

**PRESIDENTIAL LAW-MAKING POWER IN NIGERIA AND AMERICA:  
TURNING PRESIDENTS INTO SUPERMEN?**

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**ABSTRACT:** *The law-making power is traditionally assigned to the Legislature. However, the increasing involvement of Presidents in law-making has generated much interest and controversies among scholars, in recent times. This paper examines the extent of the President's law-making power both in Nigeria and the United States of America. It is argued that the increasing exercise of legislative power by Presidents, arising from delegation of such power by the Legislature, legislative abdication of power or executive usurpation of power, has virtually turned Presidents into supermen, exercising all powers of government. The paper, however concludes that if presidential legislative power is properly utilized and controlled, it could become a useful instrument for the attainment of sustainable constitutional democracy.*

**KEYWORDS:** Law-making Power, Nigeria, America, Sustainable Constitutional Democracy.

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## INTRODUCTION

Under the doctrine of separation of powers, which has now been embraced by most modern democratic nations, the legislative or law-making power of government, indisputably, belongs to the Legislature; while the President, as head of the executive branch, is empowered to execute the laws made by the Legislature.<sup>1</sup> However, in recent times, the involvement of the President in the legislative process has become increasingly dominant. Indeed, the President's duties are not all purely executive in nature; he is also intimately associated, by Constitution and custom, with the legislative process.<sup>2</sup> Therefore, despite the apparently clear and exclusive constitutional provisions making the Legislature, by whatever name called, the governmental branch entrusted with legislative powers, the President has a significant role to play in the law-making field.

The President's involvement in law-making is primarily part of the checks and balances mechanism guaranteed in most democratic Constitutions to forestall arbitrary use of power by a particular arm of government. It is also borne out of the President responsibility for the

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<sup>1</sup> See J. Locke, *Second Treaties of Civil Government*, Chapters 12 – 13, B.O. Iluyomade and B.U. Eka, *Cases and Materials on Administrative Law in Nigeria* (1980) pp. 1 – 2. See F. Ogoloma, "The Theory of Separation of Powers in Nigeria: An Assessment" (2001) 6(3) *African Research Review* 26, 128.

<sup>2</sup> C. Rossiter, *The American Presidency* 2<sup>nd</sup> edn. (1960) p. 28. See also Arthur S. Miller, *Presidential Power in a Nutshell*. (St. Paul Minn: West Publishing Co., 1977) p. 62.

policy direction and day to day running of the nation.<sup>3</sup> The law-making Power of the President may be derived from express constitutional and statutory provisions or from long-standing accepted practices. It may also arise from legislative delegation of power to the President or from presidential usurpation of such power. Irrespective of its source, the presidential legislative power remains an effective tool in the President's armory for prompt execution of government policies towards the attainment of sustainable constitutional democracy.

This paper seeks to examine the extent of the President's law-making power and its utilization in achieving sustainable constitutional democracy in Nigeria. A comparative analysis of presidential law-making power in Nigeria and America is undertaken and recommendations are proffered for a more effective utilization of this power in achieving sustainable constitutional democracy.

### **Definition of Law-making and Executive Powers and their Relationship**

According to the Black's Law Dictionary,<sup>4</sup> the word "legislation" is synonymous with "law-making", which is defined as the process of making or enacting a positive law in a written form, according to some type of formal procedure, by a branch of government constituted to perform this process. In the same vein, the word "legislative" is defined as "of or relating to law-making or to the power to enact laws. Under the Nigerian Constitution, the law-making power is vested in the National Assembly by virtue of section 4 thereof, which provides that:

- (i) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.
- (ii) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.

Similarly, section 4(6) of the 1999 Nigerian Constitution vests the legislative power of a State of the Federation in a House of Assembly of the State. Thus, under Nigeria's Federal structure, there is a bicameral legislature at the federal level and a unicameral legislature at the State level. In the United States, the legislative powers are vested in a bicameral Legislature, called Congress, consisting of the Senate and the House of Representatives;<sup>5</sup> and unlike in Nigeria, the States in America, except Nebraska, also have a bicameral Legislature, consisting of the House of Representatives in forty-one States, State Assembly in five States and House of Delegates in three States.

On the other hand, the Constitutions of both Nigeria<sup>6</sup> and America<sup>7</sup> vest the executive powers of government in the President. The Nigerian Constitution attempts to give an insight into the nature of executive powers when it provides that: "Subject to the provisions of this Constitution, the executive powers of the Federation".

- (i) .....
- (ii) Shall extend to the execution and maintenance of this Constitution, all laws made by

<sup>3</sup> Constitution of the Federal Republic of Nigeria (CFRN) s. 148(2) .

<sup>4</sup> B.A. Garner (ed) *Black's Law Dictionary* 9<sup>th</sup> edn. (West Publishing Co. 2009) p. 982,

<sup>5</sup> US Const. Art. 1 section 1.

<sup>6</sup> CFRN, 1999, s. 5.

<sup>7</sup> US Const. Art. II.

the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

From the foregoing analysis, it is obvious that both the Nigerian and American Constitutions do not deliberately set out to make the President or presidency a law-making body. working in competition against the Legislature.<sup>8</sup> Yet, in many practical ways, the President's involvement in legislation, whether directly in the enactment process or indirectly in the carrying out of executive functions, has become increasingly significant.

