

Presidential executive orders: Laws without legislation

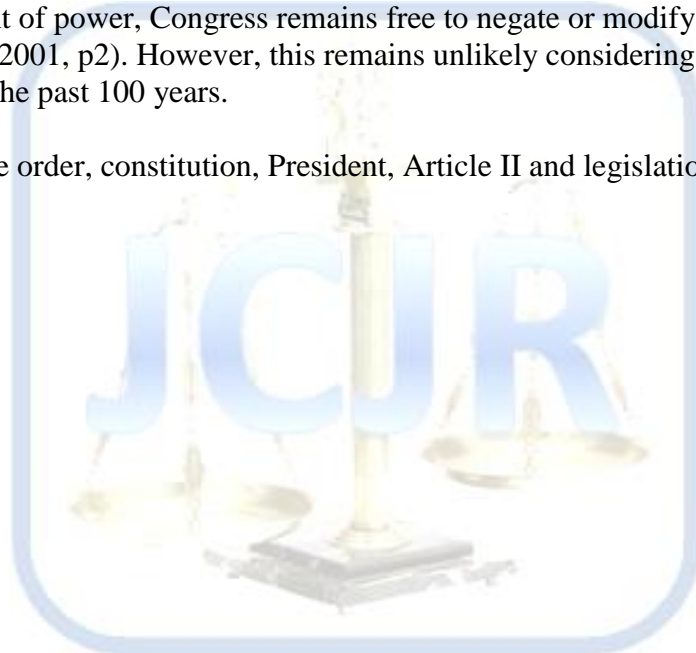
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ABSTRACT

The Constitution vests the President with the duties of commander in chief, head of state, chief law enforcement officer, and head of the executive branch. When the President is lawfully exercising one of these responsibilities conferred by Article II of the Constitution, the scope of his power to issue written directives is especially broad, and Congress has little ability to regulate or circumscribe the President's use of written directives.

Nevertheless, the President's power to issue executive decrees is limited – by the scope of his powers and by other authority granted to Congress. If the President's authority is derived from a statutory grant of power, Congress remains free to negate or modify the underlying authority. (Gaziano, 2001, p2). However, this remains unlikely considering that it has happened roughly 20 times in the past 100 years.

Keywords: Executive order, constitution, President, Article II and legislation



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INTRODUCTION

This article examines the development of the Presidential Executive Order, and will cover the Executive Orders of previous Presidents, up to and including the current administration of President Obama.

Executive orders are issued in the United States by the President, acting in his capacity as the head of the executive branch of the federal government. They are usually Presidential Orders directing the staff of the executive branch and are issued pursuant to Article II, Section 2, Clause 1, of the United States Constitution, which makes reference to “executive power” and states where in that the President “take care that the laws be faithfully executed”. *Mississippi v. Johnson*, 71 US 475 (1866).

Over the years, various President’s have used the Constitutional references as their authorization for issuing Executive Orders as part of their authority to carry out the President’s sworn duties.

Although these Presidential acts have not been authorized through Congressional action, they have for the most part, gone untested by the Courts. The Department of State instituted a numbering system for Executive Orders in 1907, starting retroactively with the Order issued on October 20, 1862 by then President Abraham Lincoln; when he suspended the writ of habeas corpus and issued the Emancipation Proclamation. There are now over 13,000 such numbered orders. The documents later became known as “Executive Orders”, probably from the document captioned “Executive Order Establishing a Provisional Court in Louisiana”. Relyea, Harold C. “Directives: Background and Overview, CRS Report to Congress #98-611, Nov 26, 2008.

Conventional wisdom suggests that Presidents use executive orders, sometimes characterized as Presidential legislation, when actual legislation is too difficult to pass. Recent studies have found little systematic evidence that executive orders are used to circumvent a hostile Congress. Deering, Christopher. “The Politics of Executive Orders: Legislative Constraints on Presidential Power. Sage Journals Online, 1999.

