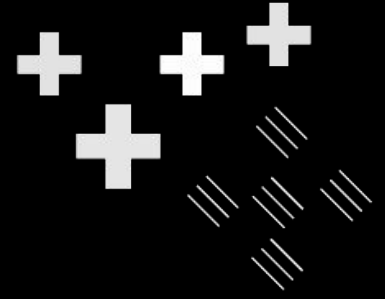




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# **Executive Orders:**

# **An Overview**

**June 2023**

# About Executive Orders: An Overview

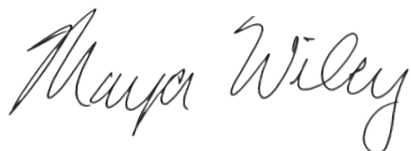
**Executive Orders: An Overview** is a supplement to the **Civil and Human Rights Executive Order Progress Report**, a project of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund. The Leadership Conference on Civil and Human Rights is the nation's oldest and largest civil and human rights coalition of more than 230 national organizations. The Leadership Conference Education Fund was founded in 1969 as its education and research arm.

Executive Orders: An Overview provides an overview of executive orders broadly — what they are and how they are issued and implemented — and is a complement to two additional publications:

- [The Civil and Human Rights Executive Order Progress Report](#) provides an overview of the Biden administration's use of executive orders to advance civil and human rights. It assesses the implementation of 41 directives contained in nine civil and human rights executive orders issued by the Biden administration and was issued on June 12, 2023.
- [Strengthening Democracy: A Progress Report on Federal Agency Action to Promote Access to Voting](#), issued on March 3, 2023 by a coalition of 53 organizations, evaluates 10 key agencies' progress on implementing the Executive Order on Promoting Access to Voting.

I would like to thank Danielle Root and Glenn Schlactus of Relman Colfax PLLC, the primary authors of this overview and the Progress Report. Staff assistance was provided by Meeta Anand, Nadia Aziz, Anita Banerji, Kanya Bennett, Josh Boxerman, Mattie Goldman, Patrick McNeil, Eunic Epstein-Ortiz, Peggy Ramin, Rob Randhava, Bree Spencer, Frank Torres, Chloé White, and Scott Simpson, who was an editor of the report. Overall supervision was provided by Corrine Yu and Jesselyn McCurdy. The report was designed by Celeste Jacobs.

We hope our colleagues across the country benefit from this overview as they assess how effectively presidents are utilizing important tools like executive orders to further policy improvements, as well as greater transparency and accountability. The author and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.



**Maya Wiley**

*President and CEO*

The Leadership Conference on Civil and Human Rights  
The Leadership Conference Education Fund



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# Introduction

Under the U.S. Constitution, the president — as leader of the executive branch — is duty-bound to ensure “that the laws be faithfully executed.”<sup>1</sup> To this end, the executive offices, agencies, and entities that the president oversees must carry out statutory directives prescribed by Congress and must adhere to legal interpretations and judgments handed down by the judiciary.

Presidents do not merely enforce federal laws; they establish, clarify, and interpret them. This is accomplished through various presidential instruments, such as presidential memoranda, proclamations, and emergency declarations. The most well-known of these activities are executive orders, which direct actions by federal agencies, offices, and personnel. Through executive orders, presidents wield substantial power over executive branch policies and functions. This has implications for access to government benefits and services — and for civil rights. Upon receipt of the president’s signature, executive orders hold legal force; this is known colloquially as “Stroke of the pen. Law of the land.”<sup>2</sup> Executive orders may include directives for executive branch entities to undertake rulemaking, issue guidance on interpretation and application of laws, or reform policies and processes. Executive orders may also create new commissions or task forces responsible for issuing recommendations on policy priorities, or they may revoke or amend orders by past presidents.<sup>3</sup>

The rate at which presidents have relied upon executive orders has ebbed and flowed. Nearly all presidents, beginning with President George Washington, have utilized executive orders to varying degrees. From 1789 until 1841, U.S. presidents averaged three executive orders per term. A huge shift occurred at the start of the 20th century. Spikes during this period coincide with World War I, the Great Depression, and World War II. Generally, executive orders are utilized most frequently during times of national crises and during times of war. From 1901 through 1953, presidents averaged 737 executive orders per term. Between 1969 and 2021, presidents issued an average of 196 executive orders per term. In all, nearly 16,000 executive orders have been issued since President George Washington became president in 1789.

Executive orders have a mixed history with respect to civil rights. Over time, they have been relied upon by presidents to both violate and advance civil rights. For example, one executive order authorized the incarceration of more than 100,000 Japanese Americans during World War II. Another order helped enforce school integration mandated by *Brown v. Board of Education*.

Halfway through his first presidential term, President Biden has issued fewer executive orders than many past presidents — but he is still on track to surpass the 171 combined average number of executive orders issued per presidential term among the four most recently serving presidents.

Despite their significance, the processes by which executive orders are issued and implemented are not well known. This overview provides background on executive orders, including what forms they take, their historical dependence, and ongoing debates over their utility in promoting civil and human rights. It also describes how executive orders are issued and implemented using three common types as examples: executive orders that direct agencies to take some type of action, those that revoke or amend past executive orders, and those that create commissions, working groups, or task forces.

Knowing how executive orders are issued and implemented is the first step to assessing how presidents fare in utilizing them to achieve affirmative policy goals. Understanding these processes is also valuable for furthering interests of government transparency and accountability.