However, it is a fundamental principle of constitutional government that the Legislature may not delegate its power to another branch. According to John Locke; the Legislature "cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others".<sup>9</sup> This concept is embodied in the ancient maxim, *delegata potestas non potest delegari*<sup>10</sup> (delegated power cannot be delegated).<sup>11</sup> Nevertheless, it is pertinent to note that, although, the Legislature cannot surrender the basic legislative power entrusted to it by the Constitution, it may give substantial discretionary authority to the executive branch and the independent regulatory Commissions.<sup>12</sup> The Constitution itself may also directly grant some legislative powers to the President to be exercised either exclusively or jointly with the Legislature.

## LEGISLATIVE POWER OF THE PRESIDENT UNDER THE NIGERIAN CONSTITUTION

### Initiation of Appropriation Bill and other Executive Bills

It is obvious in a presidential system of constitutional democracy, that the majority of bills considered by the Legislature in the process of law-making are initiated by the Executive branch, by way of executive bills. Specifically, the Constitution expressly vests in the President the power to prepare and submit the Annual Appropriation Bill to the Legislature. Thus, section 81 of the Nigerian Constitution provides that:

The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.

The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by this Constitution) shall be included in a bill to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.

<sup>8</sup> R. Morton, "Beyond the Limits of Executive Power; Presidential Control of Agency Rulemaking under Executive Order 12,291" (1981) 80 *Michigan Law Review* 192 – 247 (noting that the framers of the Constitution of the USA did not intend the presidency to be an institutional competitor to the Congress). See also Okebukola and A Kana, "Executive Orders in Nigeria as Valid Legislative Instrument and Administrative Tools" (2012) 3 *Nnamdi, Azikiwe Journal of Law and Jurisprudence* p. 67.

<sup>9</sup> John Locke, (n1) s. 41.

<sup>10</sup> Also expressed as "*delegatus non potest deligare*".

<sup>11</sup> P.W. Duff and H.E. Whiteside, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law" 14 *Corn. L.Q.* 168 (1929); H.P. Ehmke, "Delegata Potestas Non Potest Delegari, A Maxim of American Constitutional Law" 47 *Corn. L.Q.* 5 (1961).

<sup>12</sup> L. Fisher, *Constitutional Conflicts, Between Congress and the President* 5<sup>th</sup> Revised (Lawrence, Kansas University Press of Kansas) p. 85.

Basically, the Appropriation Bill therefore serves as an application by the President to the National Assembly for approval to withdraw the specified amounts of money from the Consolidated Revenue Fund, for governmental programmes. This position also finds support from the provision of sections 80(2) and 80(3) of the Constitution, which provide that:

S. 80(2)

No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation, except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.

S. 80(3)

No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by an Act of the National Assembly.

During the passage of the Appropriation or Supplementary Appropriation Bills, amendments can be made by either House of the National Assembly concerning the amounts to be spent on specific heads. An important but controversial issue relates to the power of the National Assembly to increase the total amount that will be spent in the budget beyond the amount proposed in the President's Appropriation Bill. The Nigerian National Assembly, over the years, has consistently claimed that their constitutional power to examine the Appropriation bill, appropriate funds for the purposes provided therein and ultimately pass the bill; would necessarily include the power to increase the total amount proposed by the President. Indeed, the National Assembly has been accused of having the penchant for increasing budget estimates sent to it by the President, even to the point of being unrealistic.<sup>13</sup> In 2016 a new term, "padding the budget", entered the Nigerian political lexicon. This term was used to describe the National Assembly's action of increasing the budget estimates in the Appropriation bill sent in by the President and indiscriminately inserting new projects. However, President Buhari was firm in his insistence that the 2016 Appropriation bill will only be signed by him into law after it had been modified by the National Assembly by removing those padded projects.<sup>14</sup>

On the contrary, Nwabueze,<sup>15</sup> maintains that the National Assembly lacks the power to increase the total amount in the Appropriation Bill beyond the amount purposed by the President. Amounts can, however, be reduced in relation to a particular head and added to another.<sup>16</sup> Commenting further on the unconstitutionality of the National Assembly's exercise of power to increase the total amount in the Appropriation bill submitted by the President, Nwabueze,<sup>17</sup> in his characteristic pungent manner, states as follows:

An increase in the total Amount of the budget by the National Assembly amounts to an

<sup>13</sup> See M. Amaza, "What Exactly is Budget Padding" *The Scoop*, August 30, 2016 available at <http://www.thescooping.com/2016/08/30budget-padding-2->

<sup>14</sup> *Ibid*, (noting that Late President Yar'adua refused to sign the 2008 Appropriation Bill passed by the National Assembly because the National Assembly had increased the total budget estimate from ₦2.9 trillion to ₦3.2 trillion mostly by increasing the budget line items of the National Assembly).

<sup>15</sup> See B.O. Nwabueze, *Constitutional Democracy in Nigeria Vol.1* (Ibadan: Spectrum Books Ltd., 2004) p. 264.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*.

initiation of financial bill, which is an exclusive preserve of the executive. The excess amount over and above the total figure in the appropriation bill must be regarded as having been initiated by the National Assembly not by the President, and is, therefore, unconstitutional.

While the above exposition is technically correct and acceptable, it must be noted that, in practice, adjustments by the National Assembly to the Appropriation Bill carried out within its constitutional authority will not always produce the exact total amount as submitted by the President. An increase in the total amount would likely result and it is submitted that where the increase is not unreasonable, then no harm would be occasioned.

