

**ANSWER TO QUESTION NO. 6**

The issue presented here relates to the extent, if any, the President may exercise power to modify, alter or otherwise impede the SIRA.

The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Youngstown Co v Sawyer*, 343 US 579, 585 (1952). Article II of the Constitution vests without reservation or qualification executive power in the office of the President. In comparison, Article I delegates to Congress the legislative powers "herein granted." These distinctions in grants of authority support the notion that the President has certain inherent powers beyond those expressly stated in the Constitution.

In *Medellin v Texas*, 552 US 491, 524-525 (2008), the Supreme Court of the United States recognized as the "accepted framework" Justice Jackson's tripartite scheme for judicial review of presidential authority. *Youngstown Co*, 343 US at 587 (Jackson, J. concurring). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 US at 635. Second, "[w]hen 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 distribution is uncertain." *Id.*, at 637. In such a circumstance, presidential authority can derive support from "congressional inertia, indifference or quiescence." *Ibid.* Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and a court will sustain his actions "only by disabling the Congress from acting upon the subject." *Id.* at 637-638.

Here, the President's Executive Order directs the Agriculture Secretary to take two actions. First, it directs that the Agriculture Secretary "cease allocating subsidies available under the [SIRA]." Second, it directs the Agriculture Secretary to "use the funds made available under said act to subsidize businesses engaged in the harvesting and sale of organic vegetables."

**I. The President's Authority to Order the Agriculture Secretary to Cease Allocating Subsidies Available Under the SIRA.**

The Agriculture Secretary may argue that the President is granted authority under the SIRA to cease the distribution of subsidies. This power in the President is implied from the fact that the act calls upon the executive branch, through the Agriculture Secretary, to administer the subsidy program. Further, the act provides that subsidies are to be funded "only to the extent needed." Thus, the Agriculture Secretary will argue, the executive branch is in the superior position to determine what funds are needed to administer the program. Here, the President declared that the "shrimp industry in the Gulf of Mexico [had] fully recovered from the devastation of Hurricane Katrina." Thus, the Agriculture Secretary will argue, the President's order falls under the first prong of Justice Jackson's tripartite inquiry and, as such, a reviewing court should give great deference to the authority of the President.

The Shrimp Association will argue, however, that while subsidies to its members are not perpetual and, as stated by Congress, should only be funded to the extent needed, Congress reserved to itself the determination whether continuation of the subsidy was necessary. The act provides that "Congress shall annually appropriate the funds for such subsidy only to the extent needed." Here, Congress appropriated in 2010 funding for the subsidy, thereby indicating that the continuation of the subsidy was necessary. Nothing expressly stated in the act supports the conclusion that the President was granted the power to determine the continued necessity of the Congressional grant of the subsidy or that the President could cease funding of the subsidy once the funds were appropriated. Thus, the Shrimp Association will argue, the President's exercise of authority falls under the third prong of Justice Jackson's tripartite inquiry because the President's action is inconsistent with the action taken by Congress. Thus the President's authority is at its weakest and the President's action should be deemed unauthorized.

Moreover, the Shrimp Association may argue the President is under an affirmative constitutional duty to see that the will of Congress is done. US Const Art 2 §3 provides that the President "shall take Care that the Laws be faithfully executed." Here, Congress determined in its wisdom to authorize a subsidy to assist a sector of the economy that was "crippled" by a natural disaster. While the President may declare that the industry is recovered, it is for Congress and not the President to undue the subsidy once appropriated. In the absence of legislation repealing or otherwise ending the appropriation, the Association may argue the President is constitutionally required to implement the SIRA in the manner provided by Congress.

## **II. The President's Authority to Order that Funds Appropriated Under the SIR A be Used to Subsidize the Organic Vegetable Industry.**

Review of the President's authority to order that the funds be used to subsidize the organic vegetable industry may arguably fall under the second prong of Justice Jackson's three-part inquiry, as Congress was silent in regard to subsidizing the organic vegetable industry. However, a stronger argument may also be advanced that this aspect of the President's order falls under the third prong of Justice Jackson's three-part test because funds used to implement the President's order are diverted away from a program specifically authorized by Congress.

This said, there is little doubt that the President is encroaching on the power constitutionally vested in the Congress when he orders the funds be used to subsidize the organic vegetable industry. The foundation of our federal constitution rests on the principle of separation of powers. Congress, in executing its policy-making authority under Article I of the Constitution, had the authority to assist through a government subsidy an industry that was adversely impacted by a natural disaster. US Const, Art I §1; Art I §8 cl. 18. By contrast, "[t]he Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Youngstown*, 343 US at 587

The President's Executive Order usurps from Congress the power to legislate. While the President can ask Congress to enact laws to promote the consumption of healthier foods and to subsidize the organic vegetable industry, he cannot direct that a presidential policy be executed in a manner prescribed by the President. *Youngstown*, 343 US at 587. This is particularly true where the Congress has authorized and appropriated funds to implement legislation enacted by Congress and the President is directing a member of his cabinet to refrain from doing that which is specifically directed by Congress and instead to use the appropriated funds to effectuate a different policy. *Id.*

The Agriculture Secretary may argue the President possesses residual emergency powers not expressly enumerated in the Constitution and that these powers permit him to order the Secretary to divert the funds earmarked for the gulf coast shrimp industry to the organic vegetable industry. *US v Bishop*, 555 F2d 771 (CA 10, 1977). Here, the claimed emergency would emanate from poor dietary habits of Americans. However, in the instances where emergency powers are recognized, the emergency is much more exigent than dietary concerns. See CJS, War Powers of the President, §54.

A reviewing court is likely to conclude the President exceeded his presidential authority and thus the Agriculture Secretary cannot use funds in the manner described in the Executive Order.