# **Executive Orders: What Are They?**

An executive order is a legal document that the president issues to assert the administration's position on and prioritization of a specific policy matter; to require agencies to adopt new policies or processes, issue interpretive or enforcement guidance, or pursue new regulations; to create presidential commissions and interagency task forces; and to revoke, amend, or supersede orders issued by past presidents.<sup>4</sup> There is no explicit constitutional or statutory basis for executive orders, but the authority is believed to be derived from the U.S. Constitution, Article II.<sup>5</sup> Article II Section I's vesting clause is interpreted as granting presidents' general policymaking power, including the power to issue executive orders.<sup>6</sup>

The Commander-in-Chief Clause and Treaties Clause are often interpreted as giving the president policymaking power over U.S. military and foreign affairs matters.<sup>9</sup> Still other provisions, including the Appointments Clause and Article II Section II, are interpreted as giving the president policymaking power over the executive branch.<sup>10</sup> Congress may delegate to the president policymaking power on certain matters.

Nearly all presidents, beginning with President George Washington, have utilized executive orders to varying degrees.<sup>11</sup> Between 1789 and 1841, U.S. presidents averaged three executive orders per term.<sup>12</sup> A huge shift occurred at the start of the 20th century. From 1901 through 1953, presidents averaged 737 executive orders per term. Executive orders spiked with Theodore Roosevelt's presidency, during which he issued 1,081 executive orders over two terms.<sup>13</sup> His successors issued large numbers of executive orders as well. President Franklin D. Roosevelt issued the most executive orders of any president, averaging 1,243 executive orders per term, or 3,728 overall. Spikes during this period coincide with World War I, the Great Depression, and World War II.<sup>14</sup> Between 1969 and 2021, presidents issued an average of 196 executive orders per term.

For his part, President Biden has thus far issued slightly more than 100 executive orders to advance his administration's goals.<sup>15</sup>

**“ The executive Power shall be vested in a President of the United States of America ”**

**“ [H]e shall take Care that the Laws be faithfully executed ”**

Executive orders are considered controversial by some. Critics of executive orders argue that policymaking belongs to Congress and that — by giving the president unilateral power to direct policies and federal actions — executive orders present dangers of executive overreach. As evidence, critics point to orders resulting in civil rights violations, including:

- President Abraham Lincoln’s “Authorizing General Winfield Scott to Suspend the Writ of Habeas Corpus,” issued during the Civil War;<sup>16</sup>
- President Franklin D. Roosevelt’s “Authorizing the Secretary of War to Prescribe Military Areas,” which led to the incarceration of more than 100,000 Japanese Americans during World War II;<sup>17</sup> and
- President Dwight D. Eisenhower’s “Security Requirements for Government Employment,” which implicated LGBTQI+ status as a potential government security risk.<sup>18</sup>

Proponents counter with examples of executive orders that have advanced social progress and equity, such as:

- President Dwight D. Eisenhower’s “Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas,” which helped enforce *Brown v. Board of Education*;<sup>19</sup>
- President Barack Obama’s Executive Order 13548, which advanced employment opportunities for people with disabilities within the federal government;<sup>20</sup> and

- President Abraham Lincoln’s Emancipation Proclamation, which is often considered an executive order in form but not in name.

To put into perspective executive orders’ potential impacts, some 20 percent of the U.S. workforce is now protected by Executive Order 11246’s anti-discrimination protections.<sup>21</sup>

Presidents are not given carte blanche policymaking power. Legislative and judicial checks prevent presidents from overreaching. Congress can pass a law superseding an executive order and thereby invalidating it. The president can exercise veto power, but Congress can override a veto with a two-thirds majority vote. Alternatively, Congress can “defang” an executive order by refusing to allocate funding for its implementation, among other tactics.<sup>22</sup>

Federal courts may strike down executive orders if they exceed a president’s constitutional or statutory authority. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court struck down an executive order issued by President Harry S. Truman, finding that he exceeded his authority in ordering seizures of steel mills.<sup>23</sup> The case set out a three-part test for determining whether a president has exceeded their authority in taking a particular action. Put simply, executive orders are upheld when they are rooted in constitutional law or the implied or expressed approval of Congress.

Federal agencies can also neutralize executive orders. They can drag their feet in implementing directives or refuse to implement altogether. But this is rare; executive orders are mostly dutifully obeyed by federal agencies.



## Other Policymaking Tools

Presidents have other policymaking tools at their disposal. They include:

### Presidential Memoranda

Presidents may issue memoranda on similar subjects as executive orders. Presidential memoranda need not be published with the Federal Register, though the White House may choose to do so voluntarily.<sup>24</sup> This can make presidential memoranda difficult to track. President Biden has issued more than 100 presidential memoranda, many of which center on civil rights.<sup>25</sup> For example:

- Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA),<sup>26</sup>
- Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies,<sup>27</sup>
- Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World,<sup>28</sup> and
- Memorandum on Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable.<sup>29</sup>

Federal agencies carry out provisions contained within presidential memoranda. For example, President Biden's Memorandum on Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United