In the event of a delay in the passage of the Appropriation Bill into law, the Constitution authorizes the President of the Federation to withdraw moneys from the Consolidated Revenue Fund to meet the expenditure and services of the Federation for six months or until the Appropriation Act comes into operation, whichever is earlier.<sup>18</sup> The withdrawal for any such period must not exceed the amount authorised under the Appropriation Act passed by the National Assembly to be withdrawn from the Consolidated Revenue Fund in the corresponding period of the previous year.<sup>19</sup> This is a laudable provision which ensure that government programmes are not grounded as a result of the delay in passing the Appropriation bill into law.

### **Power to Assent to and Approve Bills**

In Nigeria, one of the most important aspects of the President's executive powers is, paradoxically, his role in the core legislative process. Although the law-making power is primarily vested in the National Assembly, the Constitution also gives a share of the power to the President. Thus, section 58 of the 1999 Nigerian Constitution provides that: "The power of the National Assembly to make laws shall be exercised by bills passed by both Houses of the National Assembly and assented to, by the President".

The effect of this constitutional provision is that the President must ordinarily participate in the law-making process, as a bill duly passed by the National Assembly can only become law after presidential assent.<sup>20</sup> While it is firmly settled that presidential assent is necessary before a legislative bill can become law, the need for a presidential assent to validate a constitutional amendment is not devoid of controversy.<sup>21</sup>

In Nigeria, there was a sustained debate on the desirability or otherwise of presidential assent to validate the First Alteration bill seeking to amend the 1999 Constitution of Nigeria. This culminated in the case of *Agbakoba v The National Assembly*,<sup>22</sup> where the Federal High Court, per Okeke J., held that: "constitutional amendment without presidential assent is null and void".<sup>23</sup> Accordingly, the First, Second and Third Alteration bills in respect of the

<sup>18</sup> CFRN, 1999, s. 82.

<sup>19</sup> *Ibid.*

<sup>20</sup> However, there are two categories of rules which may be enacted by the Senate and the House of Representatives which do not require presidential participation. These are the House Standing Rules and Orders, and Concurrent Resolutions taken jointly to correct errors in bills of the National Assembly yet to receive presidential assent.

<sup>21</sup> See Generally I.B. Lawal, "The Review of the Constitutional Amendment Procedure and Presidential Assent in Nigeria", (2015) 7(5) *Journal of Law and Conflict Resolution*, 26 – 30.

<sup>22</sup> Unreported; see *The Punch*, 10<sup>th</sup> November 2010 p. 1.

<sup>23</sup> It was argued for presidential assent that constitutional amendment being by way of an Act of the National Assembly is subject to section 58(1) of the Constitution. Thus section 9 of the Constitution is not only

amendment of the 1999 Constitution of Nigeria, were subjected respectively to presidential assent.<sup>24</sup>

### **Veto Power**

The Nigerian Constitution empowers the President to veto a bill by withholding his assent, if he does not approve its content;<sup>25</sup> thereby preventing it from becoming law. There are no restrictions on the grounds for which the President may veto a bill passed by the Nigerian National Assembly. For example, the veto power is not only to be used in blocking legislation which the President considers unconstitutional; it may also be exercised whenever the President thinks the bill is objectionable for any reason. If the President withholds assent, the National Assembly, if it so wishes can invoke its constitutional power to override the presidential veto; by further enacting the bill into law without the President's assent. Under section 58(5) of the Constitution, this would occur when, after the President's veto, the bill is again passed by each House of the National Assembly, provided that this second passage is sanctioned by at least two-thirds majority of each House.

The President's power to veto bills constitutes an extremely important and effective part of his executive authority. Though the President rarely exercises this power, the possibility of the President's veto will always be in the minds of members of the National Assembly as they plan and formulate new legislation. The necessity of producing bills, which the President would willingly assent to, would be a constant factor in the legislative process. A President's timely suggestion that he may veto a particular bill under consideration could result in changes to the bill before its passage. Moreover, when the President exercises the veto power, his veto is usually not likely to be overridden by the National Assembly; because, as already noted, such an exercise requires at least two-thirds of the members voting to override. The President would count on the support of his party members and other supporters to prevent the National Assembly from overriding his veto. As Joye and Igweike<sup>26</sup> have observed, it is only in the relatively few cases that a presidential veto is overridden as the veto is normally effective in well over nine out of ten cases. Statistics would seem to indicate that passion rarely runs high enough to muster the necessary opposition to the President in the National Assembly to override his veto.<sup>27</sup> The President can therefore use his powers of assent to, and veto of, bills to ensure that only those laws that are consistent with his administration's philosophy, priorities and programmes are enacted and enforced.

There is no constitutional or statutory authorization of line – item veto in Nigeria. Thus, the President must assent to the entire bill or veto the entire bill. He is not authorized to assent to certain items in the bill and veto the others.

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subject to section 58(1) but also subject to the relevant constitutional provisions on the National Assembly in relation to law-making or law amendment.

<sup>24</sup> However, the National Assembly is still considering further review of the constitutional Amendment Procedure to expressly exclude presidential assent.

<sup>25</sup> CFRN, 1999, s. 58(4).

<sup>26</sup> E.M. Joye and K. Igweike, *Introduction to the 1979 Nigerian Constitution* (London: Macmillan, 1982) p. 227.

