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Executive Orders and Presidential Transitions

Since at least the Administration of Franklin D. Roosevelt, the concept of a President's first "100 days" has been a touchstone for evaluation of presidential effectiveness and places at least some pressure on incoming Administrations to act quickly on their campaign commitments and other priorities. Executive orders have developed into one of the most expedient tools available to a new President to change federal policies, priorities, and operations, including during that closely watched early window.

Concerns about the volume, timing, and content of executive orders, therefore, may be heightened during presidential transitions. In particular, it appears that both incoming and outgoing Administrations may use executive orders to establish preferred policies closer to Inauguration Day than could be accomplished through laws or regulations. When the incoming and outgoing Presidents are members of different political parties, this perception may be especially strong.

This In Focus examines key aspects of executive orders and the executive order process with an eye toward their use during transitions.

An Executive Order Primer

Properly issued and legally valid executive orders have force and effect of law—unless voided or revoked by congressional, presidential, or judicial action—and represent a direct path for a President to set policy.

There are two general sources of authority that may support executive orders: powers granted directly to the President under the Constitution and delegated authorities provided by Congress. Where the President has constitutional or statutory authority to create policy by executive order, executive orders may be a particularly appealing option, because they allow the President to act without waiting for Congress to pass legislation or an agency to use the rulemaking process. Capitalizing on these features may enable a President to seize the initiative on an issue and shape the national policy and may also encourage other actors, including Congress, to engage on issues. All of these factors may be particularly salient during the transition period between Administrations.

While executive orders offer certain advantages for Presidents looking to make policy, they have some limits as policymaking tools. First, the powers granted to Congress under the Constitution may limit the range of options available to the President. For instance, because Congress holds the appropriations power, an executive order cannot draw funds from the Treasury in excess of enacted appropriations. The authority to issue some executive orders is derived directly from the President's authority under Article II of the Constitution, while other directives are authorized by statute and, therefore, subject to alteration or revocation via the legislative process. For example, many actions related to the military, such as President Harry Truman's desegregation of the military in 1948, are supported by the President's commander in chief authority under Section 2, clause 1, of Article II of the U.S. Constitution. Others, such as many presidential actions related to federal workers during the COVID-19 pandemic, are tied to specific statutory provisions.

Second, each President is generally free to amend, repeal, or replace any executive order, including those of previous Presidents. Therefore, policies enacted by executive order may be less likely to persist between Administrations than policies and laws enacted through other means. For instance, in April 1992, President George H. W. Bush issued E.O. 12800, which required federal contractors to notify their employees that they were not legally required to join unions. President Bill Clinton reversed that executive order by issuing E.O. 12836 in February 1993. President George W. Bush revoked President Clinton's order with E.O. 13201 in February 2001. President Barack Obama reversed policy again, using E.O. 13496 in January 2009 to revoke President George W. Bush's order.

Use of Executive Orders During Changes of Administration

Executive orders may suit the needs of an outgoing President who wants to establish or change policy or is striving to secure a legacy. This is likely to be particularly true if the outgoing President expects that the incoming President prefers a different policy on a specific issue.

Running counter to the potential interests of an outgoing President, an incoming President may be eager to act quickly on his or her own policy agenda or campaign commitments. A new President may have specific plans to modify or overturn some of his or her predecessor's policies. As noted above, if those policies were established by executive order, then in many cases they can be reversed in the same way. For example, on Inauguration Day in 2021, President Biden took a series of actions, including executive orders that reversed major Trump Administration policies.

In many cases, executive orders may be an effective means of accomplishing these objectives, but they do not guarantee that a new policy will be successfully implemented. For instance, during the first week of his presidency, Barack Obama issued E.O. 13492, which the Administration presented as the first step in closing the detention facility at Guantánamo Bay Naval Base. In this case, as in others, an executive order alone is not always sufficient to fully achieve a policy objective—even when the President has wide latitude to set policy—as the facility remains open to this day.

Speaking in 2008, Ed Gillespie, a counselor to President George W. Bush, provided an explanation of the possibly temporal nature of executive orders when commenting on a Bush Administration executive order on budget earmarks: "This will be on the books, and will be an executive order that future presidents have to repeal or live with."

