, s 105(3)

¹⁶ No.15 of 2022 [Section 39(1) donating to the Attorney-General of the Federation the power to make regulations]

¹⁷ Cap A20, LFN 2004 [Sections 283 and 284 donating to the President the power to make regulations, rules, orders, and other instruments]

¹⁸ Cap N74, LFN 2004 [Section 6 donating to the President the power to issue an instrument necessary to administer the Act].

¹⁹ Cap Q2, LFN 2004 [Section 4 donating to the President the power to make dangerous disease containment regulations and Section 8 vesting similar power in a governor in respect of a State]

²⁰ [donating to the Chief Justice of the Federation the power to make rules governing the procedure for enforcement of the fundamental rights stipulated in chapter IV of the CFRN]

This section examines some of these instances. Under the Marriage Act,²¹ there are two notices required to be issued. The first notice is required to be issued by the President, the purpose of which is to divide Nigeria into marriage districts for the purpose of the implementation of the Act and to alter such districts.²² Both actions are to be achieved through the issuance of notices published in the Federal Government Gazette.²³ The second is the notice is required to be issued by the Minister of Interior granting marriage licence to a place of worship for the celebration of marriages under Section 6(1) of the Marriage Act.

Similarly, the Public Holidays Act²⁴ requires that national public holidays be declared and enforced by means of notices. For instance, the Minister for Internal Affairs may by public notice declare any day in any year as a special holiday.²⁵ Under the Federal Competition and Consumer Protection Commission Act,²⁶ the Federal Competition and Consumer Protection Commission is empowered to issue guidelines and notices for the effective implementation and operation of the provisions of the FCCPCA.

2.5 Administrative Memoranda and Circulars

Administrative memoranda and circulars are the official communications exchanged among members of the executive branch of government. They are acts of the president or governor or other heads of Ministries, Departments and Agencies (MDAs) of government on matters relating to internal administration which the issuing authority desires to bring to the attention of subordinate officials for notice or implementation of the matter stated therein. On a daily basis, government bureaucracies, both at the federal, State and the local government levels, issue circulars and administrative memoranda and use these instruments to communicate to officials under the issuing body or authority the decision of government and demanding actions to be taken in line with government decisions.

3. Legal Framework for the Executive Branch Implementation of Government Policies in Nigeria

The CFRN is founded on the principle of separation of powers.²⁷ Accordingly, the CFRN provides for the legislative, executive and the judicial powers of the Federal Republic of Nigeria. It vests the legislative powers of the federation in a NASS established for the federation²⁸ and also vests the legislative powers of a State of the Federation in a HoA established for each State.²⁹ The CFRN similarly vests the executive powers of the federation in the President of the Federal Republic of

²¹ Cap M6, Laws of the Federation of Nigeria, 2004

²² Ibid, s 3

²³ Ibid

²⁴ Cap P40, Laws of the Federation of Nigeria, 2004

²⁵ Ibid, s 3

²⁶ No. 2018 [FCCPCA], s 163(1)

²⁷ L O Nwauzi, 'The Doctrine of Separation of Powers under the Nigerian Constitution' (2022) (80 (2)) *International Journal of Social Sciences*, 113-127, 117

²⁸ CFRN, s 4(1)

²⁹ Ibid, s 4(6)

Nigeria.³⁰ The federal executive power vested in the president may subject to the provisions of the CFRN and any law enacted by the NASS, be exercised by the president either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the federation.³¹ The federal executive power personalised in the president, “[S]hall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all laws with respect to which the National Assembly has for the time being, power to make laws”.³²

The CFRN also provides for the executive powers of a State of the Federation which is vested in a governor of the State.³³ The State executive powers which are personalised in the governor, may subject to the limitations imposed by the CFRN and any law enacted by a HoA, be exercised by the governor either directly or through the Deputy-Governor and Commissioners of the Government of the State or officers in the public service of the State.³⁴ The CFRN delineates the scope of gubernatorial powers and stipulates that they, “[S]hall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of a State and to all matters with respect to which the House of Assembly has, for the time being, power to make laws”.³⁵ Similarly, the judicial powers of the Federation are vested in the courts established for the federation³⁶ while the judicial powers of a State are vested in the courts established for each State.³⁷

However, while the presidential and gubernatorial powers to ‘execute and maintain’ the CFRN, legislation of the NASS and the HoA, and all matters that can be competently legislated upon by the NASS or a State HoA are specifically stipulated in the CFRN, the means by which the ‘execution’ and ‘maintenance’ are to be actualised, are not explicitly provided for in the CFRN. While the CFRN did not specifically prescribe the mode of execution and maintenance of the CFRN and legislation to be employed by the president or a governor, some laws of the NASS and HoA prescribe the required mode by which the president or a governor, as the case may be, is to carry out the execution and maintenance of such specific laws.³⁸ The modes of execution of laws prescribed by NASS and HoA laws require that a president or governor would issue certain instruments in carrying out his functions. These include executive orders, proclamations, regulations, notices, and administrative memoranda/circular and have been examined under the preceding section of this paper.