<sup>27</sup> *Ibid.*

### **Regulations on Citizenship**

In addition to the President's general power to assent to and veto bills, the Constitution gives him direct power to legislate in certain instances without the participation of the National Assembly. Section 32 of the 1999 Nigerian Constitution empowers the President, on his own, to make whatever regulations he considers necessary for carrying into effect the provisions of Chapter 3 of the Constitution; which deals with citizenship. The President does not have to wait for the passage of a bill by the National Assembly authorizing him to make regulations. Indeed, the President is not required to obtain the approval of the National Assembly before making the regulations<sup>28</sup> even though he is required to lay the regulations made by him before the National Assembly.<sup>29</sup>

There is no similar provision empowering the President to make regulations relating to citizenship under the 1986 Liberian Constitution. The Liberian Legislature, consisting of the Senate and the House of Representatives, has exclusive powers to legislate on any matter relating to citizenship. Thus, by virtue of Article 27(c) of the Liberian Constitution, the Legislature shall prescribe such other qualification criteria for the procedures by which naturalization may be obtained. Also, under Article 34(h) of the said Constitution,<sup>30</sup> the Legislature shall have power to establish laws for citizenship, naturalization and residence.

### **Changes to Existing Laws**

Another constitutional provision which, in effect, gives the Nigerian President power to legislate without the participation of the National Assembly is section 315 of 1999 Nigerian Constitution. This section applies to all existing laws, which means; "any law which was in force immediately before May 29, 1999, or which having been made before that date came into force after that date".<sup>31</sup> Under section 315(2) of the Nigerian Constitution, the appropriate authority may at any time, by order, make such changes in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. The appropriate authority in relation to any law of the federation is specifically designated to be the President.<sup>32</sup> Accordingly, this provision empowers the President, acting without the National Assembly, to alter any law made before the 1999 Constitution took effect. In doing so, the President in effect, exercises an independent power to legislate without recourse to the National Assembly.

It is clear that this provision limits the President to making only such changes in existing laws as are needed to bring them into conformity with the Constitution. However, the determination of whether an existing law is in conflict with the Constitution or not could become problematic and contentious. Though the President can assert a wide area of discretionary authority in this regard under section 315 of 1999 Nigerian Constitution, his decision could result in disagreements and conflicts, as was the case in relation to the Public Order Act, which was an existing law before the coming into force of the 1979 Nigerian Constitution. President Shagari altered the Act in 1981 by removing the power to grant permits for public assemblies and processions from State Governors and vesting the same in the States' Commissioners of Police, resulting in a conflict between the President and State

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<sup>28</sup> CFRN, 1999, s. 32(1).

<sup>29</sup> *Ibid.*, s. 32(2).

<sup>30</sup> 1986 Liberian Const., s. 34(h).

<sup>31</sup> CFRN, 1999, s. 315(3)(b).

<sup>32</sup> *Ibid.* s. 315(4)(a)(i). The Governor is the Appropriate Authority in relation to the provisions of any existing law deemed to be law made by the House of Assembly of that State. See CFRN, 1999, s. 315(4)(a)(ii).

Governors.

With regard to the power to modify existing laws made by the State, the Court in *Mohammed v Attorney General of Kaduna State*,<sup>33</sup> held that the power to modify existing law to bring it into conformity with the Constitution is not vested in the Governor alone; and that, where the Governor's modification is at variance with that of the State House of Assembly, whose legislative power is contained in section 4(6) of the Nigerian Constitution, the modification by the House of Assembly would override that of the Governor. Thus, only minor modifications, like names, dates and titles, which do not go to the substance of the law can be made by the Governor or President. Any modification which would affect vested rights must be left to the constitutionally ordained law-making body.<sup>34</sup>

The exact extent of the powers of the President to modify existing laws under section 315 of the Constitution in relation to the doctrine of separation of powers which precludes him from encroaching into the area preserved for the Legislature came up in the Supreme Court for consideration in *A.G. Abia State and 35 Ors v.A.G. Federation*.<sup>35</sup> In that case, President, Obasanjo, by statutory instrument NO 9 of 2002 made an order modifying the Allocation of Revenue (Federal Account etc) Act 1990 as amended by Allocation of Revenue (Federation Account etc) Act, 1992. In so doing, the President relied on section 315 of the Constitution and purported to bring Decree 106 of 1992 in conformity with section 162(3) of the 1999 Constitution.

The plaintiffs, in their suit before the Supreme Court formulated only one issue for determination as follows; Whether section 315 of the Constitution of the Federal Republic of Nigeria 1999 authorises the President to amend the Allocation of Revenue (Federation Account, etc) Act Cap 16 laws of the Federation 1990 as amended by the Allocation of Revenue (Federation Account, etc) (Amendment) Act, 1992 in the manner and to the extent contained in paragraphs 2(1)(a) and 3 of the Allocation of Revenue (Federation Account, etc (Modification) Order 2002?<sup>36</sup>

In its judgment, the Supreme Court of Nigeria, per Belgore, JSC, in holding that the President's exercise of power, pursuant to section 315 of the 1999 Constitution was constitutional, stated as follows:

The President has wide powers when modifying any existing law to bring it in conformity with the Constitution. It is true that separation of powers is essential to a healthy democracy the powers given the President...in existing law... is not an abuse of the principle or doctrine of separation of powers.<sup>37</sup>

Iguh, JSC, on his part, held as follows:

The Constitution being an organic law, the grundnorm and the Supreme law of the land may restrict the operation of this principle of separation of powers. Accordingly, the power of the legislature may be restricted by the express provision of the Constitution... In other words the Constitution may permit the breach of the principle of separation of powers. This would

<sup>33</sup> (1981) N.C.L.R. 117.

<sup>34</sup> *Samuel Igbe v Governor, Bendel State*, (1981) S.C. 53.

<sup>35</sup> (2003) 1 SCNJ 131.

<sup>36</sup> *Ibid.* at 149.