Executive Orders do not require Congressional approval to take effect but they have the same legal weight as laws passed by Congress. In fact, many important policy changes have occurred through Executive Orders. President Harry Truman integrated the armed forces under an Executive Order. President Dwight Eisenhower used an Executive Order to desegregate schools. Presidents Kennedy and Johnson used them to bar racial discrimination in federal housing, hiring and contracting. President Regan used an Executive order to bar the use of federal funds for advocating abortion, which was reversed by President Clinton when he came into office.

As a result, Executive Orders are sometimes controversial because they allow the President to make major decisions, even law, without the consent of Congress. Congress, however, is less likely to challenge Executive Orders that deal with foreign policy, national defense, or the implementation and negotiation of treaties, as they are powers granted largely to the President by the Constitution. On the other hand, Executive Orders can be challenged in court, usually on the grounds that the Order deviates from “congressional intent” or exceeds the Presidents constitutional powers. For the most part, however, the court has been fairly tolerant of a wide range of Executive Orders. What is an Executive Order? ThisNation.com, 2008

The President can retract an Executive Order at any time. He may also issue an Executive Order that supersedes an existing one. New incoming Presidents may choose to follow the Executive Orders of the predecessors, replace them with new ones of their own or revoke the old

ones completely. Many people strongly oppose the Executive Order as being unconstitutional, even potentially dictatorial application of power. In extreme cases, Congress may pass a law that alters an existing Executive Order and the Supreme Court may declare them to be unconstitutional. US Government Info "Executive Orders" 12/18/97. About.com.

BEGINNING OF USE

Conventional wisdom suggests that Presidents use executive orders, sometimes characterized as presidential legislation, when legislation is too difficult to pass. According to this model, executive orders are strategic instruments used by a President to circumvent the constitutionally prescribed policymaking process. Presidents do use executive orders to circumvent a hostile Congress, but not if they are likely to be overturned by Congress. (Deering and Maltzman, 1999, p767).

In 1793, President George Washington issued an executive order declaring American neutrality in the war between France and England. Washington's use of an executive order was a strategic choice, as he believed that Congress was unlikely to embrace his position. This was not the last time that a President used an executive order to accomplish policy goals. Indeed, since Abraham Lincoln signed the first numbered order, Presidents have since issued in excess of 13,000 orders. (Deering and Maltzman, 1999, p768).

USE OF EXECUTIVE ORDERS

Because Presidents issued more executive orders under unified than divided government, (Skull, 1997,p103) it can be concluded that executive orders are primarily a vehicle for reinforcing legislative victories rather than circumventing a hostile Congress. As such, Presidents are not more apt to issue executive orders when they face strenuous times in the legislative arena. Rather, Presidents use executive orders to reinforce administratively their legislative victories. (Krause and Cohen, 1997,p.470). There is some evidence showing that there have been more executive orders issued under unpopular Presidents (Mayer, 1999) and during periods of high inflation and unemployment. (Krause and Cohen, 1997).

All things equal, Presidents should prefer the permanence of legislation to the potentially ephemeral character of executive action. Of course, Presidents cannot always secure their preferred policy outcomes in the legislative arena and thus are forced to calculate the viability of executive action. (Deering and Maltzman, p 770). The expense of executive orders stems from the damage done to a President's "professional reputation" if Congress passes legislation that effectively overrides an order (Neustadt, 1990). Both the benefit of circumventing Congress and the potential costs for doing so are likely to enter into Presidential calculations in deciding whether and how often to issue executive orders (Sala 1998; Moe and Howell 1998).

These cost-benefit calculations pervade other areas of presidential decision-making. For example, fear of establishing a pattern of failure leads Presidents to be more reluctant to veto a bill after they have had a veto overridden (Copeland 1983). Presidents fear both the political cost associated with having a veto overridden and the cost associated with a "fall in his reputation for effectiveness, for not carrying out a public threat to veto." (Matthews 1988,p348).

