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A Bit About Executive Orders

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The National Council of Nonprofits (NCN) just updated the helpful chart titled "Executive Orders Affecting Charitable Nonprofits" (March 26, 2025).

Since Inauguration Day, President Trump has signed "dozens of Executive Orders (EOs) covering a broad range of issues, including diversity, equity, and inclusion programs; government grants and contracts; civic engagement; immigration; and certain nonprofit subsectors." This chart "outlines some of the EOs that may affect nonprofits directly or indirectly."

So far, some of these executive orders have been challenged in court – including six or so from January 20th which were included by reference in the now-notorious OMB Memorandum (M-25-13) (January 27, 2025). See, e.g., *The Preliminary Injunctions Re OMB Memorandum (M-25-13): A Closer Look* (March 18, 2025), *FPLG Blog*.

But in the last eight weeks, more than a few Americans have been wondering out loud: What's up with all of these executive orders? Is this volume normal? Are they legal and enforceable, even when they take a hatchet to existing federal funding and long-standing public policy?

Good questions. Let's tackle the key ones before the pile of executive orders gets any higher.

The History of Executive Orders

"The Constitution does not articulate a presidential right to issue proclamations or executive orders," according to presidential historian Dr. Lindsay Chervinsky in *The Executive Order: A History of Its Rise and Slow Decline* (April 08, 2021), *governing.com*. "Indeed, they aren't even mentioned. But almost from the very beginning, George Washington understood that presidential authority had to include activities that weren't specifically defined in the Constitution in order to lead the nation." His

first directive in 1789 was to establish new executive departments; none had been created.

Over the history of the United States, the use of executive orders and other written directives has fluctuated dramatically. FDR issued the most of any president, but there was a lot of work facing him in order to lift the nation out of The Great Depression. A highlight of the use of a presidential directive was Lincoln's Emancipation Proclamation. Arguably, the worst use of this power was by FDR in ordering the internment of Japanese-Americans.

The formal name of the presidential document is not necessarily determinative. Gerald Ford's Proclamation 4311, on September 8, 1974, that awarded "a full, free and absolute pardon unto Richard Nixon …" nevertheless "technically counts as an executive order…."

"Although executive orders have played a central role in these key moments and many others, not all presidents have relied on this tool equally. In fact, contrary to our current political narrative, there has not been a steady increase in the reliance on executive orders. A brief statistical overview actually shows that executive orders have declined since the mid-twentieth century."

See Federal Register chart: Presidential documents/executive orders: "The President of the United States manages the operations of the Executive branch of Government through Executive orders. After the President signs an Executive order, the White House sends it to the Office of the Federal Register (OFR)."

See, more particularly in the Federal Register, the chart of Presidential Documents, with listings and links for earlier chief executives. There are separate listings for executive orders (back to FDR); proclamations (back to 1994) and "other presidential documents" (back to 1994, grouped separately as "presidential orders, memoranda, determinations, and notices.")

Most recently, for President Biden, the first 100 days were fairly packed with executive orders and other directives.

For President Trump, in the opening weeks of this second term, he has issued a slew of presidential directives, whether called "executive orders," "proclamations," "memoranda," or otherwise. The ones that have been officially published (so far, but there's a slight delay) in the Federal Register are included on these charts:

- Proclamations to date, 25
- Executive orders to date, 93 (from EO 14147 through EO 14239)

What is an Executive Order?

"One of the most common "presidential" documents in our modern government is an executive order." Every American president has issued at least one, totaling more than (as of this writing) 13,731 since George Washington took office in 1789." See *What Is an Executive Order?* (January 25, 2021) *American Bar Association.*

"An executive order is a signed, written, and published directive from the President of the United States that manages operations of the federal government…. Other presidential documents are sometimes similar to executive orders in their format, formality, and issue, but have different

purposes."

Proclamations, which are also signed and numbered consecutively, communicate information on holidays, commemorations, federal observances, and trade….Both executive orders and proclamations have the force of law, much like regulations issued by federal agencies, so they are codified under Title 3 of the Code of Federal Regulations.

Administrative orders—e.g. memos, notices, letters, messages—are not numbered, but are still signed, and are used to manage administrative matters of the federal government. All three types of presidential documents—executive orders, proclamations, and certain administrative orders—are published in the Federal Register, the daily journal of the federal government that is published to inform the public about federal regulations and actions. They are also catalogued by the National Archives as official documents produced by the federal government."

Staying in the Executive-Branch Lane

In *What Is an Executive Order and How Does it Work?* (February 4, 2025) Christopher Anders, Esq. of the American Civil Liberties Union explains "[w]hat executive orders can – and cannot – do, and why we have them in the first place."

In a nutshell, "Article II of the Constitution vests the president with executive power over the government, including the obligation to 'take care that the laws be faithfully executed.' An executive order is a written directive, signed by the president, that orders the government to take specific actions to ensure "the laws be faithfully executed." It might mean telling the Department of Education to implement a certain rule, or declaring a new policy priority. Executive orders, however, cannot override federal laws and statutes."

Most particularly, it cannot cross over into the authority of Congress which has "control over things like taxation, spending, and certain war powers." Simply put, Congress enacts statutes which become law, if signed by the president or – if there is no signature, through a veto override.

"With an executive order, the president can't write a new statute, but an order can tell federal agencies how to implement a statute. For example, Congress can declare a certain drug legal or illegal. But with an executive order, the president can tell the Department of Justice if prosecuting certain drug cases is a priority or not.

When Does a President Misuse an Executive Order?

"With an executive order, President Trump can order the federal government to take any steps that are within the scope of the constitutional authority of the executive branch, and do not violate any federal law."

The ACLU's Christopher Andrews further explains: "Trump, or any president, is misusing executive order authority if the president orders the government to take actions that are not authorized by the Constitution or are in violation of federal laws. That's when the courts must step in to safeguard our rule of law. However, an executive order can be lawful and still cause harm, especially when it threatens important civil liberties or civil rights."

With a bit of editorializing, he concludes: “Executive orders can be an effective way to carry out policy while staying within the rule of law. However, as we’ve seen with the Trump administration, they can also cause chaos, damage the democratic process and harm our most vulnerable communities.”

How Can An Executive Order Be Stopped?

The constitutional checks and balances provide a few ways that an executive order can be stopped:

- Congress can enact a law that reverses what the president has done, provided Congress has the constitutional authority to legislate on the issue
- A court can hold that an executive order is unlawful if it violates the Constitution or a federal statute
- Any future president can issue a new executive order that rescinds or amends the earlier executive order

Executive orders are not legislation; they require no approval from Congress, and Congress cannot simply overturn them. Congress may pass legislation that might make it difficult, or even impossible, to carry out the order, such as removing funding. Only a sitting U.S. President may overturn an existing executive order by issuing another executive order to that effect.

Conclusion

Circling back now to the litigation seeking to reverse the damage of OMB Memorandum (M-25-13) and to ensure it doesn’t happen again, it’s important to focus on the egregious overreaching by the president into the Congressional power of the purse. That’s why there have been successes so far, which are likely to continue.

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