<sup>37</sup> *Ibid.*

appear to be what the 1999 Constitution did in section 315 therefore which allows the President to modify an existing law... whereas the 1999 Constitution provided for the principle of separation of powers, the same Constitution conferred the President with power under section 315... In my view, the doctrine of separation of powers may not be involved in the present case to defeat the express provision of section 315 of the Constitution.<sup>38</sup>

The decision of the Supreme Court generated so much controversy and left many bewildered. One would have thought that if the court, with the greatest respect, found that a certain provision in the Constitution was against the principle of separation of powers, as enshrined in the same Constitution, it would have struck down the offending provision in order to prevent an invasion of the area of authority of an arm of government by another arm. This was, however, not the case. Would it then mean that, in Nigeria, the principle of separation of powers only applies to a limited extent? This would appear to be so, as that court in reaction to the plaintiffs' copious reference to cases on the application of the principle of separation of powers in other jurisdictions stated that: "no two democratic Constitutions are the same. Our own Constitution has its peculiarities."<sup>39</sup>

### **Ordinary Regulations**

Regulations constitute the bulk of subsidiary legislation made by the executive branch through express delegation of power in that regard by the Legislature. It is sometimes argued that in exercising the power to make regulations or subsidiary legislation, the Executive acts as agent of the Legislature and to that extent neither the Legislature abdicated its legislative power nor did the executive usurp same.<sup>40</sup> Besides, the regulation or rule made by the Executive derives its validity from the power granted by the Legislature through an enabling legislation. It is, however, submitted that in spite of these arguments, it cannot be denied that the regulation was actually enacted by the Executive and implemented by it. In justifying the practice of delegating legislative power to the Executive, Okany,<sup>41</sup> asserts that "Experience has shown that the Legislature, established by or under the Constitution cannot cope with the task of law-making in all fields and for all purposes".

### **Legislative Power of the President Under the American Constitution**

In the United States, even though Art. 1 section 1 of the Constitution provides that; "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives", the President is also actively involved in law-making. The exercise of presidential law-making power in the United States has assumed various forms and dimensions, including the following:

### **Executive Interactions with Congress through State of the Union Address**

The preeminent role of Congress in law-making is captured in Article 1 section 1 of the American Constitution, which asserts in unambiguous terms that Congress is the sole law-making branch of government. This position is buttressed in the light of the historical theory of the powers of the national government that it is one of limited, delegated powers only, and not possessing any power that is not expressly granted or that cannot be reasonably implied

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<sup>38</sup> *Ibid.* at 189.

<sup>39</sup> *Ibid.* at 145.

<sup>40</sup> See generally, M.C. Okany, *Nigerian Administrative Law* (Onitsha: Africana First Publishers Ltd. 2007) pp. 40 – 42.

<sup>41</sup> *Ibid* at 42.

from the granted powers.<sup>42</sup> However, the plain meaning of this constitutional provision may not be the accurate meaning in reality. Legislation is indeed the product of actions by all the three branches of government, with Congress providing the formal authority to enact statutes but with the executive (and the courts) having effective control over much of the process<sup>43</sup> through checks and balances. According to Miller, the nerve-centre for law-making is the institutionalized presidency.<sup>44</sup> Congress is no longer the self-starter it was during the latter part of the 19<sup>th</sup> century. It awaits the President's legislative proposals, submitted each year in broad general terms in the State of the Union message and detailed in the Annual Budget message.<sup>45</sup> The latter is the basic planning document of the American government; it is wholly executive in origin.<sup>46</sup> The role of Congress now is to receive, debate, at times modify, and even to reject proposals from the Administration.<sup>47</sup> In his annual State of the Union Address, the President often lays out his legislative agenda for the next year, outlining his legislative priorities for both Congress and the nation at large.<sup>48</sup> In order to ensure the smooth passage of his legislative agenda by Congress, the President will often ask a specific lawmaker to sponsor bills and lobby other members for passage. Members of the President's staff, such as the Vice President, his Chief of Staff and other liaisons with Capitol Hill also will lobby representatives to try to garner support for the legislation.

### **Proclamations and Executive Orders**

Presidents may further engage in law-making without congressional approval or involvement either by Proclamation or by Executive Orders. They may issue a Proclamation, which is often ceremonial in nature, for such matters as naming a day in honour of someone or something that has contributed to American society. A President may also issue an Executive Order, which has the full effect of law and is directed to federal agencies that are charged with carrying out the Order.

In the United States, an Executive Order is a presidential policy directive that implements or interprets a federal statute, a constitutional provision, or a treaty without the requirement of congressional approval.<sup>49</sup> According to Okebukola and Kana,<sup>50</sup> 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.

Significantly, most Executive Orders are issued under specific statutory authority from Congress and have the force and effect of law.<sup>51</sup> Such Executive Orders usually impose

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<sup>42</sup> Miller, (n2). at 72.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at 73.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* at 73 – 74.

<sup>48</sup> P. Trethan, "Legislative Powers of the President of the United States", available at <http://usgornfo.about.com>. The President and Cabinet. accessed 12/1/2017.

<sup>49</sup> J. Lehman and S. Phelps, *West's Encyclopedia of American Law* (Detroit: The Gale Group Inc 2005) at <http://www.encyclopedia.com/law/encyclopedias-almanacs>. accessed 12/2/2017.

<sup>50</sup> Okebukola and Kana, (n8). at 61.