³⁰ Ibid, s 5(1)(a)

³¹ Ibid

³² Ibid, s 5(1)(b)

³³ Ibid, s 5(2)(a)

³⁴ Ibid

³⁵ CFRN, s 5(2)(b)

³⁶ Ibid, s 6(1)

³⁷ Ibid, s 6(2)

³⁸ H Okoeguale, ‘Strengthening Legislative Controls over Delegated Legislation in Nigeria’ (2019) (10) (2) *NAULJILJ*, 35-41, 38

4. Legal Critique of Instruments of Executive Branch Implementation of Government Policies in Nigeria

In Nigeria, Section 5 of the CFRN provides the legal justification for the issuance of instruments of executive branch administration by a president or governor. This is especially true of executive orders which are empowered and limited by Section 5 of the CFRN. In *Ugochinyere v President of the Federal Republic of Nigeria*,³⁹ the Federal High Court, Abuja Division, per Ojukwu, J., held that Section 5(2)(a) of the CFRN empowers the president to issue executive orders relating to routine administrative matters and internal operations of federal agencies, policies and programmes and as long as it does not encroach into the legislative and judicial powers.⁴⁰ From the above judicial pronouncement, three parameters have been established for the validity of an executive order. These parameters are in this paper referred to as 'analytics'. The analytics from which the validity of an executive order can be determined as established in Ugochinyere's case are:

- (i) The executive order must relate to routine administrative matters and internal operations of federal agencies, policies and programmes;⁴¹
- (ii) The executive order must not encroach into the powers of the legislature as delineated under the CFRN;⁴² and
- (iii) The executive order must not encroach into the judicial powers as delineated under the CFRN.⁴³

Similarly, in *Attorney-General of Abia State v Attorney-General of the Federation*,⁴⁴ the Supreme Court of Nigeria reached the same conclusion as regards the validity of the Presidential Executive Order for the Implementation of Financial Autonomy for the State Legislature and State Judiciary and for Other Related Matters⁴⁵ when it held that:

S.5(1) of the CFRN is very clear as to its intention and range. It is to be noted that it is made subject to other over riding provisions of the CFRN. The provision is to empower the President to make Executive Orders to guide the various agencies of the FGN Federal Government to execute its policies particularly where legislation is unclear or nonexistent on the point. Before specific laws are put in place, it is merely a handmaid to the President in ensuring by publication of policy directions, the agenda of the Presidency on matters with respect to which the National Assembly can make laws. There is no doubt that appropriation and disbursement of funds for the State Judiciary are not matters with respect to which the National Assembly can make laws. Undoubtedly, it is *ultra vires* of Mr. President to alter or modify section 121 of

³⁹ [Unreported] Suit No.: FHC/ABJ/CS/740/2018 (Judgment of the Federal High Court of Nigeria, Abuja Judicial Division, delivered on Thursday, 11 October 2018 by Honourable Justice Ijeoma L. Ojukwu)

⁴⁰ (n 39) 28

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ (2022) 16 NWLR (Pt 1856) 205

⁴⁵ No. 10 of 2020 [EO10]

the Constitution in any form whatsoever. Order 1(a) appears to me to either be a repetition or modification of section 121(3) of the Constitution. In conclusion, the contents of the Presidential Executive Order particularly sections 2-7 are *ultra vires* the powers of the President of the President. It is null and void and of no effect.⁴⁶

From the dicta of the Supreme Court of Nigeria as expressed in both the leading and concurring judgments of the Court, there seems to be an acceptance that an executive order is not bad in itself, and that Section 5(1)(b) of the CFRN authorises a president to issue executive orders. However, as circumscribed by the opinion of the Supreme Court, an executive order issued pursuant to Section 5(1)(b) of the CFRN will be valid and possess the force of law where it is issued with authority and where it does not violate the law. From both the leading and concurring judgments of the Court, the validity of an executive order can be determined by using the following analytics:

- (i) The executive order must not be contrary to the principles of federalism enshrined in the CFRN;⁴⁷
- (ii) The executive order must not violate the principle of separation of powers that undergirds the CFRN;⁴⁸
- (iii) Executive orders are mainly to guide the various agencies of the federal government to execute the policies of the executive branch, particularly where legislation is unclear or non-existent on the point;⁴⁹
- (iv) Before specific laws are made on a subject or matter, an executive order is merely a handmaid to a president in ensuring by publication of policy directions, the agenda of the presidency on matters with respect to which the NASS can make laws;⁵⁰
- (v) When a president, either by an act of aggrandisement or otherwise, exercises power not vested in him by the CFRN or statute, or in excess of the powers vested in him by the CFRN or statute, he acts *ultra vires*.⁵¹

The approach adopted by the Nigerian courts appears to be similar to the tests laid down by the US Supreme Court for the determination of the validity of an executive order as an instrument of government policy implementation. These tests were laid down in *Youngstown Sheet & Tube Co. v Sawyer*.⁵² In that case, Justice Jackson, propounded the following three analytics from which the decision or determination of the validity of an executive order can be approached, viz:

- (i) When the president acts pursuant to an express or implied authorisation of Congress, his authority is at its maximum, for it includes all that he possesses in his own right including all that Congress can delegate. In these circumstances and in these only, may he be said (for what it may be worth) to personify the federal sovereignty;

⁴⁶ (n 44) 493

⁴⁷ Ibid, 493

⁴⁸ Ibid, 493

⁴⁹ Ibid, 493

⁵⁰ Ibid, 493

⁵¹ Ibid

⁵² 343 US 579 (1952)

- (ii) When the president acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law;
- (iii) 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. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to power at once so conclusive and preclusive must be scrutinised with caution, for what is at stake is the equilibrium established by our constitutional system.⁵³

5. Application of the Jacksonian Analytics in the Critique of Executive Branch Instruments

From the dictum of Justice Jackson, an executive order can be tested for its validity by engaging the following parameters which shall be referred to as the Jacksonian analytics: (i) where it is based on express or implied provision of the law (ii) where there is no express law authorising or denying the issuance of an executive order; and (iii) where an executive order is contrary to an express or implied provision of a law or undermines congressional/legislature's law-making power. It is observed that the three-pronged validity test for an executive order propounded by Jackson is similar to the parameters for determining the validity of an executive order propounded in the Nigerian cases of *Ugochinyere v President of the Federal Republic of Nigeria*⁵⁴ and *Attorney-General of Abia State v Attorney-General of the Federation*.⁵⁵

It should be noted that although the analytics to be analysed and applied in this section were formulated in relation to the tests of validity of executive orders, the present author submits that the analytics are also appropriate for the determination of the validity of the other instruments of executive branch administration, such as regulations, notices, proclamations, circulars and administrative memoranda. It is, therefore, proposed to analyse the validity of instruments of executive branch administration used in Nigeria by applying the Jacksonian analytics.

⁵³ (n 52) 635 [Jackson J, concurring opinion]

⁵⁴ (n 39)

⁵⁵ (n 44)

5.1 Instruments of Executive Branch Administration Issued Pursuant to Express or Implied Statutory Authorisation

There appears to be considerable unanimity both in the literature⁵⁶ and in judicial decisions⁵⁷ that an instrument of executive branch administration issued pursuant to an express or implied statutory authorisation is valid. This will be especially so where the issuer of the instrument stays clearly within the express or implied limits imposed by the statute from which the authority to issue the instrument is derived. Express statutory authorisation occurs where the CFRN or Act of the NASS or a Law of a HoA mentions that a president or governor, as the case may be, is vested with the power to carry out any particular act. In other words, express powers are the powers expressly mentioned and granted to a president or governor in the CFRN or any other statute. For instance, the CFRN expressly mentions the following powers as belonging to the President of the Federal Republic of Nigeria: power to make regulations on citizenship;⁵⁸ power to assent to bills or to veto bills;⁵⁹ power to enter into treaties within foreign countries subject to their domestication through an Act of the NASS;⁶⁰ power to prepare and present for the NASS's approval, budget estimates for the withdrawal of public funds;⁶¹ power to authorise expenditure from the public purse in default of appropriation by the NASS;⁶² power to appoint Ministers of the Government of the Federation;⁶³ power to appoint special advisers;⁶⁴ power to appoint chairmen and members of certain executive bodies, subject to senatorial confirmation,⁶⁵ except in the case of the ex-officio members of such executive bodies;⁶⁶ and the power to terminate the appointment of a chairman or member of any federal executive body established under Section 153 of the CFRN, subject to senatorial approval. In addition, various Acts of the NASS expressly mentions certain powers as belonging to the president.⁶⁷