States requires agencies to issue guidance describing best practices for advancing cultural competency, language access, and sensitivity towards Asian Americans and Pacific Islanders in the context of the federal government's COVID-19 response.<sup>30</sup> As a result, the Departments of Health and Human Services and Justice jointly released in May 2022 a "Special Report: Raising Awareness of Hate Crimes and Hate Incidents During the COVID-19 Pandemic," which included guidance for preventing and responding to COVID-19-related hate crimes.<sup>31</sup> A July 2021 Request for Information from the Department of Health and Human Services' Office of Minority Health requested information on "Best Practices for Advancing Cultural Competency, Language Access and Sensitivity Toward Asian Americans and Pacific Islanders."<sup>32</sup> Also in 2021, the agencies announced a new initiative aimed at addressing hate crime violence based upon the report's findings, and that month's COVID-19 Health Equity Task Force meeting addressed the impact of discrimination and xenophobia on health.<sup>33</sup>

### Presidential Proclamations

Presidential proclamations are largely ceremonial in nature.<sup>34</sup> Unlike executive orders and presidential memoranda, proclamations do not direct agency or government action. Instead, proclamations are typically used to recognize holidays, days of remembrance, or dedications. The president may issue proclamations of their own volition or may be directed to do so by Congress. Functionally, most proclamations are signaling mechanisms that presidents use to indicate their commitment to an issue, community, or cause. They are published in the Federal Register.

President Biden has issued more than 35 proclamations.<sup>35</sup> Many are centered on civil rights, for example:

- Proc. 10430: Women's Equality Day, 2022,<sup>36</sup>
- Proc. 10426: Anniversary of the Americans with Disabilities Act, 2022,<sup>37</sup>
- Proc. 10418: Juneteenth Day of Observance, 2022,<sup>38</sup>
- Proc. 10409: Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Pride Month, 2022,<sup>39</sup> and
- Proc. 10389: Missing or Murdered Indigenous Persons Awareness Day, 2022.<sup>40</sup>

Some proclamations do contain directives. For example, President Biden's Proclamation on Ending Discriminatory Bans on Entry to the United States required the Department of State to resume visa processing for individuals from the following countries: Iran, Libya, Somalia, Sudan, Syria, Yemen, and Iraq. Statistics from the Department of State's website indicates that visa processing for individuals from those countries has increased since President Biden took office.<sup>41</sup> Another example of a proclamation that directed agency action includes President Biden's Proclamation on the Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction. Progress has been made by agencies to implement orders contained within these proclamations.<sup>42</sup>

## Emergency Declarations

Presidents can issue emergency declarations for crises affecting the entire nation or affecting state and local jurisdictions. State and local officials typically submit a formal emergency request for presidential recognition. Once so recognized, they can access federal assistance through the Federal Emergency Management Agency.<sup>43</sup>

President Biden has issued, recognized, or extended more than 60 emergency declarations.<sup>44</sup> They include:

- Continuation of the National Emergency with Respect to Foreign Interference in or Undermining Public Confidence in United States Elections,<sup>45</sup>
- Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, and<sup>46</sup>
- Approval for Mississippi Emergency Declaration.<sup>47</sup>

## Congress, Nominations, and Appointments

Presidents may issue statements to Congress — referred to as Statements of Administration Policy, or SAPs — setting forth their position on legislation. The White House, often with help from federal agencies, may also provide Congress with draft legislation. The White House Legislative Affairs office works with Congress to carry out the president's legislative priorities. Moreover, presidents submit annual budgets to Congress.<sup>48</sup> These budgets lay out the administration's policy and funding priorities spanning the entire

executive branch. Presidential budgets are not approved in full, but they are used as jumping off points for congressional appropriations. President Biden's Fiscal Year 2023 budget included plans to:

- Provide \$400 million for the Title X family planning program;
- Provide \$1 billion to fund tribal efforts to expand, among other things, affordable housing and improve housing conditions;
- Provide \$16.3 billion to support special education; and
- Provide \$100 million for a national initiative to provide workforce development services to people in the federal prison system.<sup>49</sup>

Still other presidential tools include the power to nominate federal judges and executive branch officials and personnel. These nominations can have substantial impacts on legal and regulatory landscapes and can also help further civil rights priorities.

# **Executive Orders: How Are They Issued and Implemented?**

Processes for issuing and implementing executive orders are not well known. Limited formal guidance exists. The most cited authority is “Preparation, Presentation, Filing, and Publication of Executive Orders and Proclamations,” or Executive Order 11030, which provides general directions for how orders are to be formatted and issued.<sup>50</sup> Executive order implementation processes are sometimes prescribed through agency guidance, and the Administration Procedures Act includes direction for implementing an order requiring agency rulemaking. Nonetheless, clear directions do not exist in most cases. Consequently, processes for issuing and implementing executive orders are largely dictated by informal practices and traditions that are not widely publicized.

Clues can be gleaned from academic articles, guidance documents, media sources, archived White House databases, and agency records. But they do not provide a full picture. Adding to this, each administration organizes itself differently. How executive orders are issued and implemented may vary depending on delineations of roles and responsibilities. As such, processes used by past administrations may not be identical to those used today.

To promote clarity and transparency, the Biden administration should consider steps to standardize executive order issuance and implementation processes. This could be accomplished by way of publishing process maps, much like the one developed by the Office of Information and Regulatory Affairs that illustrates the rulemaking process.<sup>51</sup>

Relying on public sources, the subsections below provide useful summaries of how executive orders are issued and how certain categories of executive orders are

implemented. The categories of orders used to explain implementation processes are those that direct agency action, revoke or amend past orders, and create presidential commissions, working groups, and task forces.