In short, a Presidents willingness to issue an executive order depends upon both his positive power to get legislation enacted by Congress and his negative power to stop legislation overturning such an executive order. Viewed in this light, presidential decisions regarding

executive orders reflect strategic calculations. A President may find it difficult or impossible to change the status quo via legislative action. But in these same circumstances he may be able to maintain an executive order against hostile legislative action with judicious use of the veto. Under such conditions, an executive order will be the preferred institutional device for pursuing presidential policy goals. (Deering and Maltzman, 1999, 770-771).

Presidents have limited capacity to act unilaterally or make policy decisions on their own. An executive order is a presidential directive that requires or authorizes some action within the executive branch.

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

- Internment of Japanese-Americans during World War II. Forcing 100,000 Japanese-Americans into concentration camps and having their property confiscated. (Roosevelt, Executive Order 9066, February 19, 1942)
- Integration of the armed forces (Truman, Executive Order 9981, July 26, 1948)
- Requirement that government contractors implement affirmative action policies in employment practices. (Kennedy, Executive Order 10925, March 6, 1961; Johnson, Executive Order 11246, September 24, 1965)
- Requirement that major government regulations be justified by cost-benefit analysis (Regan, Executive Order 12291, February 17, 1981)

FURTHER STUDIES NEEDED

Despite the importance of executive orders, only a handful of studies have considered their use and significance. (Mayer, K., 1999, p 445-446) Executive orders have legal force only when they are based on the president's constitutional and statutory authority (Fisher 1991, p. 109). Yet, presidents take an expansive view of their own power when it suits them, and use executive orders to expand the boundaries of their authority. The courts typically stay out of the presidents' way, upholding executive orders even when they are "of – at best – dubious constitutional authority . . . [or] issued without specific statutory authority". (Fleishman and Aufses, 1976, p5). Between 1789 and 1956, state and federal courts overturned 16 executive orders (Schubert 1957, p 361-65); *Youngstown Steel and Tube v. Sawyer* (343 US 579, 1951), which overturned Truman's seizure of the nation's steel mills, which is undoubtedly the most famous.

Executive orders thus provide an important window into presidential power: they are a unique hybrid, as they constitute a potential reservoir of independent authority, but one that presidents do not use without regard to circumstance or consequence. (Mayer, 1999, p 448).

While political party is not a perfect proxy for activism, Democratic presidents have historically been more inclined to favor expansive government policies than Republican presidents, and so presumably would be more likely to issue orders for substantive policy purposes. (Mayer, 1999, p 450).

Presidents, when they take office, usually try to place their immediate stamp on executive branch processes and policies. Executive orders are an excellent way to do this, since they allow presidents to alter organizational relationships and administrative routines.

Presidents have issued numerous significant orders early in their administrations. Clear examples of this practice are Reagan's Executive Order 12291, which he issued three weeks into his first term, and Clinton's Executive Order 12836, issued in his second week, revoking two

Bush era orders that were unpopular with labor unions (Novak, 1992,p 2764). The incentive to make changes will be greater when party control of the White House has changed, as incoming presidents distinguish themselves from their predecessors and “hit the ground running”. (Pfiffner, 1996)

If presidents use executive orders at the beginning of their terms, they may well do the same at the end, to put a legacy in place. Outgoing presidents can use executive orders to obligate their successors by making appointments, establishing new departmental rules, and carrying out implementation tasks. Even a cursory investigation uncovers a robust pattern of last-minute orders issued on a presidents final days in office. (Mayer, 451).

CAREFUL USE: A NECESSITY

Since executive orders are a unilateral presidential tool, presidents might use them to compensate for congressional opposition. Fleishman and Aufses (1972,p 6) argued that “in some cases executive orders are as much a reflection of presidential weakness, as of presidential strength. In other words, Presidents may decide to legislate by executive order when they have failed to move desired bills through Congress.” This theme arises from histories of the civil rights orders, which maintained that Democratic presidents used executive orders because they knew that Congress would refuse to pass legislation (Morgan, 1970). Presidents may also use executive orders to preempt legislation or undercut Congress in other ways.

