



LEGAL UPDATES

Executive Orders, Actions, Agency Regulations, and Congressional Legislation – How They Differ and Why It Matters

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President Trump issued more than 70 Executive Orders in the first 30 days of his new administration – nearly twice the amount his closest competitor (President Biden) issued in his first 100 days. [1] These Executive Orders have covered topics ranging from immigration to culture, government efficiency, energy strategy, foreign affairs, crime and more.

The flurry of executive branch activity has brought the topic of presidential authority back to the fore. Generally, our Constitution envisions a legislature enacting the laws of the Republic, so where does the executive branch and its authorized orders and actions fit in, and why are their distinctions confusing? This article provides a brief overview of the main sources of federal regulative authority and the differences between each.

Executive Orders

The term “Executive Order” does not have a precise legal definition, but has been explained as a presidential directive or action that “may have the force and effect of law.” [2] Executive Orders “are generally directed to, and govern actions by, Government officials and agencies.” Executive orders must “stem either from an act of Congress or from the Constitution itself.” [3] For example, Article II of the Constitution entrusts the president with various tasks and roles; Executive Orders can be employed to implement those. The Constitution also vests the “executive Power” in the President, including a duty to ensure Congress’ laws are “faithfully executed,” providing a flexible source of presidential authority. Executive Orders must state the “authority under which the order or proclamation is promulgated.” [4]

Executive Orders primarily impact federal agencies, affecting private individuals only indirectly. [5] Executive Orders do not carry the permanence of law; they can be rescinded at any time by any president. [Lathrop GPM is tracking all of the current administration’s Executive Orders [here](#).]

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Executive Actions

Executive actions are related to, but different than, Executive Orders. While an Executive Order is a formal declaration from the Office of the President, an executive action is a less formal statement of executive branch policy. Executive actions “have been used by Presidents to call on Congress or his Administration to take action or refrain from taking action.” [6] Even though they are less formal, executive actions still carry the force of an executive branch directive because “there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is [not] styled...as an executive order.” [7] For example, former President Obama implemented a policy of prosecutorial discretion with respect to deportation of undocumented immigrants through a statement rather than a formal Executive Order. As the head of the executive branch, the president’s “action” was implemented by federal agencies even though it was never the subject of an official Executive Order.

Agency Regulations

Congress often passes laws that contain relatively broad goals but no specifics on how to achieve those goals. In such situations, Congress entrusts executive branch agencies to lean on their subject-matter expertise to provide those specifics. Thus, the executive branch agencies will “promulgate” sets of “rules” and “regulations” in furtherance of the law. For example, when Congress passes a law that affects agriculture, the Department of Agriculture will promulgate rules and regulations containing specific requirements that fulfill the law’s purpose. Executive agencies fall under the president’s chain of command and must follow Executive Orders and executive actions.

Congressional Action / Legislation

Article I of the Constitution establishes Congress, which is tasked with passing laws on topics such as interstate commerce, the military, intellectual property, immigration, taxation and more. Thus, simply put, Congressional actions take the form of laws and treaties. As previously noted, Congress often passes a law that authorizes the president to implement the law, and the president usually directs executive branch agencies (via an Executive Order or action) to implement details of the law. Importantly, however, enacted laws are permanent and can only be modified by a subsequent act of Congress or, in unusual cases, by courts in instances where laws transgress the Constitution. The president does not have the power to rescind or contravene enacted laws – to the contrary, the Constitution places an affirmative duty on the president to ensure the laws are “faithfully executed.”

What Happens When There is a Conflict?

The judiciary resolves disputes about the proper scope and reach of the president’s exercise of his or her executive power. Courts have the power to temporarily enjoin or halt executive Orders pending the outcome of a case. Enjoined executive Orders are preliminarily ineffective until a final decision is reached. Courts may also permanently enjoin executive orders, rendering them unenforceable.

Courts similarly have the final say over the enforceability of Congressionally enacted laws and treaties.

Various conflicts between government actions are handled differently. If an Executive Order contradicts an enacted law or the Constitution, the Executive Order is struck down – as was famously done when President Truman issued an Executive Order taking control of the majority of the country’s steel mills.[8] When an Executive Order or action changes how a law is enforced, a person or group affected by the change can challenge it in federal court. The court then reviews the Executive Order for compliance with the Constitution and enacted laws. Even where enforcement is paused, the transitory nature of Executive Orders means the law remains in place, even if the executive opts not to enforce it during the tenure of a particular president.

As an example, President Trump recently issued an Executive Order pausing enforcement of the Foreign Corrupt Practices Act. You can read Lathrop GPM’s full analysis of that Executive Order [here](#).

Why This Matters

Federal governance is complex. The executive, legislative, and judicial branches each have a role in the web of statutes, rules, regulations, Executive Orders and judicial interpretations that comprise the directive aspects of the federal government. But while Congress and the courts typically act slowly, the president can act quickly via Executive Orders and actions. Presidents can rapidly and dramatically influence how laws are enforced, how agencies function, and what rules govern the interaction of private entities with the government. But they must do so within the limits imposed by the Constitution, the courts, and Congress.

[1] <https://www.nbcnews.com/data-graphics/tracking-trumps-executive-orders-rcna189571>.

[2] Staff of House Comm. on Gov't Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* 1 (1957).

[3] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

[4] Exec. Order No. 7298, 1 Fed. Reg. 2284 (Feb. 18, 1936).

[5] *Id.*

[6] *U.S. v. Juarez-Escobar*, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014).

[7] Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000).

[8] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).