## **Entities Involved in Issuing and Implementing Executive Orders**

Certain federal entities, offices, and personnel play an outsized role issuing and implementing executive orders. Besides the president, they are:

### **White House Domestic Policy Council**

The White House Domestic Policy Council is tasked with coordinating the president’s domestic policy priorities across the executive branch from inside the White House.<sup>52</sup> It “drives the development and implementation of the President’s domestic policy agenda in the White House and across the Federal government, ensuring that domestic policy decisions and programs are consistent with the President’s stated goals.” Domestic Policy Council members include Cabinet secretaries and policy experts. The Domestic Policy Council advises the president on all matters of domestic policy, including on criminal justice, education, health care, and democracy issues. Domestic Policy Council staff are involved at virtually every stage of the executive order issuance and implementation process. Staff help to draft executive orders and work closely with the Office of Management and Budget in coordinating negotiations between agencies on executive order content and ensuring that whatever document ends up on the president’s desk reflects the White House’s priorities. During the implementation phase, Domestic Policy Council staff work in close

consultation with executive branch officials and personnel to ensure an order's directives are carried out to the president's specifications and liking. The Domestic Policy Council was formally established by "Executive Order 12859 — Establishment of the Domestic Policy Council" in 1993.<sup>53</sup>

### **Office of Management and Budget**

The Office of Management and Budget is situated within the Executive Office of the President. Its primary role is to serve as the administrative and management arm of the executive branch. It compiles the president's annual budget and oversees implementation of administrative programming aimed at improving the government's everyday functioning. Through its Office of Information and Regulatory Affairs, it also reviews proposed rulemaking and all related assessments and materials. The Office of Management and Budget is charged with overseeing and coordinating policy and program implementation across the entire executive branch.<sup>54</sup> Whereas the Domestic Policy Council is more focused on substance, the Office of Management and Budget focuses on process. The Office of Management and Budget and the Domestic Policy Council thus work together on executive order issuances and implementation. Among other things, the Office of Management and Budget facilitates negotiations between executive branch entities during the drafting phase and is often involved in implementation to varying degrees, depending on the order.

### **Office of Information and Regulatory Affairs**

The Office of Information and Regulatory Affairs is situated within the Office of Management and Budget.<sup>55</sup> It is responsible for reviewing and tracking the status of agency actions and regulations. The Office of Information and Regulatory Affairs' authority extends to information collection, government statistics, and federal privacy policy.

### **Department of Justice Office of Legal Counsel**

The Department of Justice's Office of Legal Counsel is responsible for advising the White House and executive agencies on matters of law.<sup>56</sup> It reviews proposed orders from the U.S. attorney general and proposed Department of Justice regulations. It also functionally serves as outside counsel to the White House and to other federal branch entities. Among other tasks, it provides answers and issues opinions on questions asked by the White House's Office of General Counsel. All executive orders must be reviewed and certified for legality by the Office of Legal Counsel before being sent to the president's desk. The Office of Legal Counsel may also answer questions posed by executive branch entities during an order's implementation phase.

### **Federal Register**

The Federal Register is an information repository for certain federal documents.<sup>57</sup> Executive orders must be published in the Federal Register — with limited exceptions. The Federal Register is also tasked with reviewing an order's formatting before publication. The database contains agency documents, including rulemaking documents,

presidential proclamations, and some presidential memoranda. The Federal Register is also tasked with reviewing an order's spelling and punctuation before publication.

## **I. How are executive orders issued?**

Executive orders may be initiated through processes that are “top-down” or “bottom-up.”<sup>58</sup> If an executive order is initiated top-down, White House staff will develop an initial draft order. If it is bottom-up, a draft order is penned by a federal agency or other executive branch office.<sup>59</sup> Formatting requirements for executive orders are dictated by Executive Order 11030, which states that an order must cite the legal authority under which it is being issued.<sup>60</sup>

Once an order is drafted, it is sent to the Office of Management and Budget.<sup>61</sup> The order must be accompanied by a signed letter from the drafting agency or office with an explanation of the nature, purpose, background, and effect of the order. The letter must also note any related laws, executive orders, or proclamations. The Office of Management and Budget and the Office of Information and Regulatory Affairs review the order for conformity with the president's policies and priorities. The Office of Management and Budget then distributes the draft order to agencies for review and feedback. The Office of Management and Budget facilitates negotiations between affected entities on the order's content. Disagreements can stem from an order's terminology, delineations of responsibilities, or a policy position.<sup>62</sup>

Once the order is approved, it is sent to the Department of Justice's Office of Legal Counsel.<sup>63</sup> The Office of Legal Counsel performs a legal review of the order and certifies its legality. The order may be rejected by the Office of Management and Budget (including the Office of Information and Regulatory Affairs) or the Department of Justice. If that occurs, the order's drafters must go back to the drawing board. Assuming the order is approved, the Federal Register checks for conformity with formatting requirements and for spelling and grammatical errors before sending it to the White House.<sup>64</sup>

