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Executive Orders can cover a very wide range of public actions and are in practice rarely repealed

United States: the power of Executive Orders

Following the elections in Georgia, the Democrats have a very small majority in Congress. To facilitate governance, the new administration is likely to continue to govern using Executive Orders (EOs). Their use has grown over time, and they have become a full-fledged instrument of governance.

Executive actions: an imprecise definition

An EO is a written statement that the President issues and signs to “direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow”. **An EO has the same force as a law passed by Congress** (unless it conflicts with an existing federal law).

It should be noted that there are two other types of executive actions, with which EOs are often confused: the memorandum and the proclamation. These are presidential acts which are similar to EOs (in that they have the force of law) but unlike an EO, which has to be signed and published, there is no formal procedure for a memorandum or proclamation.

According to the Congressional Services, there is no direct “definition of executive orders, presidential memoranda, and proclamations in the U.S. Constitution, there is, likewise, no specific provision authorizing their issuance.”

Historically, military operations have naturally been the area in which presidents have made the most use of EOs. The president, as commander-in-chief of the armed forces, can use executive action to define military policy. However, Article II of the US Constitution confers executive powers on the President, in effect the Commander-in-Chief, and stipulates that the President “shall take care that the Laws be faithfully executed.” **In practice, therefore, EOs can cover a very wide range of public actions.**

Executive actions allow the President to take decisions bypassing Congress. Every President since George Washington has used EOs in various ways. The emancipation proclamation by President Abraham Lincoln’s in 1863 is the most famous executive action¹ in American history. EOs have become more controversial over time as presidents are using them in more and more new ways. The use of EOs has expanded to many areas. Lack of majority

and increased polarisation are pushing presidents to use EOs as a substitute for legislation. But this is nothing new: the use of EOs played a key role in the Civil Rights movement: Affirmative action and equal employment opportunity actions were taken by Presidents Kennedy and Johnson using EOs.

Donald Trump has been particularly active in this area but was not the most active in history; he issued 202 EOs in a single term, which is faster than the majority of American presidents since WWII (276 for Barack Obama in two terms, 291 for George W. Bush in two terms and 364 for Bill Clinton in two terms). However, Trump issued less than Jimmy Carter (320) in one term. And this figure is a far cry from the record held by President Franklin Roosevelt (3,271 EOs recorded between 1933 and 1945) under exceptional circumstances (crisis and war); and still far below the levels achieved by some other presidents: Theodore Roosevelt (1,081), Woodrow Wilson (1,803), Herbert Hoover (968), Harry Truman (907).

However, Donald Trump’s use of EOs was particularly criticised as it allowed him to reconfigure (in peacetime) the entire US trade policy, in particular to strengthen his electoral base. A use far removed from the spirit of the constitution.

An EO can be terminated in theory, but this rarely happened in practice:

- **Congress can override an EO by removing the necessary funding.** In which case the law passed prevails over the EO. However, the President can then veto this provision of Congress; and Congress can only override this veto by a two-thirds majority, which is very difficult to obtain. This is why friction with Congress has no consequences.
- **A court can also annul an EO.** But it has to show that the President acted outside his authority, which is difficult given the broad prerogatives of the President. The President can base his authority on the Constitution, his power as commander-in-chief or a law.

¹ Technically, it was a proclamation and not an EO (in both cases the President acts by bypassing Congress). In an emergency, the President can issue decrees with almost unlimited power. Abraham Lincoln used an EO to fight the Civil War, as did Woodrow Wilson to manage US involvement in WW I, or Franklin Roosevelt to approve Japanese internment camps during WW II.

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In practice, the courts have only struck down an EO when he violated² civil rights.

- **However, an incumbent president can cancel a decree or issue a new EO that contradicts a previous EO,** which amounts to the same in practice. This frequently happens when a new president takes office³. President Biden can therefore be expected to use this means to reverse some of Donald Trump's decisions as early as January 20, 2021.

It must be noted that the EOs issued by Donald Trump have not been challenged either by Congress or by the courts. It is therefore **likely that the use of EOs will continue with President Biden, including on trade policy issues** (US-China relations).

Moreover, as far as regulation is concerned, there is nothing to exclude

the use of EOs, especially when it comes to opposing monopolistic positions (as EOs can rely on existing antitrust laws). There is, however, one area where the President can certainly not act through EOs, and that is in most fiscal matters. Ultimately, this is why the elections in Georgia were so decisive for economic policy.

Conclusion: the US President has broad powers that should not be underestimated even when Congress is not on his side. **Donald Trump's actions via EOs has set a precedent** that could bring about a lasting change in the practice of governance in the US (trade policies). **It will be interesting to see the extent to which Biden can and wants use EOs to combat growing inequalities in the same vein that Kennedy used them to fight racial discrimination.**

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² The most famous example of a court overturning an executive action occurred in 1952. During the Korean War, President Truman seized steel mills to break a strike using his authority as Commander-in-Chief. The Supreme court quashed Truman's EO on the grounds that his authority as Commander-in-Chief did not authorise him to seize private property.

³ Barack Obama, upon taking office, cancelled an EO by George W. Bush that limited funding for stem cell research. Donald Trump issued an executive memorandum contradicting President Obama's previous memorandum on the Deferred Action for Childhood Arrivals (or "DACA") initiative.

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