

Connecticut Debate Association

State Finals

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Amity Regional High School

Resolved: Executive orders should require Congressional review.

Executive Power Run Amok

The New York Times, By JOHN YOO, FEB. 6, 2017

Berkeley, Calif. — Faced with President Trump’s executive orders suspending immigration from several Muslim nations and ordering the building of a border wall, and his threats to terminate the North American Free Trade Agreement, even Alexander Hamilton, our nation’s most ardent proponent of executive power, would be worried by now.

Article II of the Constitution vests the president with “the executive power,” but does not define it. Most of the Constitution instead limits that power, as with the president’s duty “to take care that the laws are faithfully executed,” or divides that power with Congress, as with making treaties or appointing Supreme Court justices.

Hamilton argued that good government and “energy in the executive” went hand in hand. In *The Federalist No. 70*, he wrote that the framers, to encourage “decision, activity, secrecy and dispatch,” entrusted the executive power in a unified branch headed by a single person, the president.

Many of Hamilton’s intellectual admirers today endorse the theory of the unitary executive, which holds that the Constitution grants the president all of the remaining executive powers that existed at the time of the founding. These include the powers to conduct foreign affairs, protect the national security, interpret and execute the law and manage all lower-level federal officers.

As an official in the Justice Department, I followed in Hamilton’s footsteps, advising that President George W. Bush could take vigorous, perhaps extreme, measures to protect the nation after the Sept. 11 attacks, including invading Afghanistan, opening the Guantánamo detention center and conducting military trials and enhanced interrogation of terrorist leaders. Likewise, I supported President Barack Obama when he drew on this source of constitutional power for drone attacks and foreign electronic surveillance.

But even I have grave concerns about Mr. Trump’s uses of presidential power.

During the campaign, Mr. Trump gave little sign that he understood the constitutional roles of the three branches, as when he promised to appoint justices to the Supreme Court who would investigate Hillary Clinton. (Judge Neil M. Gorsuch will not see this as part of his job description.) In his Inaugural Address, Mr. Trump did not acknowledge that his highest responsibility, as demanded by his oath of office, is to “preserve, protect and defend the Constitution.” Instead, he declared his duty to represent the wishes of the people and end “American carnage,” seemingly without any constitutional restraint.

While my robust vision of the presidency supports some of Mr. Trump’s early executive acts — presidents have the power to terminate international agreements like the Trans-Pacific Partnership, for example — others are more dubious. Take his order to build a wall along the border with Mexico, and his suggestion that he will tax Mexican imports or currency transfers to pay for it. The president has no constitutional authority over border control, which the Supreme Court has long found rests in the hands of Congress. Under Article I of the Constitution, only Congress can fund the construction of a wall, a fence or even a walking path along the border. And the president cannot slap a tax or tariff on Mexican imports without Congress.

Nor can Mr. Trump pull the United States out of Nafta, because Congress made the deal with Mexico and Canada by statute. Presidents have no authority to cancel tariff and trade laws unilaterally.

Immigration has driven Mr. Trump even deeper into the constitutional thickets. Even though his executive order halting immigration from seven Muslim nations makes for bad policy, I believe it falls within the law. But after the order was issued, his adviser Rudolph Giuliani disclosed that Mr. Trump had initially asked for “a Muslim ban,” which would most likely violate the Constitution’s protection for freedom of religion or its prohibition on the state establishment of religion, or both — no mean feat. Had Mr. Trump taken advantage of the resources of the executive branch as a whole, not just a few White House advisers, he would not have rushed out an ill-conceived policy made vulnerable to judicial challenge.

Mr. Trump's firing of the acting attorney general, Sally Yates, for her stated intention not to defend his immigration policy, also raises concerns. Even though the constitutional text is silent on the issue, long historical practice and Supreme Court precedent have recognized a presidential power of removal. Mr. Trump was thus on solid footing, because attorneys general have a duty to defend laws and executive orders, so long as they have a plausible legal grounding. But the White House undermined its valid use of the removal power by accusing Ms. Yates of being "weak on borders and very weak on illegal immigration." Such irrelevant ad hominem accusations suggest a misconception of the president's authority of removal.

A successful president need not have a degree in constitutional law. But he should understand the Constitution's grant of executive power. He should share Hamilton's vision of an energetic president leading the executive branch in a unified direction, rather than viewing the government as the enemy. He should realize that the Constitution channels the president toward protecting the nation from foreign threats, while cooperating with Congress on matters at home.

Otherwise, our new president will spend his days overreacting to the latest events, dissipating his political capital and haphazardly wasting the executive's powers.

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The Legality of Obama's Executive Orders (And Why You Should Care)

Berkeley Political Review, MICHAEL ELIOTMAY 11, 2016

During the recent in-the-gutter name calling of the Presidential campaign, the Republican presidential candidates repeatedly and loudly have proclaimed that the moment they step into the Oval office, they will immediately undue the flagrantly illegal Executive Orders that President Obama has issued. They assert that the Executive Orders are illegal because Obama is using them to make new

Rather than the duly elected members of Congress solely making laws, we would now have two branches of the government making laws, the legislative branch and the executive branch. Not only is this contrary to what our founding fathers intended as bounding the scope and powers of each branch, it also starts us down a very slippery and ugly slope.

Let's take a look at where this might lead.

Part of the rationale for not allowing the executive branch to create new laws is that being the designated implementer of laws, the executive branch could intentionally make new laws that suited its own fancy and then seemingly dutifully carry out the new laws that they themselves had crafted. This is the kind of Big Brother government activity that our constitution purposely seeks to avoid and prevent.