The White House staff secretary is responsible for ensuring that executive orders are reviewed inside the White House. The staff secretary must verify that all individuals and departments with potential stakes in the order or whose opinion the president trusts have provided feedback on the order before sending it to the president's desk.<sup>65</sup> White House general counsel, Office of Legislative Affairs, Domestic Policy Council, and the chief of staff are all chiefly involved.<sup>66</sup> Reviewers provide comments and feedback. The president must be presented with all viewpoints before signing an executive order, and reviewers are encouraged to highlight for the president any concerns and differing opinions. Comments and feedback are incorporated into an internal memo that is attached to the order, along with the Department of Justice's Office of Legal Counsel's legal certification, which is then delivered to the president for signing. Once signed, the order is published in the Federal Register.<sup>67</sup>



## II. How are executive orders implemented?

It usually falls to executive branch offices and agencies to create a plan for how to proceed in carrying out an order. Sometimes an interagency task force is tasked with helping to coordinate and implement executive order directives across the federal government, and the Office of Management and Budget will sometimes issue implementation guidance for agencies — but this is not always the case.<sup>68</sup>

Implementing an executive order can be done in different ways depending on its content. An executive order directing agency action may involve a lengthy rulemaking process. An order revoking or amending a past executive order involves certain steps. Still other steps are involved in standing up commissions or working groups. Each of these processes is described in the proceeding sections.

### (a). Implementing Executive Orders That Direct Executive Agency or Entity Action

Affected federal agencies and entities often become aware of an order during the issuance phase. If the order is bottom-up, the affected entity may have been the original drafter. If the order is top-down, the entity was likely consulted during content negotiations facilitated by the Office of Management and Budget. Offices may perform internal tracking of White House actions concerning their respective policy areas.

The first step is typically for an agency or entity's political appointees, general counsels, and policy experts to review the executive order to determine how it and its operations are implicated by the order. This may involve

cross-comparisons with controlling laws, regulations, and internal policies. Once this is understood, agencies and federal entities may be creative in designing implementation plans that avoid potential conflicts so as not to disrupt ongoing work.

For orders directing agencies to alter policies or enforcement priorities, federal agencies and entities may choose to effectuate the order's directives by issuing guidance documents.<sup>69</sup> Guidance may communicate the agency or entity's legal interpretation, enforcement, or policy position on subject matter. Guidance may come in the form of formal memos or may be presented as education materials or statements of policy.<sup>70</sup> During the drafting phase, key personnel debate the guidance's substantive provisions and terminology. The final product may require multiple layers of approval or may be expedited to only the highest-ranking officials. Drafting agencies may also seek input from other agencies with relevant insights. Guidance documents are not binding but are treated as authorities by federal personnel, regulated entities, and the public.

Alternatively, an executive order may direct an agency to issue, amend, or revoke regulations. Agencies may choose to undergo rulemaking even if an executive order does not require it, but they will usually seek out alternatives to avoid time-consuming rulemaking procedures. Rulemaking is controlled by the Administrative Procedures Act. Before undergoing rulemaking, an agency might publish an Advance Notice of Proposed Rulemaking in the Federal Register.<sup>71</sup> The purpose is to solicit public feedback on whether rulemaking should be pursued at all. If the agency decides to undertake rulemaking, it notifies the White



House and works in consultation with White House Domestic Policy Council staff to draft a proposed rule. Agencies may consult other federal agencies at the drafting stage for legal and policy synchronicity. The proposed rule is reviewed by the Office of Management and Budget and the Office of Information and Regulatory Affairs to ensure conformity with presidential priorities.<sup>72</sup>

The next step is for the agency to publish a Notice of Proposed Rulemaking in the Federal Register. With limited exceptions, the Administrative Procedures Act requires that a notice of proposed rulemaking include a statement of the time, place, and nature of public rulemaking proceedings; reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved.<sup>73</sup> The Office of Information and Regulatory Affairs tracks the status of rules undergoing rulemaking and compiles all relevant documentation, including agency assessments of the rule's potential impact and cost analyses.<sup>74</sup>

The rulemaking agency solicits public comments and information on the proposed rule. During this period, agencies may hold public meetings with agency officials and experts. Notice is required for these meetings. Agencies are then responsible for reviewing and analyzing the results. An agency may revise the rule or scrap it altogether and start again based upon its findings.

The final rule is then drawn up for publication. The final rule must include a preamble that summarizes the agency's response to major issues raised during public comment. In addition to the text of the rule, summaries must be included stating its basis and purpose.

The final rule gets sent to the Federal Register for review and is published.<sup>75</sup> With limited exception, final rules are not effective until 30 days after their publication. Once a rule goes into effect, the agency may issue guidance documents to employees and regulated entities on how it will implement and enforce the new rule. Agency political appointees, program staff, general counsels, and enforcement departments may be tasked with carrying out a rule's programs, policies, and initiatives. Implementation is ultimately overseen by high-ranking political appointees.

Some executive orders direct federal agencies to act in other ways. Some broadly direct federal agencies and entities to evaluate internal processes and policies for conformity with the president's policy priorities, or they may require agencies to study a particular issue. These orders may prescribe how these assessments or studies are to be carried out. They may direct who at an agency or entity is responsible for performing the assessment, provide detailed task lists, and set deadlines by which final assessments must be presented to the White House. Federal agencies or entities may carry out these assessments alone or may do so as part of an interagency task force or working group.