For the same reasons, presidents who have low levels of public approval may be more likely to resort to executive orders. Doing so offers a way of getting around other institutional actors who might be emboldened in their opposition to what they perceive as a weak White House, and also provides presidents with a method of position taking, framing policy questions, or delivering on promises made to key constituencies. (Mayer,1999,p 452).

The following functions of the President expressly mentioned in the U.S. Constitution are among the more important under which the President may issue at least some directives in the exercise of his constitutional and statutorily delegated powers:

- Commander in Chief. Broad powers as the military commander (U.S. Const., Art II, Section 2, Cl. 1).
- Head of State. The President is solely responsible for carrying out foreign policy. (U.S. Const., Art II, Section 2, Cl 2 and Section 3
- Chief Law Enforcement Officer. The President has the sole constitutional obligation to “take care that the laws be faithfully executed “ (U S Const., Art II, Sec 3)
- Head of the Executive Branch. The Framers of the Constitution determined that the President alone would be vested with “the executive power” of Article II.

A presidential pardon, for example, is a decision squarely within the President’s discretion. (U S Const., Art II, Sec 2, Cl 1; U.S. v Klein, 60 US (13 Wall) 128, 147 (1871) “[t]o the executive alone is entrusted the power of pardon.”

PUBLICATION REQUIREMENT

The federal law governing presidential decrees is sparse. Since 1935, a federal statute provides that presidential proclamations and executive orders “of general applicability and legal

effect” must be published in the Federal Register unless the President determines otherwise for national security or specified reasons. (statute codified at 44 USC Sec 1505. Other than a few rules, a President is free to adopt procedures regarding the issuance and publication of directives as he sees fit.

For over 100 years, the President has asked the Attorney General or another senior official in the Department of Justice to review draft executive orders with regard to their form and legality. Since 1962, the proper form and routing of executive orders has been governed by Executive Order 11030, which makes the Director of the Office of Management and Budget responsible for shepherding such directives through the process.

The Attorney General’s review responsibilities are currently delegated to the head of the Office of Legal Counsel (OLC) in the Department of Justice. Once the order is revised to his satisfaction, the Assistant Attorney General for the OLC transmits it with a formal letter that dates back to the 19th century. The letter begins with the salutation “My dear Mr. President.” It summarizes the order in a few paragraphs and then assures the President that the document for his signature has been approved with regard to form and legality. (Gaziano, 2001, pp 11-12).

The greatest fear the founders of this nation had was the establishment of a strong central government and a strong political leader at the center of that government. They no longer wanted kings, potentates or czars; they wanted a loose association of states in which the power emanated from the States and not from the central government.

Many of the fears of the founding fathers may now be coming to fruition. Today, the executive branch of the government is immensely powerful, much more powerful than the founding fathers had envisioned or wanted. Congressional legislative powers have been usurped. There is no greater example of that usurpation than in the form of the presidential executive order. The process totally by-passes Congressional legislative authority and places in the hands of the President almost unilateral power.

Without Congressional approval, the President now has the power to transfer whole populations to any part of the country, the power to suspend the Press and to force a national registration of all persons. The President, in essence, has dictatorial powers never provided to him under the Constitution. The President even has the power to suspend the Constitution and the Bill of Rights in a real or perceived emergency. (Martin, 1995).

Executive orders can be challenged formally in two ways:

- 1) A lawsuit can be brought if the order contradicts the original legislative intent of the law or has no underlying statutory authority, and
- 2) Congress could pass a bill repealing or modifying a specific executive order. The bill would, of course, be subject to a presidential veto and would then need an override. (Hirsen, 1999).