As French political philosopher Montesquieu famously stated: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."

Therefore, are Republicans (and other critics of Obama) correct that these Executive Orders are illegal?

Additionally, is this the first time ever that a President has tried to overstep his reach and issued such Executive Orders?

Executive Orders and Their Bounds

Executive Orders began with George Washington, and have been used by all U.S. presidents since then.

Today, there are well over 13,000 and counting Executive Orders and are considered "presidential directives" along with other presidential proclamations. Obama has issued about 226 Executive Orders, while recent preceding president's counts have been that George W. Bush issued 291, Clinton issued 364, George H.W. Bush issued 166, and Ronald Reagan issued 381. Each of these presidents has had critics claiming that some of their Executive Orders were illegal. For example, George W. Bush issued Executive Orders allowing for expanded warrantless search by the National Security Agency (NSA), leading to this criticism in 2006 by Harry Reid, D-NV and Senate Majority Leader at the time: "In matters ranging from domestic spying to the use of torture, the current president has effectively declared himself above the law."

Strictly speaking, there is no specific constitutional definition for Executive Orders and a president can even opt to not particularly publish or make public an Executive Order. This means that the public at large might not even know that a president has issued an Executive Order and be kept in the dark about what it contains and its effects. Though in some rarer cases this might be appropriate if the Executive Order deals with sensitive national security matters, it has generally been the expectation that a president will make known and publish their Executive Orders in the official Federal Register.

Clearly, the use of Executive Orders is well established as a presidential prerogative and has been used by both Democrat and Republican presidents, by liberals and conservatives, ranging from somewhat trivial matters to matters of

the utmost importance. The question arises as to whether any specific Executive Order is potentially legal in its reach or illegal in its reach. To ascertain legality, we need to turn to the third branch of government, the judicial branch. Ultimately, it is the U.S. Supreme Court that ascertains whether or not an Executive Order is consider illegal or legal.

One of the first such cases involved President Andrew Johnson. He issued a presidential directive on Christmas day in 1868 that granted a pardon to those that had participated in the civil war. Hotly contested at the time, opponents that thought the order to be illegal took the case all the way to the U.S. Supreme Court. The Supreme Court ruled that via Article II, section 2, clause 1 of the U.S. Constitution that the order was legal since it was based upon constitutional authority.

However, a Supreme Court ruling will not always go the way of the presidential Executive Order.

In 1952, President Truman issued an Executive Order that instructed the executive branch to seize steel mills, which became a hotly contested presidential directive at the time. After winding its way through the courts, the case reached the U.S. Supreme Court and the justices ruled that the Executive Order was illegal because it was not based on the Constitution nor by any Act of Congress.

Generally, the U.S. Supreme Court has established that an Executive Order must arise from one of three sources to be consider legal:

Via the presidential executive power granted by Article II, section 2 of the Constitution, or

Via the role of Commander in Chief powers as stipulated in Article II, section 2, or

Via the requirement that the president take care that the laws are to be faithfully executed (Article II, section 3)

Thus, any Executive Order that is issued should be carefully reviewed with respect to those three sources of validation. Per the Truman case and the overreaching Executive Order to grab private steel mills, the U.S. Supreme Court indicated and reaffirmed that the president cannot be a lawmaker and must only be a faithful executor of the law. This would seem to make it easy to figure out whether an Executive Order is considered legal or illegal. Unfortunately, similar to just about anything else involving the law, it is in reality much murkier than it is clear cut.

U.S. Supreme Court as Decider of Legality of Executive Orders

Whenever an Executive Order is contested and goes into the courts, odds are that it will eventually land at the door step of the U.S. Supreme Court. For today's U.S. Supreme Court, up until the death of Justice Scalia, the Court had typically leaned toward the conservatives, and so any case involving a disputed Executive Order was likely to side against Obama.

Now that the Court is at a count of 8 justices, it is likely that any case involving a disputed Executive Order will go to a 4-4 tie, which then allows the last appellate court ruling on the case to generally prevail. Obama would need to add a justice with a liberal bent to the Supreme Court in order to help ensure that his challenged Executive Orders are considered legal. This desire to add such a justice is perhaps an insurmountable challenge since the Republican controlled Senate determines whether a justice candidate provided by the president will actually be able to take a Supreme Court seat.

At this time, most of Obama's controversial Executive Orders will be stuck in limbo until they reach the Supreme Court, and the make-up of the Supreme Court is probably unlikely to be resolved during his remaining tenure in office.

Let's take a specific example to illustrate this.

Obama had issued a controversial Executive Order on immigration (attempting to protect 4 million or more undocumented immigrants from deportation).

The case rose to the top level appeals court and had been decided against by the appeals court.

Now, the case is appealed to the U.S. Supreme Court, but assuming the vote goes 4-4 then the appeals court decision will stand and the Executive Order would be considered illegal and not enforceable.

Of course, it could have been the other way around, namely that the appeals court was saying that the Executive Order was legal, and then at the Supreme Court say the vote is a 4-4 tie, in that case Obama would prevail since the Executive Order would be the status of the appeals court decision.

Upshot about Executive Orders

The legality of Executive Orders are ultimately decided by the Supreme Court and disputed Executive Orders often take years to wind their way through the court system.

You might wonder why a president would opt to issue a controversial Executive Order and instead of issuing ones that are clearly legal and not contested. Obama expressed it aptly when he said: "America does not stand still, and neither will I," when asked why he continues to issue Executive Orders that out-the-gate are instantly attacked by his critics as blatantly illegal. When a president believes that they are faced with a so-called "do-nothing Congress" then the

president is tempted to make action occur by producing Executive Orders that presumably are intended to overcome Congressional inaction.