<sup>51</sup> Lehman and Phelps, (n49). See also Miller, (n2) at 85. (maintaining that where executive orders are based

sanctions, determine legal rights, limit agency discretion and require immediate compliance. The federal courts consider such Orders to be the equivalent of federal statutes. Okebukola and Kana<sup>52</sup> have rightly noted that where Executive Orders create rules, modify Acts or set out the parameters for their implementation, the President carries out manifestly legislative functions. This is perfectly legitimate as long as the Executive Order in issue is consistent with its enabling constitutional or statutory authority.<sup>53</sup> Even where there is no specific statutory authority, an Executive Order may still have the force and effect of law if Congress has acquiesced in a long standing executive practice that is well known to it. For example, in *Damas v Regan*<sup>54</sup> the US Supreme Court upheld various Executive Orders that suspended claims of US nationals arising out of the Iranian hostage crisis, citing Congress acquiescence in a 180 year old practice of settling US citizen's claims against foreign governments by executive order. Executive orders may also be authorized by the President's independent constitutional authority.<sup>55</sup> Various clauses of the US Constitution have been cited to support the issuance of Executive Orders; among which are the vesting clause, the Take care clause, and the Commander-in-chief clause. However, Executive Orders often omit citing a specific constitutional provision as authority. Presidential practice, accompanied by congressional silence or acquiescence has also been cited as sources of authority for the issuance of executive orders by Presidents.<sup>56</sup>

In addition to their legislative qualities Executive Orders can also serve as administrative tools, where the enabling authority so requires.<sup>57</sup>

Congress cannot directly vote to override an Executive Order in the way they can override a veto. Instead, Congress must pass a bill canceling or changing the Order in a manner they see fit. The President will typically veto that bill, and then Congress can try to override the veto of that second bill. The Supreme Court can also declare an Executive Order to be unconstitutional. Congressional cancellation of an Order is extremely rare.

Executive orders constitute an effective lawmaking instrument. American Presidents, from George Washington to the current President Donald Trump have made extensive use of Executive orders in governance.<sup>58</sup> President Truman integrated the Armed Forces with Executive Order No. 9981. Executive Order No. 12,291 was a Reagan Administration Executive Order that reformed the regulatory process in the executive branch.<sup>59</sup>

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squarely on express statutory terms or provisions, the President in making the order is in the same position as any administrative agency. However, see *Re Neagle* 135 US (1890) where the Order of the President made through the Attorney General, arising from an implied obligation of the President to protect federal officials became a law which he must faithfully execute.

<sup>52</sup> Okehukola & Kana, (n8) at 68..

<sup>53</sup> *Ibid.*

<sup>54</sup> 453 US 654.101 S.Ct 2972, 69L Ed. 2d 918 (1981).

<sup>55</sup> *Cunningham v Neagle*, 135 US 1,10S ct 658, 34 L Ed (1890).

<sup>56</sup> *Ibid.*

<sup>57</sup> A Schick and A. Pfister, *American Government: Continuity and Change* (1975) p. 195.

<sup>58</sup> President Washington issued the first Executive Order in 1789. President Trump, who assumed office as President of the United States on 20<sup>th</sup> January 2017 had as at 30<sup>th</sup> March 2017 issued 20 Executive Orders; while his immediate predecessor, President Obama issued a total of 276 Executive Orders. See "Executive Orders Disposition Table" available at <http://www.archives.gov/federal-register/executive-orders/disposition>, accessed 18/2/2017.

<sup>59</sup> F.H. Easterbrook, "Presidential Lawmaking Powers", (1990) 68 *Washington University Quarterly* 536.

### Approving Legislation/Assent

While it is the responsibility of Congress to introduce and pass bills, it is the President's duty to either approve those bills or reject them.<sup>60</sup> Where the President approves the bill, he signs it into law, which will come into force immediately, unless there is another effective date noted.<sup>61</sup> However, the Supreme Court, in the exercise of its power of judicial review of legislative actions, can abrogate the law by declaring it as unconstitutional, null and void.<sup>62</sup>

### Veto Power

Another aspect of presidential law-making is the veto power of the Chief Executive. By article 1, section 7 clause 2 of the American Constitution, the President's power to veto a bill duly passed by Congress is clearly outlined in terms as follows:

Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States: If he approves he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated who shall enter the objections at large on their journal and proceed to reconsider it.

The important feature of the veto power lies not in its actual use, although that at times is important, but in the threat of its use.<sup>63</sup> Thus, Presidents are able to control in some degree the content of legislation, through proposing changes in statutory terms, by letting it be known that a particular bill, passed by the Legislature will be vetoed unless altered.<sup>64</sup> By threatening a veto, the President can persuade legislators to alter the content of the bill to make it more acceptable to the President.<sup>65</sup>

Though the President may veto a specific bill, he cannot exercise a line item veto.<sup>66</sup> However, in 1996 the Line Item Veto Act<sup>67</sup> was enacted which gave the President the authority to select particular items from the Appropriation Bill and individually veto them. The President was also enabled to impose cuts on the federal budget without vetoing the bill in its entirety.<sup>68</sup> Nevertheless, barely two years thereafter, the Supreme Court in *Clinton v City of New York*<sup>69</sup> invalidated the Line Item Veto Act. Congress can override the President's veto with a two-thirds majority of the number of members present in both the Senate and the House when the override vote is taken.<sup>70</sup>

Apart from approving or vetoing the bill, the President also has the option of taking no action on the bill. The effect of adopting this option depends largely on whether Congress is in session or not. If Congress is in session at any point within a period of 10 business days after the President receives the bill; it automatically becomes law.<sup>71</sup> If Congress does not

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<sup>60</sup> Trethan, (n48).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Miller, (n2) at 98.

<sup>64</sup> *Ibid.*

<sup>65</sup> C.H. Pyle and R.M. Pious, *The President, Congress and the Constitution* (New York: the Free Press, 1984) p. 222.