On the other side of the divide are the implied constitutional or statutory powers of the president under the CFRN. Driesen and Banks assert that the US president possesses not only express powers but also implied powers under the US Constitution.⁶⁸ Implied powers are powers that are not specifically expressed or mentioned in the CFRN or in a statute but which follow as a concomitant from the enumerated powers specifically granted to an authority established under the CFRN or a statute. Examples of implied powers abound in the CFRN as much as they can also be found in

⁵⁶ J A Adeyeye (n 6) 9; E O Okebukola and A A Kana (n 7); M T Ladan (n 6); S Amadi (n 2) 85-86

⁵⁷ *Ugochinyere v President of the Federal Republic of Nigeria* (n 39); *Attorney-General of Abia State v Attorney-General of the Federation* (n 44); *Youngstown Sheet & Tube Co. v Sawyer* (n 52)

⁵⁸ CFRN, s 32(1)

⁵⁹ *Ibid*, s 58(3) and (4)

⁶⁰ *Ibid*, s 121(1) and (2)

⁶¹ *Ibid*, s 81(1)

⁶² *Ibid*, s 82

⁶³ *Ibid*, s 147(1)

⁶⁴ *Ibid*, s 151(3)

⁶⁵ *Ibid*, s 153(1)

⁶⁶ *Ibid*, s 153(2)

⁶⁷ *Ibid*, s 157(1)

⁶⁸ D M Driseen and W C Banks, 'Implied Presidential and Congressional Powers Powers' (2020) (41) *Cardozo Law Review*, 301-1365,1324

other statutes. Under the CFRN, for instance, the power to appoint Ministers of the Government of the Federation granted to the president under Section 147(1) of the CFRN carries with it an implied power of the president to terminate the appointment of any of the Ministers or to dissolve the entire cabinet.

However, this important power to fire is not mentioned anywhere in the CFRN. In another instance, the power to enter into treaties by the president is not an express power under the CFRN. Thus, neither Section 12 of the CFRN nor the Treaties (Making Procedure, Etc) Act⁶⁹ expressly mentions or grants the power to enter into or negotiate treaties with foreign governments to the president, as is the case with the US Constitution which makes express grant of treaty-making power to the president.⁷⁰ However, the power is implied from Sections 5(1)(b) and 12 of the CFRN, the power of the president to appoint ambassadors, high commissioners or other principal representatives of Nigeria abroad under Section 171(2)(c) of the CFRN as well as the TMPA.

By the same token, a governor is given express and implied powers under both the CFRN and statute. Some of a governor's express powers include: power to appoint Commissioners of the Government of a State subject to confirmation of such appointment by the HoA;⁷¹ power to appoint special advisers;⁷² and power to appoint the chairmen and members of certain State executive bodies, and of State Boards, governing bodies of statutory corporations and companies in which the State has controlling interest, and of higher educational institutions,⁷³ among others. In addition to the express powers enumerated above, a governor also has implied powers, one of which is the power to remove from office Commissioners of the Government of the State. This implied removal power derives from the appointment power donated to a governor under Section 192(1) of the CFRN. There are express and also implied powers of a governor under the various laws of a State in Nigeria.

The sum total of this analysis is that where the exercise of executive powers by a president or governor is based on express or implied constitutional or statutory authorisation as outlined above, such exercise of executive power and by extension, an instrument of executive branch administration issued pursuant to such constitutional or statutory enablement would be valid. This was the view of the US Supreme Court in *Youngstown Sheet & Tube Co. v Sawyer*.⁷⁴ In that case, the Supreme Court, by a majority of 6:3, held that there was no express or implied constitutional or statutory authority for the executive order issued by President Truman of the US directing the Secretary of Commerce to seize and operate compulsorily most of the country's steel mills, for the purpose of ensuring the steady supply of steels necessary for the prosecution of the Korean war in which the US forces were participants. The President's reliance on the inherent power of the aggregate of the President's power was rejected by a majority of the Court who insisted that the US Constitution did not give the President such power and that the Harley-Taft Act upon which

⁶⁹ No. 16 of 1993, now Cap T20, Laws of the Federation of Nigeria 2004 [TMPA]

⁷⁰ US Constitution 1787, art 2(2)

⁷¹ CFRN, s 192(1) and (2)

⁷² Ibid, s 196(1)

⁷³ Ibid, s 197(1)

⁷⁴ (n 52)

the President predicated the exercise of his power did not give him the power of compulsory acquisition of private property without congressional authorization.