Depending upon whether you are supportive of the particular president at the time, you might think the president is a hero for doing the job that Congress was supposed to be doing, or you might instead be opposed to that president and therefore riled that the president dared to try and overstep Congress.

Obama has said that he has a pen and a phone, and he will use them to create as many Executive Orders as he thinks necessary. Ted Cruz sees this differently: “President Obama is fond of saying he has a pen and he has a phone.” Well, live by the pen and die by the pen. Every illegal executive action that he puts in place can be undone in an instant by the next president through the same mechanism. The proper avenue for creating law in this country is not unilateral decree. It is rather passing legislation through Congress that is signed into law by president pursuant to the dictates of the Constitution.”

Only time will tell whether Obama’s Executive Orders are legal or not, and whether the next president opts to undo them or not. Illegal or legal, lasting or soon to be outcast, you’ll have to watch the news to know which Executive Orders withstand the political gauntlet and which don’t.

The Imperial President’s Toolbox of Unconstitutional Power

The Tenth Amendment Center, John Whitehead, October 10, 2016

Presidents don’t give up power.

Executive orders don’t expire at the end of each presidential term.

And every successive occupant of the Oval Office since George Washington, who issued the first executive order, has expanded the reach and power of the presidency.

The Constitution invests the President with very specific, limited powers: to serve as Commander in Chief of the military, grant pardons, make treaties (with the approval of Congress), appoint ambassadors and federal judges (again with Congress’ blessing), and veto legislation.

In recent years, however, American presidents have anointed themselves with the power to wage war, unilaterally kill Americans, torture prisoners, strip citizens of their rights, arrest and detain citizens indefinitely, carry out warrantless spying on Americans, and erect their own secretive, shadow government.

These are the powers that will be inherited by the next heir to the throne, and it won’t make a difference whether it’s a President Trump or a President Clinton occupying the Oval Office.

The powers amassed by each successive president through the negligence of Congress and the courts—powers which add up to a toolbox of terror for an imperial ruler—empower whomever occupies the Oval Office to act as a dictator, above the law and beyond any real accountability.

Consider some of the presidential powers—which have been acquired through the use of executive orders, decrees, memorandums, proclamations, national security directives and legislative signing statements and can be activated by any sitting president—that have allowed past presidents to operate above the law and beyond the reach of the Constitution.

The power to kill. As the New York Times concluded, “President Obama, who came to office promising transparency and adherence to the rule of law, has become the first president to claim the legal authority to order an American citizen killed without judicial involvement, real oversight or public accountability.” Obama’s kill lists—signature drone strikes handpicked by the president—have been justified by the Justice Department as lawful because they are subject to internal deliberations by the executive branch. “In other words,” writes Amy Davidson for the New Yorker, “it’s due process if the President thinks about it.”

The power to wage war. Ever since Congress granted George W. Bush the authorization to use military force in the wake of 9/11, the United States has been in a state of endless war without Congress ever having declared one. Having pledged to end Bush’s wars, Barack Obama has extended them. As the New York Times notes, “He has now been at war longer than Mr. Bush, or any other American president... he will leave behind an improbable legacy as the only president in American history to serve two complete terms with the nation at war.” More than that, as the Atlantic makes clear, “Obama is inaugurating an era of unbridled war-making by the commander in chief, without any of the checks and balances contemplated by the American constitutional system.”

The power to torture. Despite the fact that the Bush Administration’s use of waterboarding as a torture tactic was soundly criticized by Obama, the Obama Administration refused to hold anyone accountable for participating in the rendition and torture programs. In the absence of any finding of criminality, the authorization of such torture tactics remain part of the president’s domain—should he or she ever choose to revive it.

The power to spy on American citizens. In the wake of the 9/11 terror attacks, President Bush secretly authorized the National Security Agency to carry out surveillance on Americans' phone calls and emails. The Bush Administration claimed that the Constitution gives the president inherent powers to protect national security. The covert surveillance has continued under Obama.

The power to indefinitely detain American citizens. In 1942, President Franklin D. Roosevelt issued an executive order requiring that all Japanese-Americans be held in internment camps. While that order was later rescinded, the U.S. Supreme Court declared it to be constitutional. The ruling has never been overturned. Pointing out that such blatantly illegal detentions could happen again—with the blessing of the courts—Justice Scalia warned, “In times of war, the laws fall silent.” In fact, each National Defense Authorization Act enacted since 2012 has included a provision that permits the military to detain individuals—including Americans citizens—indefinitely without trial.

The power to strip American citizens of their constitutional rights. The Bush Administration claimed it could strip American citizens of their constitutional rights, imprison them indefinitely, and deny them legal representation simply by labeling them as enemy combatants. While the Obama Administration jettisoned the use of the term “enemy combatant,” it has persisted in defending the president’s unilateral and global right to detain anyone suspected of supporting terrorist activities.

The power to secretly rewrite or sidestep the laws of the country. Secret courts, secret orders, and secret budgets have become standard operating procedure for presidential administrations in recent years. A good case in point is Presidential Policy Directive 20, a secret order signed by President Obama as a means of thwarting cyberattacks. Based on what little information was leaked to the press about the clandestine directive, it appears that the president essentially put the military in charge of warding off a possible cyberattack. A FOIA request by the Electronic Privacy Information Center (EPIC) seeking more details on the directive was allegedly denied because doing so could cause “exceptionally grave damage to the national security.” However, EPIC believes the order allows for military deployment within the United States, including the ability to shut off communications with the outside world if the military believes it is necessary.