Still other executive orders direct federal agencies and entities to stand up new programming. Doing so may necessitate rulemaking on the part of the affected agency or entity. In other cases, agencies may pursue new initiatives through internal channels and thus rely on agency personnel, programming officers, general counsels, and political appointees to create and drive their success. If an agency has similar initiatives already in place, supplementation of new programming may be relatively uncomplicated.

## **(b). Implementing Executive Orders That Revoke or Amend Past Orders**

Executive orders are often used to revoke or amend orders issued by past administrations. A president's decision to revoke or amend a prior order may be a matter of necessity to ensure the federal government's proper functioning. Presidents often revoke or amend past orders because of differing governing philosophies or policy priorities.<sup>76</sup> President Biden has issued more than 30 executive orders that revoke, amend, or supersede executive orders issued by former President Trump. Four of these Trump-era orders have especially pronounced civil rights implications.<sup>77</sup> These include:

- Executive Order 13950, which blocked federal agencies and contractors from administering unconscious bias training,<sup>78</sup>
- Executive Order 13769, which introduced the discriminatory Muslim ban,<sup>79</sup>
- Executive Order 13809, which promoted militarization of law enforcement,<sup>80</sup> and
- Executive Order 13958, which advanced supposed "patriotic education" in schools as a counter to programs that include references to slavery, racial discrimination, and diverse viewpoints of American history.<sup>81</sup>

As noted previously, federal agencies or entities are often made aware of an incoming order at the issuance phase during agency negotiations over the order's content. An agency may have drafted the revocation order itself in coordination with the White House. Agencies may have informal tracking mechanisms to keep abreast of new orders.

Once an executive order revoking or amending a past order is signed, agencies and offices must next determine how they are affected, if at all. General counsel offices work with agency personnel and political appointees to assess the order and evaluate it against existing programs and policies. They may consult with other affected federal agencies over how to proceed.

If regulations were adopted under the old order, agencies must assess whether those rules need amendment or rescission.<sup>82</sup> For example, agencies are assessing whether regulatory changes are necessary to effectuate President Biden's revocation of President Trump's Executive Order on the Establishment of a White House Faith and Opportunity Initiative.<sup>83</sup> If so determined, agencies must adhere to rulemaking procedures described in the previous subsection.<sup>84</sup> To avoid time-consuming rulemaking processes, an agency may choose instead to issue guidance or policy statements articulating new approaches to interpretation or enforcement.

Eventually, the old executive order's nullified programs, policies, and processes will be dismantled, and its resources will be reallocated.

## **(c). Implementing Executive Orders That Establish Commissions, Working Groups, or Task Forces**

A president may issue an executive order that establishes a presidential commission, working group, or interagency task force to investigate and provide recommendations on specific subject matter.<sup>85</sup> These can also coordinate cross-agency presidential priorities or ensure

synchronized implementation of presidential programs or initiatives. In all, President Biden has established more than 35 commissions, working groups, and task forces through executive orders.<sup>86</sup>

Executive orders creating commissions, working groups, and task forces often have requirements for their makeup, as well as for their duties and deliverables. An executive order may name a chairperson, such as the vice president, and list essential members, such as members of the Domestic Policy Council. Other participants may include department secretaries and deputies, representatives from other offices within the White House, or non-government experts, such as academics, scientists, or external policy professionals.

Meetings for these groups may be held publicly or in private depending on their purpose. The chairperson calls an initial meeting, during which the groups' bylaws, scheduling and logistics, and responsibilities are formalized. An executive order may specify how frequently these groups must meet and may dictate reporting structures. Depending on groups' objectives, prospective meetings may include presentations by government officials and personnel, expert testimony, consultations with advocates and activists, assessments of emerging research, or tending to operational matters.

A commission, working group, or task force may be required to produce one or more reports with findings and recommendations. The group may seek feedback from affected agencies and individuals. Some reports are formally submitted to Congress, announced to the public, or published on the White House or an agency website, but not all are made available for public consumption. Report publication may be just one step of many. Groups may be required to oversee implementation of their recommendations, collect public feedback, or investigate related subjects. Upon achievement of a group's objectives, it will typically adjourn and disband.

# Appendix I.

## Numbers of Executive Orders by U.S. Presidents

Years (Presidents)	Number of Executive Orders	Number Years in Office	Number of Terms	Average Executive Orders Per Term
1789-1797 (George Washington)	8	8	2	4
1797-1801 (John Adams)	1	4	1	1
1801-1809 (Thomas Jefferson)	4	8	2	2
1809-1817 (James Madison)	1	8	2	0.5
1817-1825 (James Monroe)	1	8	2	0.5
1825-1829 (John Quincy Adams)	3	4	1	3
1829-1837 (Andrew Jackson)	12	8	2	6
1837-1841 (Martin Van Buren)	10	4	1	10
1841 (William H. Harrison)	0	0	0	0
1841-1845 (John Tyler)	17	4	1	17
1845-1849 (James Polk)	18	4	1	18
1849-1850 (Zachary Taylor)	5	1	0.25	1.25
1850-1853 (Millard Fillmore)	12	3	0.75	9
1853-1857 (Franklin Pierce)	35	4	1	35
1857-1861 (James Buchanan)	16	4	1	16
1861-1865 (Abraham Lincoln)	48	4	1	48
1865-1869 (Andrew Johnson)	79	4	1	79
1869-1877 (Ulysses S. Grant)	217	8	2	108.5
1877-1881 (Rutherford B. Hayes)	92	4	1	92
1881 (James Garfield)	6	0	0	6
1881-1885 (Chester Arthur)	96	4	1	96
1885-1889 (Grover Cleveland)	113	4	1	113
1889-1893 (Benjamin Harrison)	143	4	1	143