In *Ugochinyere v President of the Federal Republic of Nigeria*,⁷⁵ the Federal High Court upheld the power of President Muhammadu Buhari to issue Presidential Executive Orders on the Preservation of Suspicious Assets Connected with Corruption and Other Relevant Offences⁷⁶ pursuant to Section 5(1)(b) of the CFRN. The Court reasoned that Section 5(1)(b) of the CFRN expressly vests in the President power to execute and maintain all Acts of the NASS; and that since the NASS has enacted the various anti-corruption laws in the country, it was the duty of the President to execute and maintain them. The Court also held that in exercise of his power of execution and maintenance of the anti-corruption laws enacted by the NASS, the President could issue executive order.

However, the Court imposed stringent conditions on the presidential power to issue executive instruments by stating that such executive order must operate merely as an internal administrative tool for co-ordinating the implementation activities of the executive branch, and should not encroach into the legislative and judicial powers vested in the legislature and the judiciary under the CFRN. The Court found that EO6 is valid as same was issued in pursuance of express constitutional authorisation and it did not breach any provisions of the CFRN.

5.2 Instruments of Executive Branch Administration Issued Where Statutory Authorisation is Neither Expressly Granted Nor Denied

This second limit in the Jacksonian analytics occurs where a president or governor exercises executive power in circumstances in which there is absence of express statutory authorisation for the action but there is also no express statutory prohibition of same. This will be the case where no specific legislation has been enacted on a subject-matter within the legislative competence of the appropriate legislature. Another instance would be where the CFRN or other statute requires a president or governor to act but did not specify that the president or governor will act pursuant to a law. Jackson holds the view that in this situation, a president or governor can only rely on his own independent powers. He, however, acknowledges that there is a zone of twilight in which both the president or governor, as the case may be, may possess concurrent powers with the legislature and in which the distribution of authority is uncertain. Jackson did not cite examples of such situation of uncertain distribution of authority as between a president or governor and the relevant legislature in the US Constitution.

Jackson argued that in situations of absence of express constitutional or congressional authorisation or prohibition, legislative “inertia, indifference or quiescence may sometimes at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”⁷⁷

⁷⁵ (n 39)

⁷⁶ No. 006 of 2018 [EO6]

⁷⁷ *Youngstown Sheet & Tube Co. v Sawyer* (n 52) 637

Jackson further held that, “[I]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law”.⁷⁸ Ogunwumiju, JSC, in his concurring judgment in *Attorney-General of Abia State v Attorney-General of the Federation*⁷⁹ seems to have accepted this possibility when he posited that the purport of Section 5(1) of the CFRN is, “to empower the President to make Executive Orders to guide the various agencies of the FGN [sic] Federal Government to execute its policies particularly where legislation is unclear or nonexistent on the point.” Ogunwumiju further held that, “Before specific laws are put in place, it is merely a handmaid to the President in ensuring by publication of policy directions, the agenda of the Presidency on matters with respect to which the National Assembly can make laws”.⁸⁰ However, the situations that would bring an executive instrument, such as an executive order, regulation, proclamation or notices within this second limb of the Jacksonian analytics are indeed rare.

5.3 Executive Instruments Incompatible with the Express or Implied Provisions of the CFRN or Statute

This is the third limb of the Jacksonian analytics as propounded in the *Youngstown* case,⁸¹ and this limb relates to situations where the executive instruments issued by the executive branch stand expressly against the express or implied provisions of the constitution or congressional statute. In the context of Nigeria, this will occur where a president or governor, in the exercise of his executive power, adopts a measure that is contrary to, conflicts with or is otherwise incompatible with the expressed or implied will of the framers of the CFRN or the will of the legislature as expressed in a statute. In such a case, Jackson counseled that the president or governor concerned can rely only upon his own constitutional or statutory power, excluding any constitutional or statutory power vested in the legislature over the same matter.

