



Biden's Orders Continue the Presidency's Slide Toward Elective Monarchy

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"Ease up on the executive actions, Joe," *The New York Times* urged recently inaugurated President Biden last week. While supportive of the president's broadly progressive agenda, the newspaper's editorial board found his flurry of executive orders and other unilateral actions both troubling and vulnerable to easy reversal by future presidents. "This is no way to make law," the *Times* added.

Unfortunately, creeping rule-by-decree has become common for presidents, and Biden's impatience with the normal frustrations of the legislative process builds on the conduct of his predecessors. While partisans tend to pick sides on executive power depending on who holds the White House, the devolution of the presidency into something resembling elective monarchy should worry everybody.

Not that executive orders are supposed to be royal decrees. At their root, they are nothing more than the authority of leaders to set rules for their organizations.

"Presidents have historically utilized various written instruments to direct the executive branch and implement policy," the Congressional Research Service noted in 2014. "These include executive orders, presidential memoranda, and presidential proclamations."

"The substance of an executive order, including any requirements or prohibitions, may have the force and effect of law only if the presidential action is based on power vested in the President by the U.S. Constitution or delegated to the President by Congress," the 2014 report added.

But the limits of such orders are fuzzy since there is no mention of them in the Constitution; they evolved as a matter of convenience and so have their powers.

"When carried out pursuant to legislative or constitutional authority, executive orders are unobjectionable," the Cato Institute's Gene Healy observed in his 2008 book, *The Cult of the Presidency*. "Yet many of the orders issued by modern presidents lack such authority and justification."

Professor Dana D. Nelson of Vanderbilt University agrees. In her 2008 book *Bad for Democracy*, Nelson called such unilateral commands "power tools" that "allow the president to enact both foreign and domestic policy directly, without aid, interference, or consent from the legislative branch."

That's not to say that executive actions can't be challenged; judges do occasionally overturn them. But it takes less time to issue a memo than to fight it in court, so orders accumulate along with their reach.

Under Coolidge and Hoover, most executive orders applied to such matters as civil service rules. However, by the 1960s, the majority were policy-specific, filling the role of legislation. Issuing orders is easy; persuading lawmakers to pass your bills is difficult and time-consuming. As a result, unilateral action is tempting even for critics of such governance.

"A polarized, narrowly divided Congress may offer Mr. Biden little choice but to employ executive actions or see his entire agenda held hostage," the *Times* sniffed while objecting to the practice.

For its part, the Biden administration makes no secret of its impatience with normal legislative channels.

"There are steps, including overturning some of the harmful, detrimental and yes, immoral, actions of the prior administration that he felt he could not wait to overturn," White House press secretary Jen Psaki told reporters who questioned the Biden administration's reliance on unilateral action.

But *every* faction thinks its agenda is important and that its ideological foes do harm; that's why political parties oppose each other. If the refusal of lawmakers to enact a president's policies is justification for unilateral executive action, then a slide toward elective monarchy is inevitable. And that's exactly what seems to be happening.

"Biden's use of the executive power in his first two days far outpaced that of his predecessors," PolitiFact confirmed amidst public concern over the issue. "Biden issued 17 executive orders on his first two days in office, compared with Trump who issued one and Obama who issued two. Biden issued three proclamations, while Trump and Obama each issued one."

But those predecessors also relied heavily on executive actions. "Trump is on pace to sign more executive orders than any president in the last 50 years," CNN reported in 2017 of the 45th president.

"Once a presidential candidate with deep misgivings about executive power, Mr. Obama will leave the White House as one of the most prolific authors of major regulations in presidential history," *The New York Times* concluded at the end of the 44th president's time in office.

Notably, before taking office, Obama, Trump, and Biden were all critics of presidential rule through unilateral orders. "We're a democracy. We need consensus," Biden told ABC News in October. Just months later he issued his flurry of executive actions.

Maybe that's because consensus is difficult to find in a vast nation of millions of people with varying values and preferences. That's especially true when the country is as bitterly divided as the United States is now, into factions that despise each other to the point of violence. Presidents and their supporters often complain of a "do-nothing Congress" when legislators are in fact doing something: they're blocking the president's agenda. That may well be what their constituents *want* them to do.

Such relative inaction may actually be best when there's so little agreement on what people desire from government—and what they fear from it.

"Overwhelming majorities of both Biden and Trump supporters say that if the other candidate wins in November they would not only be very concerned about the country's direction, but that this would lead to lasting harm to the nation," Pew Research found before the presidential election. That was before the Capitol riot and further souring of the national mood, with a majority of Americans *now* fearing each other as "domestic enemies."

America's divisions have deepened as government has become more involved in our lives and as presidents have indulged their taste for bypassing Congress. To reverse that dangerous trend, we need a president willing to do less, especially when it comes to issuing unilateral orders. That's a tough ask for people who spend their lives pursuing political power. We may have to settle, again, for the next president unilaterally reversing this one's actions.