The power to transform the police into extensions of the military and indirectly institute martial law. What began in the 1960s as a war on drugs transitioned into an all-out campaign to transform America’s police forces into extensions of the military. Every successive president since Nixon has added to the police’s arsenal, tactics and authority. In fact, the Obama Administration has accelerated police militarization by distributing military weapons and equipment to police and incentivizing SWAT team raids and heavy-handed police tactics through the use of federal grants and asset forfeiture schemes.

The power to command the largest military and intelligence capabilities in the world and, in turn, “wag the dog.” As law professor William P. Marshall points out:

In his roles as Commander-in-Chief and head of the Executive Branch, the President directly controls the most powerful military in the world and directs clandestine agencies such as the Central Intelligence Agency and National Security Agency. That control provides the President with immensely effective, non-transparent capabilities to further his political agenda and/or diminish the political abilities of his opponents. Whether a President would cynically use such power solely for his political advantage has, of course, been the subject of political thrillers and the occasional political attack. President Clinton, for one, was accused of ordering the bombing of terrorist bases in Afghanistan to distract the nation from the Lewinsky scandal, and President Nixon purportedly used the Federal Bureau of Investigation to investigate his political enemies. But regardless whether such abuses actually occurred, there is no doubt that control of covert agencies provides ample opportunity for political mischief, particularly since the inherently secretive nature of these agencies means their actions often are hidden from public view. And as the capabilities of these agencies increase through technological advances in surveillance and other methods of investigation, so does the power of the President. Thus, it doesn’t matter what the pundits predict, the candidates promise, and the people decree.

It doesn’t even matter whether the people elect Trump or Clinton. After all, politicians sing a different tune once elected. For instance, the Chicago Tribune editorial board observed that although Barack Obama opposed the imperial tendencies of George W. Bush, once in office, Obama “wound up behaving as if he had a scepter and throne.”

What matters is that the damage has already been done.

As Professor Marshall explains, “every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents.” Moreover, it doesn’t even matter whether other presidents have chosen not to take advantage of any particular power, because “it is a President’s action in using power, rather than forsaking its use, that has the precedential significance.”

In other words, each successive president continues to add to his office’s list of extraordinary orders and directives, granting him- or herself near dictatorial powers.

So let's not have any more talk of which candidate would be more dangerous with these powers.

The fact that any individual—or branch of government—is empowered to act like a dictator is danger enough.

This abuse of presidential powers has been going on for so long that it has become the norm and it will continue no matter which corporate puppet wins the election. The Constitution be damned.

The government of laws idealized by John Adams has fallen prey to a government of men.

As a result, we no longer have a system of checks and balances.

“The system of checks and balances that the Framers envisioned now lacks effective checks and is no longer in balance,” concludes Marshall. “The implications of this are serious. The Framers designed a system of separation of powers to combat government excess and abuse and to curb incompetence. They also believed that, in the absence of an effective separation-of-powers structure, such ills would inevitably follow. Unfortunately, however, power once taken is not easily surrendered.”

The solution is far from simple but it's time, as Marshall suggests, to recalibrate the balance of power. This will mean putting an end to the use of executive orders, decrees, memorandums, proclamations, national security directives and legislative signing statements as a means of getting around Congress and the courts. It will mean that Americans will have to stop letting their politics blind them to government wrongdoing. And it will mean holding all three branches of government accountable to the Constitution (i.e., if they abuse their powers, vote them out of office).

Thus far, Congress, with little spine, less integrity and too busy running for re-election, has offered little attempt at oversight, enabling the president to ride roughshod over the Constitution. The media—the perfect accomplice in this stealthy, bloodless coup—continues to inundate us with the latest celebrity scandal, says virtually nothing about these burgeoning powers. All the while, most Americans continue to operate in blissful near-ignorance, unaware or uncaring that the republic is about to fall.

Yet as I point out in my book *Battlefield America: The War on the American People*, it will be “we the people”—not the president, the politicians, the corporate elite or the media—who will suffer the consequences when freedom falls and tyranny rises. They may justify violating our freedoms in the name of whatever phantom menace-of-the-month threatens “national security,” but we will always be the ones to pay the price.

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9 Executive Orders That Changed American History

Time, Lily Rothman, Feb 06, 2017

In just a few weeks in office, President Trump has made striking use of his power to issue Executive Orders, using them to pave the way for the repeal of the Affordable Care Act, change the rules about federal regulations, and enact a controversial ban on admission to the U.S. for range of immigrants and refugees.

But historically, most executive orders have been issued with little fanfare, says Kenneth R. Mayer, a professor of political science at the University of Wisconsin-Madison and author of *With the Stroke of a Pen: Executive Orders and Presidential Power*. “Most real executive orders are pretty routine,” Mayer tells TIME. “In the 1930s and '40s, Roosevelt had to use an executive order every time he wanted to exempt someone from mandatory retirement.”

But that doesn't mean that unilateral executive action hasn't had a major effect on the history of the United States.

Some of the most important unilateral executive action in American history, like George Washington's Neutrality Proclamation and Abraham Lincoln's Emancipation Proclamation, have not technically been executive orders. Mayer says that, for this reason, the number of orders a President issues is not a good measure of how he used unilateral power. Nevertheless, over the years the executive order has become a more controversial tool and more “prominent in the public psyche,” perhaps partly because its formality makes such orders easy to track.