There are a number of situations that can result in the assertion of an executive power in a manner that is incompatible with the CFRN or the legislature’s expressed or implied will. These situations include: where the CFRN or statute did not grant to a president or governor the power claimed; where the power claimed is given to another person or agency within the executive branch; where the power claimed is expressly or impliedly granted to the legislature or the judiciary by the CFRN or other legislative instrument; where the CFRN or other statute expressly or impliedly assigns responsibilities for the performance of an act to an authority in the executive branch other than the president or a governor; where the power is granted to the president or governor under the CFRN or other statute, but the president or governor exceeds the scope of his powers by making additional provisions not found in the enabling statute, or by expanding or amending the provisions of the enabling statute, or otherwise acting inconsistently with the express or implied provisions of the enabling statute; or where the CFRN or other statute grants to the president or governor power to act but anchors the exercise of the power on a law enacted by the relevant legislature.

⁷⁸ Ibid

⁷⁹ (n 44) 493

⁸⁰ Ibid

⁸¹ (n 52)

Jackson held that where a president or governor exercises power that is inconsistent with the express or implied will of the legislature as stipulated in the CFRN or other statute, the president's or governor's power is at its lowest ebb. In such a case, the president or governor will have to rely only upon his own constitutional or statutory power, excluding the power vested in the legislature by the CFRN or other statute. In other words, the president or governor will have to restrict himself to the powers expressly or impliedly conferred on him by the CFRN or other statute. The president or governor cannot claim a power that is expressly or impliedly granted to the legislature. The sum total of this analysis is that an executive of executive branch administration that contradicts, purports to supplant or conflicts with the express or implied provisions of the CFRN or other statute is invalid and liable to be set aside by the court.

In *Youngstown Sheet & Tube Co. v Sawyer*,⁸² the US Supreme Court by a majority of 6:3 held that Executive Order 10340 issued by President Truman was an exercise of power that was inconsistent with the manifest constitutional and congressional intention, and accordingly invalid. Similarly, in *Attorney-General of Abia State v Attorney-General of the Federation*,⁸³ the Nigerian Supreme Court held that EO10 was an invalid exercise of executive power in that through the executive order, the president sought to perform the function of the State Governors, in breach of Nigeria's federal principles espoused in the CFRN.⁸⁴ The Supreme Court also held that EO10 encroached on the constitutional principle of separation of powers, as the president purported to rewrite or amend the CFRN by means of the executive order, and that enactment or amendment of legislation is the exclusive prerogative of the legislature.⁸⁵ The Court further stated that the president arrogated to himself the power to seize the allocation of a State in the Federation Account and to pay same directly at source as enforcement measure of EO10, when the CFRN did not give to the president such power.⁸⁶

There has been a large pool of decisions of the US courts which have upheld the exercise of presidential power that were found to conform to constitutional or congressional donation of power. In *The Prize Cases*,⁸⁷ President Lincoln proclaimed a blockade of southern ports in April 1861 and thus directed the seizure of vessels bound for Confederate Ports. These presidential actions were taken without congressional authorisation. By July 1861, Congress authorised President Lincoln to declare a state of insurrection in the US by an Act of 13th July 1861. The Congress subsequently by an Act passed on 6th August 1861 – about three months after the commencement of presidential military action, retroactively ratified all Lincoln's military actions. The Supreme Court was called upon to determine whether President Lincoln acted within the confines of his presidential powers as defined by Article II of the US Constitution when he took military actions without a formal congressional declaration of war. The Supreme Court held that the President had the power to act as Lincoln did and that a state of war existed *de facto* after the

⁸² (n 52) 637

⁸³ (n 44)

⁸⁴ *Ibid*, 491-492

⁸⁵ *Ibid*, 489-490

⁸⁶ *Ibid*, 492-493

⁸⁷ 67 US 635 (1863)

firing on Fort Sumter, on 12 April 1861, and of which fact the Supreme Court is bound to take judicial notice. It was further held that although neither Congress nor the President can declare war against a State of the Union, when States waged war against the US government, the President was “bound to meet it in the shape it presented itself, without waiting for Congress to baptise it with a name”.⁸⁸

In *United States v Midwest Oil Co.*,⁸⁹ the US Supreme Court upheld the validity of a proclamation⁹⁰ issued by President Glenver Cleveland which temporarily withdrew all public lands in California and Wyoming from private acquisition and mining of mineral oil by private persons as was the case under previous congressional law. The President issued the proclamation upon the advice of the Director of Geological Surveys who had made a report to the Secretary of the Interior to the effect that if government did not step in and halt the rate at which private exploration of oil on public lands by private individuals was being conducted, the government’s ability to conserve the mineral resources and guarantee a steady supply of affordable fuel for the maintenance and operation of the country’s naval fleets would be severely jeopardised. Prior to the presidential proclamation, it was lawful for individuals to acquire public lands, explore the mineral oil and sell them to the government.