Preparing Executive Orders During Transitions

Given the incentives that may be associated with quick action during a new Administration, it may be the case that transition team officials and other advisors to a presidential candidate or President-elect may consider preparing draft executive orders in advance.

For instance, many presidential candidates promise "day one" actions while on the campaign trail. Even if this language is understood to be aspirational or rhetorical in many instances, one of the ways that a new President can formally launch some new policies on Inauguration Day is through executive orders. Practically speaking, the only way to act so quickly is to have orders prepared in advance for the signature of a new President. For instance, during the 2012 election, Mitt Romney made economic recovery a key part of his platform, and his campaign proposed "day one" bills and executive orders to support its policy commitments.

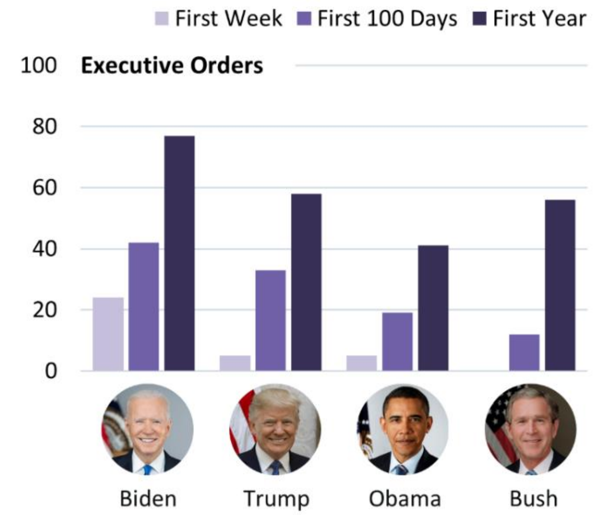
Additionally, while Title 44, Section 1505, of the *U.S. Code* requires orders to be published in the *Federal Register*, this publication occurs when an executive order is issued by the President and does not delay the effective date of the order. By practice, the White House makes most presidential directives, including executive orders, available on its website when they are issued by the President, which may occur several days before they are published in the *Federal Register*. Particularly for issues of great public interest, it may also be the case that executive orders are announced while still in development.

Preparation of executive orders during transitions is not without some risks. In other circumstances, many executive orders are initially proposed or prepared by subject matter experts and other officials within the policy agencies and departments. Even executive orders prepared by White House staff may enjoy the benefit of quality control and technical assistance by lawyers and other experts in the Office of Management and Budget, the Office of Legal Counsel, and relevant departments.

Recent Use of Executive Orders by New Administrations

As shown in **Figure 1**, since the start of the 21st century there appears to have been an increase in executive orders early in new Administrations. This is especially true in the early periods of the first week and first 100 days following the inauguration, which may indicate that more work is being done to prepare executive orders during the transition period.

Figure 1: Executive Orders in the First Year of New Presidential Administrations



Source: CRS analysis of *Federal Register* data available at https://www.federalregister.gov/presidential-documents/executive-orders. This graphic was prepared by CRS Visual Information Specialist Juan Pablo Madrid.

There are a few reasons that this apparent trend may be occurring. It may be the case, for instance, that there is a growing belief that executive orders are an effective (or at least expected) tool for presidential policymaking.

Alternatively, it may be the case that the major policy issues during an election or at the start of a new Administration fall into issue areas such as foreign affairs in which the President has more authority to act by directive, such as when President Donald Trump issued directives pertaining to immigration early in his Administration.

It may also be the case that as more policy decisions are made via executive order, there will be a greater need for new Presidents to issue executive orders addressing the body of their predecessors' decisions. Both of these factors may have contributed to the number of executive orders issued during the first week of the Biden Administration, as the President issued orders that reversed a number of his predecessors' policies on select issues and took new actions related to the COVID-19 pandemic.

Additional Resources

- CRS Report R46738, *Executive Orders: An Introduction*, coordinated by Abigail A. Graber
- CRS In Focus IF11358, *Presidential Directives: An Introduction*, by Ben Wilhelm

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