## Numbers of Executive Orders by U.S. Presidents

Years (Presidents)	Number of Executive Orders	Number Years in Office	Number of Terms	Average Executive Orders Per Term
1893-1897 (Grover Cleveland)	140	4	1	140
1897-1901 (William McKinley)	185	4	1	185
1901-1909 (Theodore Roosevelt)	1081	8	2	540.5
1909-1913 (William Taft)	724	4	1	724
1913-1921 (Woodrow Wilson)	1803	8	2	901.5
1921-1923 Warren G. Harding)	522	2	0.5	261
1923-1929 (Calvin Coolidge)	1203	6	1.5	802
1929-1933 (Herbert Hoover)	968	4	1	968
1933-1945 (Franklin D. Roosevelt)	3728	12	3	1242.7
1945-1953 (Harry Truman)	907	8	2	453.5
1953-1961 (Dwight D. Eisenhower)	484	8	2	242
1961-1963 (John F. Kennedy)	214	2	0.5	107
1963-1969 (Lyndon B. Johnson)	325	6	1.5	216.7
1969-1974 (Richard M. Nixon)	346	5	1.25	276.8
1974-1977 (Gerald R. Ford)	169	3	0.75	126.75
1977-1981 (Jimmy Carter)	320	4	1	320
1981-1989 (Ronald Reagan)	381	8	2	190.5
1989-1993 (George H.W. Bush)	166	4	1	166
1993-2001 (Bill Clinton)	364	8	2	182
2001-2009 (George W. Bush)	291	8	2	145.5
2009-2017 (Barack Obama)	276	8	2	138
2017-2021 (Donald Trump)	220	4	1	220
2021-2022 (Joe Biden)	103	2	0.5	51.5

# Appendix II.

Contained here are the 103 executive orders signed by President Biden and published in the Federal Register as of November 15, 2022.

Executive Order Number	Executive Order Title	Executive Order Signing Date
14088	Taking Additional Steps To Address the National Emergency With Respect to the Situation in Nicaragua	10/24/2022
14087	Lowering Prescription Drug Costs for Americans	10/14/2022
14086	Enhancing Safeguards for United States Signals Intelligence Activities	10/7/2022
14085	Expanding Eligibility for Certain Military Decorations and Awards	10/3/2022
14084	Promoting the Arts, the Humanities, and Museum and Library Services	9/30/2022
14083	Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States	9/15/2022
14082	Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022	9/12/2022
14081	Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy	9/12/2022
14080	Implementation of the CHIPS Act of 2022	8/25/2022
14079	Securing Access to Reproductive and Other Healthcare Services	8/3/2022
14078	Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home	7/19/2022
14077	Establishing an Emergency Board To Investigate Disputes Between Certain Railroads Represented by the National Carriers' Conference Committee of the National Railway Labor Conference and Their Employees Represented by Certain Labor Organizations	7/15/2022
14076	Protecting Access to Reproductive Healthcare Services	7/8/2022
14074	Advancing Effective, Accountable Policing and Criminal Justice Practices To Enhance Public Trust and Public Safety	5/21/2022
14073	Enhancing the National Quantum Initiative Advisory Committee	5/4/2022



Executive Order Number	Executive Order Title	Executive Order Signing Date
14072	Strengthening the Nation's Forests, Communities, and Local Economies	4/22/2022
14070	Continuing To Strengthen Americans' Access to Affordable, Quality Health Coverage	4/5/2022
14071	Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression	4/6/2022
14069	Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency	3/15/2022
14068	Prohibiting Certain Imports, Exports, and New Investment With Respect to Continued Russian Federation Aggression	3/11/2022
14067	Ensuring Responsible Development of Digital Assets	3/9/2022
14066	Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine	3/8/2022
14065	Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine	2/21/2022
14064	Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan	2/11/2022
14063	Use of Project Labor Agreements for Federal Construction Projects	2/4/2022
14062	2022 Amendments to the Manual for Courts-Martial, United States	1/26/2022
14061	Adjustments of Certain Rates of Pay	12/22/2021
14060	Establishing the United States Council on Transnational Organized Crime	12/15/2021
14059	Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade	12/15/2021
14058	Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government	12/13/2021
14057	Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability	12/8/2021

Executive Order Number	Executive Order Title	Executive Order Signing Date
14056	The National Space Council	12/1/2021
14055	Nondisplacement of Qualified Workers Under Service Contracts	11/18/2021
14054	Termination of Emergency With Respect to the Situation in Burundi	11/18/2021
14052	Implementation of the Infrastructure Investment and Jobs Act	11/15/2021
14053	Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People	11/15/2021
14051	Designation To Exercise Authority Over the National Defense Stockpile	10/31/2021
14050	White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans	10/19/2021
14049	White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities	10/11/2021
14048	Continuance or Reestablishment of Certain Federal Advisory Committees and Amendments to Other Executive Orders	9/30/2021
14047	Adding Measles to the List of Quarantinable Communicable Diseases	9/17/2021
14046	Imposing Sanctions on Certain Persons With Respect to the Humanitarian and Human Rights Crisis in Ethiopia	9/17/2021
14044	Amending Executive Order 14007	9/13/2021
14045	White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics	9/13/2021
14042	Ensuring Adequate COVID Safety Protocols for Federal Contractors	9/9/2021
14043	Requiring Coronavirus Disease 2019 Vaccination for Federal Employees	9/9/2021
14040	Declassification Reviews of Certain Documents Concerning the Terrorist Attacks of September 11, 2001	9/3/2021