The presidential proclamation was issued in anticipation of congressional legislation on the subject. The Supreme Court was invited to determine the constitutional validity of the exercise of presidential power in breach of congressional legislation which permitted individual acquisition of such public lands. It was held by the majority of the Court by a ratio of 6:3 that the presidential exercise of power was valid in the face of congressional acquiescence in more than 250 instances of the exercise of the same power by various presidents over a period of 80 years in unbroken sequence.

In *Hirabayashi v United States*,⁹¹ in the wake of the Japanese attack on Pearl Harbor during the war between Japan and the US, President Roosevelt took measures aimed at preventing incidents of subversion and espionage from individuals of Japanese descent who were living in the US at the time. Accordingly, the President issued two executive orders which were quickly enacted into law by the Congress. One of the executive orders granted power to the Secretary of War to designate certain parts of the US as military areas and to exclude certain persons from the designated area. The second executive order established the War Relocation Authority and granted the Authority power to remove, maintain and supervise individuals who were excluded from the military areas.

By an Act of 21 March 1942, Congress ratified Executive Order 9066 and thereby authorised and implemented such curfew order as the military commander should promulgate pursuant to the executive order. The executive order had empowered the military commander to promulgate any order which is necessary for the execution of the order. The military commander imposed an 8pm-6pm curfew on the entire area designated as military area. The appellant, US citizen of Japanese

⁸⁸ (n 87)

⁸⁹ 236 US 459 (1915)

⁹⁰ Temporary Petroleum Withdrawal No.5 of 1909

⁹¹ 320 US 81 (1943)

descent was convicted for violation of the curfew order. He challenged the validity of the executive order under which he was convicted.

The Supreme Court was invited to determine the validity of the presidential executive orders and whether the orders violated the Fifth Amendment's non-discrimination right of the aliens of Japanese descent. It was held by a unanimous Supreme Court that the executive orders and their implementation were constitutional. The Court considered the great importance of military installations and production of weapons that was carried out on the West Coast and the solidarity that individuals of Japanese origin felt for their motherland. The Court took the view that restrictions on the activities of the Japanese aliens served an important national interest warranting the exercise of presidential power as Commander-in-Chief of the Armed Forces. The Court further held that the racial discrimination was justified because in time of war, residents having ethnic affiliation with an invading enemy may be a greater source of danger than those of a different ancestry.

*Koretmasu v United States*⁹² shares identical facts with *Hirabayashi's case*. In *Koretmasu's case*, in response to the Japanese attack on the Pearl Harbor during World War II, President Roosevelt issued Executive Order 9066 by which Japanese-Americans were moved into relocation camps as measure towards the protection of national security. Koretsu – a Japanese-American man who refused to relocate to the camp as required by the order was convicted of violating the order. The convict challenged the constitutional validity of the executive order, contending in the main, that it violates the Fifth Amendment's non-discrimination right of American citizens of Japanese descent. The Supreme Court, by a majority opinion, held that the executive order was valid not only because the war time necessity of the moment warranted the military actions taken by the President, but also because the presidential action was ratified by express congressional authorisation. The Supreme Court relied on similar decision of the Court handed down in *Hirabayashi case*.

Two executive orders issued by the former Governor of Rivers State, Mr. Nyesom Wike, by which he purported to regulate political campaigns by political parties – matters beyond the legislative competence of the Rivers State House of Assembly could be cited as examples of executive instruments issued contrary to the express provisions of the CFRN and statute. These are Executive Order RVSG-21 of 2022 Prohibiting the Use of Premises and Structures of Public Educational Institutions for Political Rallies without Permission, 2022⁹³ and Executive Order RVSG-22 2022 Pursuant to Section 176 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) and Sections 5(1)(b), and 32(1) and (2) of the Rivers State Outdoor Signage and Advertisement Law, No. 2 of 2018 Prohibiting the Use of Premises, Buildings and Structures in Residential Areas in Urban and Non-Urban Areas as Campaign Offices by Political Parties, and Posting of Bills or Posters or any Other Material in Unauthorised Places, 2022.⁹⁴ Executive Order RVSG-21 of 2022

⁹² 323 US 214(1944)

⁹³ Published as No. 29, vol. 58 of the Rivers State of Nigeria Official Gazette dated 6 October 2022 [RVSG-21-2022]