<sup>66</sup> This means that the President cannot veto part of the bill and approve the remainder. He can only approve or veto the entire bill.

<sup>67</sup> 2 U.S. CA ss 691 & 692.

<sup>68</sup> See "Presidential Powers," [www.answers.com/topic/presidential-power](http://www.answers.com/topic/presidential-power). accessed 1/12/2015.

<sup>69</sup> *Clinton v City of New York* 224 U.S. 417, 118 S. CT, 209 (1998).

<sup>70</sup> US Const. Art. 1 s. 7 Clause 2.

<sup>71</sup> *Ibid.*

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convene within 10 days, the bill dies, in which case it shall not be a law.<sup>72</sup> The power to obstruct a bill by doing nothing, so that it dies and does not become law is called pocket veto; and it is valid as one affirmatively disapproving a bill.<sup>73</sup> It is also noteworthy that as Congress cannot vote while in adjournment, a pocket veto cannot be overridden. Statistics show that 42% of all presidential vetoes from 1789 – 2004 were pocket vetoes.<sup>74</sup>

The veto power allows the President, not only to check the legislature in the exercise of legislative function, but also determine what becomes the laws of the country. The significance of the President's veto power is underscored by the fact that Congress rarely overrides vetoes due to the inability of mustering the requisite two thirds majority votes for the purpose. According to Sollernberger,<sup>75</sup> out of 1,484 regular vetoes since 1789, only 7.1% or 106, have been overridden.

### **Executive Legislation by Judicial Appointments**

By having the power to appoint justices of the Supreme Court and other federal judges, even though the Senate must approve nominees, a President can, and does influence the course of constitutional construction.<sup>76</sup> Though Justices do not do the bidding of the President, who appointed them, it is obvious that Presidents generally appoint those Judges whose philosophies are congruent with their own.<sup>77</sup> The case of *Hepburn v Criswold*<sup>78</sup> and its aftermath is a classic instance. In that case, the attempt to make paper money a legal tender in the U.S. was lost in the Supreme Court by a 5 – 3 vote. Fifteen months later, in the *Legal Tender Cases*,<sup>79</sup> the decision was reversed by a 5 – 4 vote, the crucial votes coming from two appointments by President Grant.<sup>80</sup>

### **Exercise of Treaty-making Power**

The American President is further involved in law-making through the exercise of his power to make treaties, subject to the concurrence of Senate.<sup>81</sup> Under the American Constitution, a treaty becomes the law of the land.<sup>82</sup> Thus, under the American legal system, a treaty has equal standing with legislation. In case of conflict between a treaty and legislation, the most recently enacted prevails<sup>83</sup> and both are subject to constitutional review.

In *Whitney v Robertson*,<sup>84</sup> the Supreme Court of the United States stated as follows:

By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation.... When the two relate to the same subject, the courts will always endeavour to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the

<sup>72</sup> *Ibid.*

<sup>73</sup> *Edward v U.S.* 236 U.S. 282 (1932).

<sup>74</sup> *Ibid.*

<sup>75</sup> M.A. Sollenberger, "The Presidential Veto and Congressional Procedure", *Congressional Research Service*, (RS 21750; February 27, 2004) p. 2.

<sup>76</sup> Miller, (n2) at 69.

<sup>77</sup> *Ibid.*

<sup>78</sup> 75 U.S. 603 (1870).

<sup>79</sup> 79 U.S. 457 (1871).

<sup>80</sup> Miller, (n2) at 70.

<sup>81</sup> US Const. Art. II, s. 2 clause 2.

<sup>82</sup> U.S. Const. Art VI(2).

<sup>83</sup> H.T. Krent, *Presidential Powers*, (New York: New York University Press, 2005) p. 92.

<sup>84</sup> 124 US, 190, 194 (1888).

other...

The fact that the American Constitution does not limit the subject matter that could be addressed in treaties clearly shows the wide latitude of presidential law-making power through treaty-making.

### **Ordinary Regulations**

Regulations enacted by the Executive branch, pursuant to statute or simply by unilateral executive action constitute the largest body of laws promulgated by the executive branch. The Supreme Court has held that an executive branch regulation is enforceable even against the President. He has the power to reverse, withdraw, or rewrite the regulation, but it remains enforceable and binding until reversed. "So long as [the] regulation remains in force, the Executive Branch is bound by it, and indeed the United States as the sovereign, composed of the three branches, is bound to respect and enforce it".<sup>85</sup>

### **Executive Presence in the Senate**

The President, through his subordinate, the Vice-President, presides over the Senate of the United States of America and may cast the tie-breaking vote directly in the legislative process. The Vice President's power, in this regard, is derived from the Constitution of America, which provides that: "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided".<sup>86</sup>

### **Comparative Analysis of Presidential Law-making Power: Nigeria and America**

The similarities and difference in the exercise of presidential law making power in Nigeria and America may be examined as follows:

#### **Similarities**

There are similarities between the provisions in the Nigerian and American Constitutions on the President's power to assent to or veto bills passed by the Legislature. Indeed, under both Constitutions, the President has wide discretion in the exercise of such powers. Though Presidents are generally not bound to give reasons for the exercise of their veto power, courtesy would compel them to do so; and to particularly, show whether the affected bill would be unconstitutional or against the interest of the nation. A presidential veto may also be overridden by the Legislature under the Constitutions of both Nigeria and America, after the affected bill has been re-enacted by two thirds majority of the members of each House of the Legislature.