Executive Order Number	Executive Order Title	Executive Order Signing Date
14041	White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity Through Historically Black Colleges and Universities	9/3/2021
14039	Blocking Property With Respect to Certain Russian Energy Export Pipelines	8/20/2021
14038	Blocking Property of Additional Persons Contributing to the Situation in Belarus	8/9/2021
14037	Strengthening American Leadership in Clean Cars and Trucks	8/5/2021
14036	Promoting Competition in the American Economy	7/9/2021
14035	Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce	6/25/2021
14034	Protecting Americans' Sensitive Data From Foreign Adversaries	6/9/2021
14033	Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans	6/8/2021
14032	Addressing the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China	6/3/2021
14031	Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders	5/28/2021
14030	Climate-Related Financial Risk	5/20/2021
14029	Revocation of Certain Presidential Actions and Technical Amendment	5/14/2021
14028	Improving the Nation's Cybersecurity	5/12/2021
14027	Establishment of the Climate Change Support Office	5/7/2021
14026	Increasing the Minimum Wage for Federal Contractors	4/27/2021
14025	Worker Organizing and Empowerment	4/26/2021
14024	Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation	4/15/2021
14023	Establishment of the Presidential Commission on the Supreme Court of the United States	4/9/2021

Executive Order Number	Executive Order Title	Executive Order Signing Date
14022	Termination of Emergency With Respect to the International Criminal Court	4/1/2021
14020	Establishment of the White House Gender Policy Council	3/8/2021
14021	Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity	3/8/2021
14019	Promoting Access to Voting	3/7/2021
14017	America's Supply Chains	2/24/2021
14018	Revocation of Certain Presidential Actions	2/24/2021
14016	Revocation of Executive Order 13801	2/17/2021
14015	Establishment of the White House Office of Faith- Based and Neighborhood Partnerships	2/14/2021
14014	Blocking Property With Respect to the Situation in Burma	2/10/2021
14013	Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration	2/4/2021
14010	Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border	2/2/2021
14011	Establishment of Interagency Task Force on the Reunification of Families	2/2/2021
14012	Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans	2/2/2021
14009	Strengthening Medicaid and the Affordable Care Act	1/28/2021
14007	President's Council of Advisors on Science and Technology	1/27/2021
14008	Tackling the Climate Crisis at Home and Abroad	1/27/2021
14006	Reforming Our Incarceration System To Eliminate the Use of Privately Operated Criminal Detention Facilities	1/26/2021
14004	Enabling All Qualified Americans To Serve Their Country in Uniform	1/25/2021

Executive Order Number	Executive Order Title	Executive Order Signing Date
14005	Ensuring the Future Is Made in All of America by All of America's Workers	1/25/2021
14002	Economic Relief Related to the COVID-19 Pandemic	1/22/2021
14003	Protecting the Federal Workforce	1/22/2021
13994	Ensuring a Data-Driven Response to COVID-19 and Future High-Consequence Public Health Threats	1/21/2021
13995	Ensuring an Equitable Pandemic Response and Recovery	1/21/2021
13996	Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats	1/21/2021
13997	Improving and Expanding Access to Care and Treatments for COVID-19	1/21/2021
13998	Promoting COVID-19 Safety in Domestic and International Travel	1/21/2021
13999	Protecting Worker Health and Safety	1/21/2021
14000	Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers	1/21/2021
14001	A Sustainable Public Health Supply Chain	1/21/2021
13985	Advancing Racial Equity and Support for Underserved Communities Through the Federal Government	1/20/2021
13986	Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census	1/20/2021
13987	Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security	1/20/2021
13988	Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation	1/20/2021
13989	Ethics Commitments by Executive Branch Personnel	1/20/2021
13990	Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis	1/20/2021
13991	Protecting the Federal Workforce	1/20/2021
13992	Revocation of Certain Executive Orders Concerning Federal Regulation	1/20/2021
13993	Revision of Civil Immigration Enforcement Policies and Priorities	1/20/2021

# Endnotes

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[2] Wall Street Journal, 'Stroke of the Pen' (Dec. 22, 1999), <https://www.wsj.com/articles/SB945818601141853968>.

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[4] It is generally accepted that executive orders do not establish new privately held rights. To communicate this clearly, modern executive orders typically conclude with the following disclaimer: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."

[5] Jonathan M. Gaffney, *Executive Orders: An Introduction*, Congressional Research Service; John Contrubis, *Executive Orders and Proclamations*, Congressional Research Service.

[6] The Presidential oath requires presidents to swear to "faithfully execute the Office of President of the United States" and to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II., § 1.

[7] U.S. Const. art. II., § 1.

[8] U.S. Const. art. II., § 3.

[9] U.S. Const. art. II., § 2.

[10] "[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II., § 2.

[11] The exception is President William Harrison who did not complete even one full year in office.

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