⁹⁴ Published as No. 32, vol. 58 of the Rivers State of Nigeria Official Gazette dated 11 November 2022 [RVSG-22]

and Executive Order RVSG-22 2022 contain provisions that directly conflict with the Electoral Act – a federal law regulating political campaigns, which is subject to federal executive power. The executive orders were also issued without any Law of the Rivers State House of Assembly authorising their issuance and which they could be said to be implementing. The executive orders were themselves laws, thus violating the separation of powers principles enshrined in the CFRN, which prohibit the executive from making laws. The Nigerian Supreme Court in *Attorney-General of Abia State v Attorney-General of the Federation*⁹⁵ frowned at a similar situation where President Buhari by dint of EO10 prescribed a penalty for contravention of the constitutional provision on legislative and judicial financial autonomy by State Governments, when the CFRN did not prescribe any penalty therefor. In that case, the President under EO10 directed the Accountant-General of the Federation to deduct at source from the amount standing to the credit of a defaulting State Government in the Federation Account, such amount as is sufficient to meet the sum appropriated to the State legislature and the State judiciary in any particular year as arising from the State budget and to pay such sum directly to the heads of the affected bodies.

The Supreme Court held that the executive order violated the principles of federalism enshrined in the CFRN in that the President purported to implement the provisions of the CFRN relating to State matters which only the Governor could implement; that the presidential executive order contravenes the principle of separation of powers which has clearly, under the CFRN, ceded legislative powers to the legislature; that the executive order amounts to executive-legislating since by it, the President enacted provisions not contemplated by the CFRN; and further that the penalty provision of the executive order were clearly *ultra vires* the powers of the President as the head of the federal executive branch.

6. Conclusion and Recommendations

This paper has demonstrated that Section 5 of the CFRN donates to the president and governor of a State in Nigeria the power to issue instruments of government policy implementation. Both the Federal High Court in *Ugochinyere v President of the Federal Republic of Nigeria*⁹⁶ and the Supreme Court of Nigeria in *Attorney-General of Abia State v Attorney-General of the Federation*⁹⁷ recognise this power of the executive to issue such instruments to aid it in undertaking its onerous duty under the CFRN, which is to execute and maintain the CFRN and laws of the NASS and the HoA. The paper demonstrated that some of the instruments of executive branch administration have remained controversial in Nigeria, especially in the case of executive orders, which have been perceived as instruments that encroach into the legislative powers and consequently constitute an egregious violation of the sanctity of separation of powers which undergirds the CFRN.

⁹⁵ (2022) 16 NWLR (Pt 1856) 205

⁹⁶ *Ugochinyere v President of the Federal Republic of Nigeria* (n 32)

⁹⁷ *Attorney-General of Abia State v Attorney-General of the Federation* (n 37)

This is the case with EO6 and EO10 issued by President Buhari; RSVG-21 of 2022 and RSVG-22 of 2022 issued by former Governor Nyesom Wike of Rivers State, and many others issued by governors in Nigeria. The same is true of other instruments such as regulations, proclamations and circulars in which claims of excess authority have been made against the issuing authorities. In recognition of the fact that abuse of executive power would upend the delicate balance of the power dynamics that undergirds the proper functioning of a constitutional democracy, which is limited government, the paper developed a three-pronged test of validity of instruments of executive branch administration in Nigeria. These tests are called the Jacksonian Analytics, which propose circumstances under which the courts should hold that executive instruments are valid and when they should be invalidated, in order to keep the powers of government in check and thereby prevent power aggrandisement, especially by the executive.

By way of recommendation, the paper advocated that the CFRN should be amended to incorporate the express power of the President and a Governor to issue executive instruments, particularly executive orders as instruments of government policy implementation. It is important to the effective implementation of government policy that the President and the Governor be granted express power in the CFRN to issue executive orders rather than the current situation where the power is asserted as an implied power. To avoid the possibility of abuse of executive instruments issuing power of the President and a Governor, the scope and limits of the subject-matter and content of an executive order which a President or Governor can lawfully issue should be expressly stipulated either in the CFRN or in an Act of the NASS (in case of Presidential executive powers) or a Law of the HoA (in the case of gubernatorial executive power). This Act or Law should regulate and streamline the procedure for issuance of executive branch instruments in order to make it difficult for presidential or gubernatorial abuse of executive powers. Finally, the courts should rise up to the occasion to invalidate executive branch instruments issued in violation of the CFRN or statutes.