

# How executive orders and judicial review are shaping environmental policy

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Determined to fulfill his business friendly campaign promises, and in the face of hyperpartisanship marked by congressional paralysis, President Donald Trump signed a slew of executive orders in his first months in office. The orders address a diverse range of topics, including immigration reform, environmental law and regulatory reform more generally.

In his first 23 weeks in office, Trump issued 38 executive orders.<sup>1</sup> One of the prime targets has been environmental deregulation: Trump has issued executive orders on regulatory reform aimed at deconstructing the administrative state, promoting the Keystone XL and Dakota Access pipelines, and eliminating the “waters of the United States” rule, among others.

The use of executive orders to implement presidential policy is not new, although their form, substance and quantity have varied dramatically. President George Washington issued eight executive orders in his time in office, while President Franklin D. Roosevelt penned over 3,700 during his 12-year term. President Bill Clinton issued 364, and President Barack Obama issued 276 — including nine in his first 10 days in office

— on topics as diverse as climate change, government contracting and health reform.<sup>2</sup>

While modern presidents generally have not issued as many executive orders as several previous ones, executive orders are prolific in the current era and often play a significant role in presidential policymaking.

However, today as in the past, courts frequently review and halt executive orders that exceed their constitutional limits, thus curbing the broad power of the executive. Several of Trump’s executive orders are not being implemented because they

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have been blocked, or partially blocked, by federal courts. Others are subject to pending litigation.

This article describes the limits of Trump’s ability to exercise presidential power through the use of executive orders generally, and

focuses specifically on several recent orders concerning the environment.

## LIMITATIONS ON EXECUTIVE AUTHORITY

An executive order is an official statement from the president that tells federal agencies how to enforce and implement federal law. The legal authority for executive orders derives from the Take Care Clause of Article II, § 3 of the federal Constitution, which grants the president broad, unspecific authority by stating, “[The president] shall take care that the laws be faithfully executed.”

Throughout American history, presidents have utilized executive actions to tackle a range of issues. President Abraham Lincoln’s Emancipation Proclamation eventually ended slavery; President Harry Truman issued an executive order establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Services, ending desegregation in the armed forces; and Clinton issued an executive order revoking the “Gag Rule,” which prohibited abortion counseling in clinics that receive federal funding to serve low-income patients.

While presidents have broad authority to issue executive orders, there are significant restraints on their use of this governing tool, as the Supreme Court’s recent decision to accept certiorari in a case involving President Trump’s executive order on immigration confirms. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (June 26, 2017) (upholding in part and rejecting in part stay issued by lower courts prohibiting implementation of the executive order).<sup>3</sup>

The Constitution’s framers ensured that presidential powers are circumscribed by placing power in the legislature and the judiciary. The Constitution forms three co-equal branches of government that provide checks and balances on one another and constrain presidential power. Congress has the power to legislate and to appropriate



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funds, and the federal judiciary possesses the power to ensure that the president's actions are legally authorized.

### **Legislative limits on executive orders**

The constitutional authority granted to the legislature limits the executive's domain in an important way. Presidents cannot grant themselves authority they do not have; they cannot create new law, rescind existing law, or appropriate funds from the U.S. Treasury pursuant to executive order. Only Congress has that authority.

However, the president does have the authority to direct the executive branch's exercise of administrative discretion. The president can also reduce the size of federal agencies, and can prioritize federal governmental actions and the enforcement of federal laws to the extent not otherwise directed by Congress or the judiciary.

Further, the president can rescind a previous executive order by issuing a new one. The Constitution grants presidents wide discretion on how to use their executive power, with general acknowledgement that, in the absence of laws to the contrary, they are not bound by the decisions of their predecessors.

### **Judicial limits on executive orders**

The courts have played a key role in ensuring that the exercise of presidential authority is constitutional, rejecting the proposition that executive orders may regulate all that the Constitution does not expressly forbid.<sup>4</sup>

The Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), concerning an attempt by Truman to seize steel mills in the wake of a national strike, is illustrative. The high court held that Truman's executive order was an ultra vires action in the absence of any constitutional or statutory provision that expressly authorized the steel seizure.