USE BY THE OBAMA ADMINISTRATION

It should come as no surprise that the Obama transition team reviewed nearly every order by the Bush administration. Certain superseding executive orders are predictable because of their adherence to party platforms. Early orders from Obama were intended to place his imprint on the executive office. (Strohman, 2008)

In fact, President Obama, in his second full day in office, issued three major executive orders dealing with detention and interrogation in the war on terrorism. The orders were received

as major policy shifts in counterterrorism law and strategy, actually varying a great deal in their consequence. The most eagerly anticipated one, which orders an eventual closure of the detention facilities at Guantanamo Bay, Cuba, is actually far less significant than it may appear. It is also far less important than the interrogation order that President Obama signed along with it. In conjunction with a companion order establishing a task force to study the future of detention policy, it answers more of the major detention policy questions facing America.

Obama's executive detention order is careful to preserve all options for each detainee and offers the new administration a great deal of wiggle room. (Wittes, 2009). The interrogation order signed by President Obama shows that the United States will continue to be involved in practices including kidnapping, secret detention and torture. The order ostensibly ended torture and a network of secret CIA prison camps. However, they allow the continual use of "extraordinary rendition" by the CIA, whereby the U.S. secretly abducts individuals it claims are terrorists, sending them to nations that practice torture. President Obama is not only contemplating preserving rendition, he foresees using it more than the Bush administration. The order also allows an exception for "facilities used only to hold people in short-term transitory basis." What constitutes "short-term" is not defined.

This provision will allow the CIA's secret prison system to function more or less as it did in the Bush administration. While under the Bush administration, prisoners could not be held indefinitely in CIA-run black holes, in many cases, CIA prisons – many of which were located in eastern Europe – acted as way stations for prisoners who were to be shipped off to regimes where the abductees were subjected to torture.

In relationship to the use of torture by the U.S. military and the CIA, he has proposed the creation of a task force that would study ways of changing the manual to allow for new forms of interrogation. (Eley, 2009).

While on a three-day western trip, President Obama issued executive orders to help students repay their loans, to keep struggling homeowners in their houses and to help 8,000 veterans find jobs. On all three, he used his presidential powers rather than try to hash out legislation with uncooperative Republicans, who are determined to keep President Obama from padding his resume before the 2012 election. (Star-Ledger Editorial Board, 2011).

CONCLUSION

Executive orders are important to presidents, and their use reflects much more than simple administrative routines or random noise. Presidents use them to make substantive policy, exercise emergency powers, strengthen their control over executive branch agencies and administrative processes, emphasize important symbolic stances, and maintain electoral and governing coalitions.

The president's power to make policy through executive orders has grown along with, and has reinforced, the expansion of executive branch responsibilities. Some of this authority has been delegated to the president by Congress, but presidents have also simply assumed unilateral policymaking powers, especially in national security and foreign policy matters. (Koh 1990; Fisher 1995).

Presidents therefore have the authority to make significant policy choices. "[T]hey can organize and direct the presidency as they see fit, create public agencies, reorganize them, move them around, coordinate them, impose rules on their behavior, put their own people in top positions, and otherwise place their structural stamp on the executive branch," (Moe, 1993, 366)

Former White House aide Paul Begala once wrote about an executive order by then President Clinton: “Stroke of the pen, law of the land. Kind of cool.” (Novak, 1992)

APPENDIX

Number of Executive Orders by President
National Archives and Records Administration
Federal Register

Barack Obama (2009-2011) – 95
As of 1/1/12 – 106
George W. Bush (2001-2009) -291
William J. Clinton (1993-2001) – 364
George Bush (1989-1993) – 166
Ronald Reagan (1981-1989) – 381
Jimmy Carter (1979-1981) -320
Gerald R. Ford (1974-1977) – 169
Richard M, Nixon (1969-1974) – 346
Lyndon B. Johnson (1963-1969) – 324
John F. Kennedy (1961-1963) – 214
Dwight D. Eisenhower (1953-1961) – 482
Harry S. Truman (1945-1953) – 894
Franklin D. Roosevelt (1933-1945) – 3,467
Herbert Hoover - 995

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