“A person's attitude about executive action depends almost entirely on whether the President is of your party,” Mayer says, but the fundamental question of the limits of Executive Branch power dates back to the earliest days of the republic. “Hamilton and Madison fought over it. Those debates have not been tempered in the centuries since.”

And perhaps with good reason, as that power has greatly shaped the history of the United States. Here are nine 20th-century Executive Orders that show just how far that influence can go:

Franklin D. Roosevelt's Executive Order 7034 (1935): This order established the Works Progress Administration, among other agencies. The New Deal spending machinery was so complicated that, TIME reported back then, that the President himself gave the press four separate “lectures”—complete with diagrams—explaining how the WPA “would keep its finger on the pulse of all projects started.”

Franklin D. Roosevelt's Executive Order 9066 (1942): This post-Pearl Harbor order, now infamous, gave the military the ability to mark out areas from which it would be possible to exclude "any and all persons." The upshot of this move was that more than 100,000 Japanese-Americans and Japanese immigrants were sent to internment camps.

Harry Truman's Executive Order 981 (1948): This order declared that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin," leading to the desegregation of the American military.

Harry Truman's Executive Order 10340 (1952): This order directed the Secretary of Commerce to "take possession of" American steel plants. The order put to rest a threatened strike, which Truman held to be a military necessity, but in doing so it raised "a great constitutional question," as TIME put it, about the limits of executive power—and in fact, after the Supreme Court struck down the Order, it turned out that the resolution of that question was where its influence was felt most in the long run.

Dwight Eisenhower's Executive Order 10730 (1957): This order, in reaction to the resistance of "certain persons" in Arkansas to federally mandated school integration, particularly at Little Rock's Central High School, directed the Secretary of Defense to federalize National Guard units in Arkansas, which had previously been used by Gov. Orval Faubus to prevent integration. As TIME reported, the President was left with little choice but to sign "a historic document" that "ordered Secretary of Defense Charles Wilson to use the armed forces of the U.S. to uphold the law of the land in Little Rock."

John F. Kennedy's Executive Order 10924 (1961): This order established the Peace Corps, which, as TIME put it, "captured the public imagination as had no other single act of the Kennedy Administration."

Lyndon Johnson's Executive Order 11246 (1965): This order made the U.S. Government practice equal opportunity in hiring, and demanded that each executive department set up a "positive, continuing program" to support equal employment opportunity. The order extended to government contractors as well. According to the Department of Labor, that provision of the Executive Order now protects about 20% of the entire American workforce from discrimination.

Ronald Reagan's Executive Order 12291 (1981): This order, signed by President Reagan almost immediately upon taking office, required cost-benefit analysis to be applied to every "regulatory action" undertaken by the Federal government, signaling a broad shift toward deregulation. George W. Bush's Executive Order 13228 (2001): This order established an Office of Homeland Security, which grew into the Department of Homeland Security that, as TIME put it, merged "merged 22 federal agencies into a single department whose primary mission is fighting terrorism."

A President's First 100 Days Really Do Matter

Fivethirtyeight.com, By Julia Azari, Jan. 17, 2017

But don't hold Trump to FDR's standard.

By his 100th day in office, Franklin D. Roosevelt had already begun to reshape government's role in the American economy. He declared and then lifted a national banking holiday, signed bills that provided government relief for farmers and the unemployed, and pushed for new federal jobs programs.¹ For every president since, the ghost of Roosevelt has loomed: Can they rack up as many accomplishments as he did? Donald Trump, who will start Day 1 of his presidency on Friday, faces the same expectations. So how much do new presidents typically accomplish during this period? What standard should Trump be held to?

Available evidence generally suggests that presidents' first 100 days have become less productive since the sprint at the beginning of FDR's first term. Political scientists John Frenreis, Raymond Tatalovich and Jon Schaff, found that while the FDR effect may have put the pressure on modern presidents, modern Congresses aren't any more productive during the first 100 days. They looked at presidents from William McKinley in 1897 to Bill Clinton in 1993, and found that the average number of laws passed during a president's first 100 days period before the 81st Congress (1947-1949) was 46 compared to 16 in later Congresses. The last two presidents have followed suit: There were seven bills passed during George W. Bush's first 100 days in 2001, and 11 in Obama's in 2009, according to Govtrack's statistics.

So, what changed? Early legislative productivity declined in the 1950s because of changes in how Congress works, according to Frenreis, Tatalovich and Schaff. The authors suggest that stronger subcommittees during this period "added a new layer of decision-makers to the legislative process, which potentially would slow down the pace of legislative enactments during the 100 days period."

As you might expect, whether the same party controls the presidency and Congress has a big effect on how much legislation passes in the first 100 days, as does the state of the economy (more laws are passed when economic conditions are bad). They identify FDR's first 100 days in 1933 as exceptional, with not only an unusually high number of bills passed, but also more than one major piece of legislation (using some widely accepted political science measures of major legislation). That FDR was president during the Great Depression and had large Democratic

President	First 100 Days		
	Laws Passed	Executive Orders	Previous Exec. Orders Revoked
Franklin Roosevelt	76	9	-
Harry Truman*	55	25	0
Dwight Eisenhower	22	20	1
John Kennedy	26	23	11
Lyndon Johnson*	10	26	5
Richard Nixon	9	15	1
Jimmy Carter	22	16	5
Ronald Reagan	9	18	18
George H.W. Bush	18	11	4
Bill Clinton	24	13	2
George W. Bush	7	11	4
Barack Obama	11	19	9

*Took office after predecessor's death, so we're counting the first 100 days of their full elected terms — 1949 for Truman and 1965 for Johnson. Gerald Ford is omitted from the list.