In a concurring opinion, Justice Robert Jackson described the conundrum faced by courts tasked with construing the limits of presidential authority in the "zone of twilight" or "when the president acts in absence of either a congressional grant or denial of authority."

The president must rely solely on his own independent powers when issuing executive orders. In certain instances, though, "he and Congress may have concurrent authority,"

or the distribution of the authority between Congress and the president may be uncertain, Justice Jackson wrote. In this "zone of twilight," it is the court's duty to decide the extent of each one's authority.

### **JUDICIAL CHALLENGES TO TRUMP'S EXECUTIVE ORDERS**

On Trump's first day in office in January, he published a memorandum for the heads of executive departments and agencies, immediately freezing all regulatory action until a department or agency appointed by the president reviewed and approved the action.

This initial move foreshadowed what has followed: a slew of executive orders aimed at rolling back Obama's environmental regulatory policies. Executive Order 13778 and Executive Order 13771, discussed below, best illustrate the pattern and intent to undo Obama's environmental legacy.

of Engineers to regulate navigable waters and wetlands.

The rule was immediately challenged by 27 states,<sup>5</sup> trade associations and others, resulting in lawsuits now pending in at least 13 district courts and various federal appeals courts.

The new administration seeks to curb the rule's jurisdictional reach, fulfilling Trump's general promise of regulatory reduction.

In fulfillment of EO 13778, the EPA on March 6 published its intention to review the WOTUS rule. It followed that action with the announcement of its intent to rescind the rule altogether in an effort to substantially narrow the jurisdictional reach of the CWA. The courts will have the last say, however, as litigation over the new rule is a virtual certainty.

As this administrative game of ping-pong demonstrates, rewriting previous administrations' rules is common — although

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The judiciary has already begun to weigh in on the scope of Trump's authority to take these actions, limiting the executive orders' reach while affirming that the president's decrees are not immune to constitutional limits.

### **Rollback of the WOTUS rule**

One of Trump's more significant environmental executive orders directs the Environmental Protection Agency to review the "waters of the United States" rule issued by the Obama administration in 2015.

The Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, also referred to as EO 13778, seeks to "ensure that the nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the states under the Constitution."

The WOTUS rule expanded the jurisdictional reach of the Clean Water Act, including the authority of the EPA and the U.S. Army Corps

typically not in the midst of litigation. The George W. Bush administration initiated the process of drafting regulations to define WOTUS, which was subsequently completed through major revisions by Obama.

Although Trump cannot rid himself of a prior administration's final rule through presidential proclamation or issuance of an executive order, he can, as he did, direct federal agencies to rescind or amend the rule through the use of the lengthy, somewhat cumbersome and very public rulemaking procedures mandated by the Administrative Procedure Act, 5 U.S.C.A. § 553.

Rulemaking to implement the executive order is expected to take at least a year or two, although courts are likely to extend that timeline. Because the rule was judicially challenged before Trump's executive order issued, the judiciary — and not the executive branch — will have the final word on how this matter plays out.<sup>6</sup>

### **'2 for 1' order**

Another example of the judiciary's role in checking presidential authority can be gleaned from an analysis of Trump's executive order titled Reducing Regulation and

Controlling Regulatory Costs, also referred to as EO 13771, and the legal challenge thereto.

Commonly known as the “two for one” order, EO 13771 requires that at least two existing regulations be identified for elimination for every new regulation issued by federal agencies.

The executive order also imposes a regulatory cap for fiscal year 2017 by stating, “The total incremental cost of all new regulations, including repealed regulations, to be finalized [in 2017] shall be no greater than zero, unless otherwise required by law.”

Public Citizen and a coalition of environmental groups are mounting a vigorous separation-of-powers challenge to this executive order, charging that it “will deter, weaken, or delay regulations” authorized or mandated by Congress to protect health, safety and the environment.<sup>7</sup>

Their lawsuit claims that by effectively hamstringing federal agencies from implementing new regulations, EO 13771 “exceeds President Trump’s constitutional authority, violates his duty under the Take Care Clause of the Constitution, and directs federal agencies to engage in unlawful actions that will harm countless Americans.”