Furthermore, the powers of the President to initiate the country's Appropriation Bill and to sponsor other executive bills are basically the same in the two jurisdictions.

#### **Differences**

While the President of America has the constitutional power to summon Congress, the Nigerian President lacks such powers. Additionally, the American Constitution deliberately provides for executive presence in the Senate, by allowing the Vice President to preside as Senate President, though with no right to vote; except, where there is a tie, he can cast the deciding vote.<sup>87</sup> The Nigerian Constitution does not permit such arrangement, which

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<sup>85</sup> *United States v Nixon*, 418 U.S. 683, 696 (1974). 1990].

<sup>86</sup> US Const. Art 1 section 3(4).

<sup>87</sup> US Const. Art. 1, s. 3 cl 4.

obviously, violates the principle of separation of powers among the three branches of government; particularly the requirement of separation of personnel.

Undoubtedly, the American President's constitutional duty of presenting, from time to time, the State of the Union address to Congress,<sup>88</sup> provides him with the opportunity to unfold his legislative agenda and chart the legislative direction. The Nigerian Constitution does not afford the President with such opportunity. A proposed constitutional amendment to allow the Nigerian President to present a State of the Nation Address was rejected by the National Assembly on the ground that the budget presentation address suffices.

It has also been shown that in America, the President's law-making power includes his power to make treaties. This is because in America, a treaty is constitutionally regarded as the law of the land.<sup>89</sup> However, in Nigeria, treaties would only become the law of the land after they have subsequently been enacted into law by the Legislature through the process of domestication.<sup>90</sup> Therefore, in Nigeria, unlike in America, treaties entered into by the President, do not automatically become the law of the land. Accordingly, the exercise of treaty-making power by the Nigerian President does not also amount to an exercise of presidential legislative power, as it does in the United States of America.

The use of Executive Orders, though permitted in both Nigeria and America, has actually gained more prominence in America. No one knows how many have so far been issued as they were not numbered in the early days.<sup>91</sup> However, in 1907, the State Department began assigning each Order a number and filing it in chronological order.<sup>92</sup>

### Turning Presidents into Supermen

In the light of the massive involvement of Presidents in law-making, as discussed in this paper, it is little wonder that scholars have branded him as the chief legislator.<sup>93</sup> As has been shown above, law-making has ceased to be the exclusive preserve of the Legislature.<sup>94</sup> Though some scholars, such as Berle,<sup>95</sup> now maintain that ultimate legislative power in the United States has come to rest with the Judiciary; and case law, such as *Miranda v Arizona*,<sup>96</sup> prescribing the reading of rights to a suspect, on arrest, and *Marbury v Madison*,<sup>97</sup> seem to support such a view, Miller, insists that ultimate legislative power resides in the Executive branch<sup>98</sup>

The President seems to have seized the initiative and control of the entire legislative process; while the Legislature merely exists to carry out the legislative intentions and programmes of the Executive. It is against this background that Presidents are said to have been turned into

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<sup>88</sup> *Ibid*, Art II, s. 3.

<sup>89</sup> *Ibid* Art VI(2).

<sup>90</sup> CFRN, 1999, s. 12.

<sup>91</sup> Fisher, (n12) at 105.

<sup>92</sup> *Ibid*.

<sup>93</sup> Rossiter, (n2) at 28.

<sup>94</sup> Miller, *Op. Cit.* 73 – 74.

<sup>95</sup> A. Berle, *The Three Faces of Power* (1967). Quoted in Miller, *Op. Cit.* at 62.

<sup>96</sup> 384 U.S. 436 (1966).

<sup>97</sup> 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall stated that "it is emphatically the province and duty of the judicial branch to say what the law is".

<sup>98</sup> Miller, (n2) at 63.

supermen, with extra-ordinary powers to navigate the whole gamut of governmental functions without assistance from the other branches of government.

It is significant to note that under both the Nigerian and American constitutional orders, power may be shared among the three branches of government, but it is flowing ever increasingly and ever more rapidly toward the Executive; and within that branch, towards the Presidency.<sup>99</sup> Usually, this has been made possible with the all too ready acquiescence of the Legislature and the indifference of the Judiciary. This, of course, is a dangerous trend, which could result in the emergence of tyrants and dictators as Presidents, with the attendant negative impact on the sustainability of constitutional democracy.

## CONCLUSION AND RECOMMENDATIONS

It has been shown in this article that the involvement of Presidents in the legislative process has become more prominent in recent times. Presidential legislative powers are derived from the Constitution or other statutory provisions. However, Presidents have continued to assume law-making powers, citing their constitutional powers as Chief Executive and Commander in Chief of the Federation, for their actions.

In America, Executive Orders, for example, can have the same effect as a federal law, under certain circumstances. The American President can carry out far reaching policy decisions through Executive Orders without the necessity of seeking congressional approval. Congress, however, has the power to pass a legislation to override the Executive Order; but such legislation would still be subjected to presidential assent or veto, and the President would likely exercise the veto power, thereby extending the operation of the Executive Order. It has also been shown that presidential law-making power, though liable to judicial and legislative controls, are, in fact, rarely subjected to such restraint and scrutiny. With decreasing dependence of Presidents on the Legislature to provide the necessary legislative backup for their policy decisions, Presidents have become fully independent and therefore increasingly authoritarian. In response, both legislative and judicial checks and controls on presidential law-making power must be strengthened and effectively applied in order to prevent the emergence of dictatorship and ensure the sustainability of constitutional democracy in both Nigeria and the United States of America.

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<sup>99</sup> *Ibid* at 29 and 35.