Laws Passed: SOURCES: FRENDRIS, TATALOVICH AND SCHAFF (2001); GOVTRACK

Executive Orders: SOURCE: MEREDITH CONROY

majorities in Congress helped, too.

Even if first-100-day productivity has declined, however, it remains one of a president's best chances to enact his agenda, according to work by Casey Dominguez. Looking at the question of the "presidential honeymoon," Dominguez found that, when looking at bills on which presidents took public positions, chief executives do enjoy greater rates of success with Congress early on. This is not fully explained by a public opinion bounce (most incoming presidents are popular) or by strategic choices about which bills to support during the first 100 days. Her research concludes that presidents do enjoy a "100-day honeymoon" with Congress, and that their influence during this period is demonstrably higher than later on in the administration.

Of course, legislation is not the only yardstick of presidential success. New presidents can also take advantage of their unilateral power to direct the executive branch. For example, Clinton, George W. Bush and Obama issued memoranda reversing the previous administration's rules about abortion funding and international aid shortly after taking office. One of Jimmy Carter's early executive orders was related to his pardon of Vietnam draft-dodgers. For some time,

unilateral action during the first 100 days seemed to be on the decline, but it climbed back up under Obama.

Here (see table above) are the number of executive orders issued by each president since FDR during their first 100 days, as well as the number of executive orders from other presidents they revoked. On balance, modern presidents have issued more executive orders in their first 100 days than the second 100 days. There are some exceptions, though — George W. Bush, Carter, Dwight Eisenhower and FDR.2

But even looking at laws and executive orders doesn't really solve the problems inherent in trying to quantify how productive a new administration is. Increasingly, accomplishing something in government means undoing policies you don't agree with. This is especially important for Republican administrations, who normally seek office on the promise of less government, not more. (Although the incoming administration may be an exception.)

Obama's early legislative accomplishments included things like expanding health insurance coverage for children in low-income households, a policy that had been vetoed by George W. Bush in 2007, and the passage of the Lily Ledbetter Fair Pay Act, an initiative to combat wage discrimination, also opposed by the Bush White House. Both were major bills that expanded government influence, and they were also visible repudiations of the previous administration. In other words, these were accomplishments for Obama, but preventing them from becoming law had been a mark of success for Bush.

Some of Obama's early executive orders followed this pattern as well. Just a few weeks after taking office, Obama issued an executive order that addressed Bush's faith-based initiatives (also an executive order from the 43rd president's first 100 days). Obama's directive revised the language of Bush's order to emphasize "preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion." Similarly, in March 2009, Obama issued an order "removing barriers to responsible scientific research involving human stem cells," another direct reversal of a Bush administration position.

Another hurdle to measuring presidential effectiveness: Productivity isn't just about volume. The scope of laws and executive orders matter, too. FDR's first 100 days in 1933 were particularly important, for example, because of the context and timing. They resulted in major changes to regulation and governance — changes that "created modern America" through the establishment of new agencies and the effort to provide relief for people suffering from the effects of the Great Depression, according to journalist Adam Cohen. The Great Depression hit with the 1929 stock market crash — not even a year into Herbert Hoover's presidency. By the time FDR took office in March 1933, the Depression had raged on for years. The newly elected president had made big promises — to alleviate the immediate

effects of the Depression and also to start restructuring American institutions to make sure nothing like it happened again. Because the pressure had been building for so long – including the five months between the election and FDR’s Inauguration — it made sense for FDR to focus on early accomplishment.

Even with the problems in measuring presidential success, it’s still likely true that productivity in the first 100 days has decreased. One possible reason for this is that as American politics becomes more partisan and complex, it takes longer to assemble the coalitions necessary for major legislation. Obama’s signature legislative proposal, the Affordable Care Act, came a full year after he took office. Bush’s major legislative accomplishments, tax cuts and No Child Left Behind, also happened well after his first 100 days had come and gone.

How this applies to the incoming Trump administration is hard to say. First, Trump is less popular than any other newly elected president in modern history. Second, many of Trump’s central campaign promises, such as building a wall across the Mexican border and enacting protective trade barriers, depart from the usual Republican legislative agenda. The stated goals of Republican legislative leaders revolve heavily around repealing the Affordable Care Act and paring back social safety net programs like Medicaid and Medicare. The complexity involved in these policy changes, which would affect millions of Americans, suggests that they may take longer to enact.

In this sense, we may see Trump’s first 100 days follow the mold of Obama’s, with a number of bills and executive orders that highlight the major symbolic differences between the new administration and the previous one, and a flurry of executive actions reversing Obama-era policies. But recent history suggests that, despite the pressure of the first 100 days benchmark, major initiatives require sustained attention and effort from the president, and the ability to build a coalition that will hold beyond the honeymoon.

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Ruling on Trump Travel Ban Asserts Court Role in Review of Presidential Policies

The Wall Street Journal, By JOE PALAZZOLO and JACOB GERSHMAN, Feb. 10, 2017

Judges emphatically reject view that president can dictate, without judicial review, who enters the country
it blessed parts of a lawsuit challenging the Trump administration’s ban on travel from seven predominantly Muslim countries, while reserving judgment on others....

Barack Obama’s Executive Actions Run Into Roadblocks in the Courts

The Wall Street Journal, By JOE PALAZZOLO, June 23, 2016 4:55 p.m. ET

Supreme Court’s immigration ruling is latest check on efforts to assert presidential power

The Supreme Court deadlock that led to the defeat of President Barack Obama’s plan to shield millions of people from deportation was just the latest judicial check on the ambitions of his administration.