Because agencies have the power to engage in rulemaking only by virtue of authority delegated by Congress, and because Congress has not authorized any agency to condition the issuance of a new rule on the repeal of two or more separate rules, Trump’s “two for one” rule appears vulnerable if the plaintiffs can survive the government’s attempt to dismiss their case on ripeness and standing grounds.<sup>8</sup>

While the case has not yet been decided, the strength of the pleadings thus far suggests that the president may have a tough road ahead to persuade the judiciary that this executive order passes constitutional muster. Here again, the courts will take a commanding role.

## THE RISING INFLUENCE OF THE JUDICIARY

In addition to the examples provided above, the Supreme Court’s decision to accept certiorari in a case involving Trump’s immigration order is a harbinger of future judicial activity concerning the president’s authority to effect significant policy change through executive order. Within the “zone of twilight” described by Justice Jackson, the

judiciary’s ability to cabin the president’s authority is at its zenith.

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However, the president’s executive order power is limited, and executive orders are not immune from judicial challenge. As the Public Citizen litigation hopes to demonstrate, agencies cannot easily repeal regulations that they have already determined, through notice-and-comment rulemaking under the APA, advance the purposes of the underlying statutes.

Finally, it remains to be seen whether agencies acting pursuant to executive orders are subject to judicial review at all under the APA.

Plaintiffs cannot sue under the APA to review presidential actions — actions involving the exercise of discretionary authority vested in the president by law — because the president is not an “agency” as defined in the APA.

If the president delegates his discretionary authority to a subordinate agency to make the actual decision and implement regulations on the issue, is this decision subject to judicial review? The courts have not definitively answered this question, and the proper scope of judicial review is another significant question for the courts.

## CONCLUSION

The Supreme Court’s resolution of the immigration order litigation is expected to play a major role in defining the scope of presidential power. Its decision will undoubtedly shape how the lower courts will construe President Trump’s existing environmental executive orders and will shape the course of ones to follow.

How the courts define the president’s authority in the coming months will have major ramifications for matters of significant national, and even international, policies in the climate change arena in particular.

Trump’s decision to undo President Obama’s environmental policies, such as the Clean Power Plan, which would reduce carbon emissions from power plants, is perhaps the most notorious example of his attempt to

effect sweeping change through executive order.<sup>9</sup>

The courts’ resolution of these executive order challenges will test the depth of the Trump administration’s resolve in redirecting critical national policy — and ultimately, Trump’s own regulatory legacy. **WJ**

## NOTES

- <sup>1</sup> Twenty-three weeks as of June 30.
- <sup>2</sup> Gerhard Peters & John T. Woolley, *Executive Orders: Washington-Trump*, AM. PRESIDENCY PROJECT, <http://bit.ly/19YSb5J> (last updated June 20, 2017).
- <sup>3</sup> Trump’s immigration order is in effect for those “foreign nationals who lack any bona fide relationship with a person or entity in the United States,” according to the Supreme Court opinion granting certiorari. Justice Clarence Thomas’ dissent predicts a flood of litigation until the immigration order case is resolved on the merits because the lower courts will struggle to determine what exactly constitutes a “bona fide relationship,” granting increased significance to the judiciary in the interim.
- <sup>4</sup> See, e.g., Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, *Public Citizen Inc. v. Trump*, No. 17-cv-253, at 33 (D.D.C. June 26, 2017), <http://bit.ly/2vaRxix>.
- <sup>5</sup> Timothy Cama, *27 States Challenge Obama Water Rule in Court*, THE HILL (June 30, 2015, 12:02 PM), <http://bit.ly/1NvhevX>.
- <sup>6</sup> The Supreme Court recently rejected a request to stay the pending litigation over the 2015 rule while the new administration pursues its regulatory reversal. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, No. 16-299.
- <sup>7</sup> Complaint for Declaratory and Injunctive Relief, *Public Citizen Inc. v. Trump*, No. 17-cv-253, at 44 (D.C. Cir., filed Feb. 8, 2017).
- <sup>8</sup> See Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, *supra* note 4.
- <sup>9</sup> The Clean Power Plan can be found at 40 C.F.R. Part 60. The executive order titled Promoting Energy Independence and Economic Growth (EO 13783) directs the EPA to immediately take all steps necessary to review the CPP and other regulations that burden the development or use of domestically produced energy.