Earlier this week, a federal judge in Wyoming blocked an Interior Department rule setting stricter standards for hydraulic fracturing on public lands. That decision followed another Supreme Court ruling in February suspending a major regulation limiting carbon emissions from power plants.

In October, a federal appeals court halted an Environmental Protection Agency regulation that would bring more waterways and wetlands under federal protection...

Trump Follows Obama’s Lead in Flexing Executive Muscle

The New York Times, By CARL HULSE, JAN. 26, 2017

WASHINGTON — When President Obama relied heavily on executive orders to push through policies that had no chance in Congress, Republicans called him a dictator who abused his power and disregarded the Constitution. They even took him to court.

“We have an increasingly lawless presidency where he is actually doing the job of Congress, writing new policies and laws without going through Congress,” Representative Paul D. Ryan, then the Budget Committee chairman, said in a 2014 television interview after Mr. Obama made clear in his State of the Union address that he would readily take unilateral action to get his way.

Now President Trump, at the start of his tenure, is relying heavily on executive actions not just to reverse Obama administration initiatives, but to enact new federal policies covering immigration, health care and other areas in ways

that could be seen more as the province of the House and Senate. And he is doing that with clear Republican majorities in Congress.

The flurry of administration edicts flowing from the Trump White House puts some top Republicans in the awkward position of welcoming aggressive executive muscle flexing from a president of their own party after castigating Mr. Obama for using the same approach.

Their rationale: Mr. Obama took executive action too far, stretching the intent of legislation to fulfill an ideological agenda.

“We’ve never been against executive action,” said Ashlee Strong, a spokeswoman for Mr. Ryan, now the House speaker. “We’re against overreaching, illegal action.”

Mr. Trump’s eager embrace of the executive order — he signaled clearly during his campaign that he intended to follow his predecessor’s lead — allows him to claim immediate progress on his campaign promises rather than waiting for a lengthy legislative process to play out.

Hillary Clinton plans to use executive orders as president to go around GOP Congress

By Kelly Riddell - The Washington Times - Tuesday, December 15, 2015

Democratic front-runner Hillary Clinton is pledging to use executive orders to increase her clout in the White House to work around Congress and force Republicans to respond to her agenda, a tactic frequently employed by President Obama that has angered his GOP critics...

7 OBAMA EXECUTIVE ORDERS THAT ARE RIPE FOR ANNIHILATION ON TRUMP’S FIRST DAY

Slate, By: Chris Pandolfo | January 17, 2017

As Donald Trump prepares to take office Friday, thoughts of President Obama's legacy looms. Simply put, many of the president’s signature achievements are built on a foundation of unconstitutional executive overreach. Barack Obama’s mark on U.S. history is that of an imperial president. His legacy is one of governance by fiat.

Article I of the U.S Constitution endows the Congress with the legislative power of government – the power to make laws. The presidency, as part of the executive branch, is given the Article II, Section 3 requirement of faithfully executing the laws passed by Congress.

After the Democrats lost control of the Senate in 2014, Obama declared at his first Cabinet meeting: “We’re not just going to be waiting for legislation ... I’ve got a pen and I’ve got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward.”

He assumed for himself Congress’ lawmaking power. Ignoring the people’s representatives in Congress, the president repeatedly and unconstitutionally sought to implement his far-left agenda through executive action.

His efforts bore fruit in the passage of several liberal policies. But now, with November’s election shakeup, whatever Obama accomplished through executive action can be undone by executive action.

Repealing Obama’s unconstitutional executive orders is exactly what President-elect Trump has pledged to do. Here is where he should start ...

1. DACA and DAPA amnesty

The president unilaterally superseded the nation’s immigration laws by illegally granting amnesty to thousands of illegal immigrants through his Deferred Action on Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) executive orders...

2. Obama’s Clean Power Plan executive actions

After the Obama administration failed to see cap-and-trade legislation become law in 2009, the president decided to take action himself. Through the EPA, the president instituted a series of rules that effectively instituted cap-and-trade (essentially a tax on carbon emissions)...

3. Forcing federal contractors to violate their religious beliefs

Executive Order 13672 required all federal contractors and subcontractors to affirmatively state that they make employment decisions without regard to sexual orientation or gender identity. There was no exemption for religious liberty, and those that refused to comply with the order were declared ineligible to contract with the federal government...

4. The transgender bathroom order

Obama issued guidelines to public school districts in the U.S. admonishing them to let transgender students use the bathroom of their self-proclaimed identity...

5. Appeasing the world's leading terrorism sponsor: Iran

President Obama upturned a two-decade standing policy of the United States when he revoked economic sanctions against the terrorist-sponsoring Iranian regime in early 2016. The move freed up as much as \$150 billion of frozen Iranian assets under the assumption that Iran would comply with the nuclear deal negotiated by the Obama administration...

6. Gun control

In early 2016, President Obama announced sweeping executive actions on gun control that instructed the Bureau of Alcohol, Tobacco, Firearms and Explosives to redefine who is "engaged in the business" of selling firearms. By broadening that term, the administration could classify anyone who sells a firearm as a "firearms dealer," potentially subjecting private sellers to a slew of onerous regulations meant to apply to retail firearms dealers.

7. Gutting work requirements for welfare

In the mid 1990s, a Republican-controlled Congress led by Newt Gingrich successfully compromised with President Bill Clinton to enact welfare reform that placed a work requirement on the Temporary Assistance for Needy Families (TANF) program. These work requirements were made mandatory and nonwaivable, and the subsequent success of the welfare reform led to a drop in welfare recipients and a decrease in child poverty. President Obama illegally claimed the authority to waive the TANF work requirements... These are just a few of the many executive orders issued by President Obama that are under review by the incoming Trump administration. Obama staked his legacy on the election of a Democrat to succeed him and uphold his policies.

It is now in President-elect Trump's power to ensure the Obama legacy is enshrined in our memories, and not in our laws.

In First 100 Days, Obama Flips Bush Admin's Policies

ABC News, By HUMA KHAN April 29, 2009

In his first 100 days in office, President Obama has demonstrated a clear departure from his predecessor. From relaxing marijuana enforcement laws to releasing torture memos, the new administration has moved rapidly to revoke and alter policies that marked the legacy of the Bush team...

Here is a list of the Bush administration policies and laws that Obama has reversed so far:

Changing California Drug Policy

Signaling a drastic shift in the Bush administration's policies on drugs, Obama's appointed Attorney General, Eric Holder, said federal agents will relax their enforcement of marijuana laws...

Endorsing Gay Rights

On March 18, the Obama administration formally endorsed a United Nations statement urging world leaders to decriminalize homosexuality, a declaration that less than three months ago Bush refused to sign.

Stem Cell Research

In his latest rollback of Bush administration policies, President Obama signed an executive order Monday lifting the 7½-year ban on federal funding for embryonic stem cell research...

Global Gag Rule

The debate on whether U.S. government should fund international family planning groups that provide abortions or related services has been brewing for decades. The "Mexico City Policy" that was signed into law by Ronald Reagan in 1984 was overturned by Bill Clinton in 1993 and restored by Bush in 2001. So, it was only a matter of time before the next Democratic president also rescinded his predecessor's rule...

War On Terror

For President Obama, words do matter. The administration will no longer be employing the phrases "war on terror" and "enemy combatants," words that defined the Bush administration's foreign policy after the events of Sept. 11, 2001. The announcement that the term "war on terror" won't be used was made by Secretary of State Hillary Clinton just days before President Obama embarked on his first overseas trip to Europe as U.S. president...

Guantanamo

In his first major step in office, Obama signed an executive order closing down the detainee center at the Guantanamo

Bay military facility within a year, and established new guidelines on interrogation methods and the treatment of detainees. In another order signed on the same day, Obama mandated all U.S. interrogators in all agencies to adhere to rules in the Army Field Manual, and the president also called for the shut down of CIA detention centers around the world.

Troops Drawdown in Iraq

Partially fulfilling one of his major campaign promises that probably is one of the sharpest reversals from Bush's policy, Obama ordered the drawdown of troops in Iraq at a late February pit stop in Camp Lejeune, N.C. "Let me say this as plainly as I can: by Aug. 31, 2010, our combat mission in Iraq will end," the president said on Feb. 27 in a gathering of troops...

Defending John Yoo

But the Obama administration hasn't completely torn itself away from Bush's policies. The president's Justice Department is defending former Bush official John Yoo, so-called author of the "torture memo," and who is being sued by Jose Padilla, a suspected terrorist who says Yoo's memos on interrogation policies led to his detention and torture...

The 'State Secrets' Argument

The Obama administration also continues to uphold -- so far -- the controversial Bush-era "state secrets" argument. Holder said the few cases he has reviewed so far since taking over the reins at the DOJ show that the "invocation of the doctrine was correct."

Greenhouse Gases

The Environmental Protection Agency's finding that greenhouse gases are hazardous to public health and welfare gives Obama the authority to invoke stricter emission controls and regulations under the 40-year-old Clean Air Act. Obama has indicated he would prefer Congress to advance the cap-and-trade regulation...

Endangered Species Act

The president authorized full scientific reviews of projects that might harm endangered wildlife and plants. Obama's memorandum overrides the Bush administration regulation that limits scientific reviews of projects that could harm endangered species.

Allowing States to Set Fuel Efficiency Standards

Obama started a process and asked the EPA to look at allowing California and 13 other states the right to set their own, stricter, automobile emissions and fuel efficiency standards, a plea by the states that was rejected by the Bush administration. This was just one of the first steps in altering the environment policy from that of the Bush administration.

Oil & Gas Leases

Interior Secretary Ken Salazar announced in February that the government would withdraw oil and gas leases that were offered on 77 parcels of public land for drilling near national parks in Utah by the Bush administration and that are currently in court...

Labor Laws

Only ten days in office, Obama signed three executive orders that he said would "level the playing field" for labor unions and that would make unions easy to organize. Obama reversed a Bush order requiring federal contractors to post notice that workers can limit financial support of unions serving as their only bargaining representatives. Additionally, in undoing Bush's policies, Obama ordered that federal contractors offer jobs to current workers when contracts change and that federal contractors be prevented from being reimbursed for expenses meant to influence workers deciding whether to form a union and engage in collective bargaining. Obama's first law signed was also labor-related. The Equal Pay for Equal Work Bill was signed into law Jan. 29 and sought to end pay disparities between men and women.

Restrictions on Cuba

The president relaxed travel, commerce and mail restrictions on Cuba, allowing American-Cuban families unlimited visits to the island and no restrictions on the amount of remittances they can send back.

ABC News' Kate Barrett, Lindsey Ellerson, Karen Travers and Nitya Venkataraman contributed to this report

If you want to read a detailed historical review and analysis of this issue, see this piece from The Heritage Foundation, "The Use and Abuse of Executive Orders and Other Presidential Directives" by Todd Graziano, from 2001.

(<http://www.heritage.org/political-process/report/the-use-and-abuse-executive-orders-and-other-presidential-directives>)