



Challenging Executive Authority: Pending Litigation Against Trump's Executive Orders

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Executive Orders

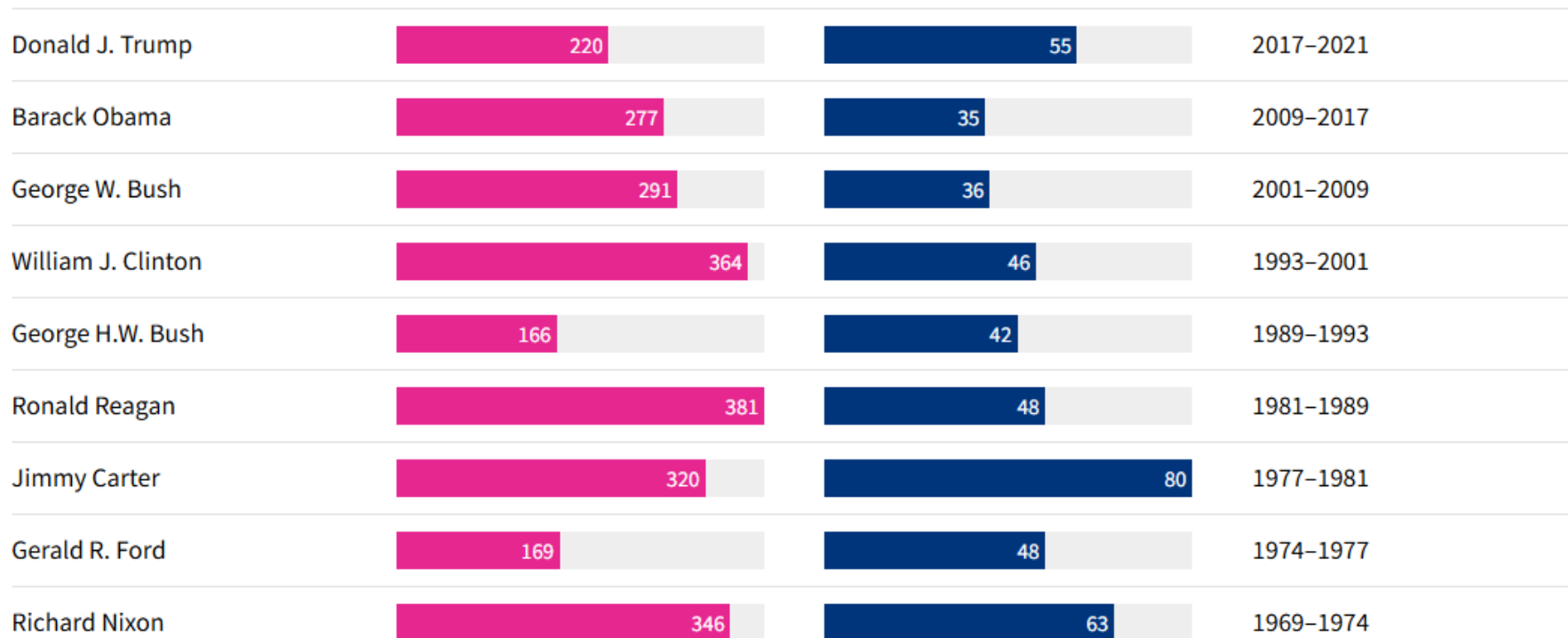
Executive Orders

- **What is an Executive Order?**
 - Presidential directive issued to the Executive Branch
 - Issued pursuant to the President's Article II power to ensure that "the laws be faithfully executed."
 - Generally speaking, cannot override a federal law or statute
 - Cannot violate the constitution
- President cannot use EO to write a new statute
- President can use EO to tell federal agencies how to implement a statute, or how to prioritize resources



History of Executive Orders

Number of Executive Orders per President, 1969 – 2025:



History of Executive Orders

Number of First Day Executive Orders per President, 1969 – 2025:

President	Number of executive orders	Inauguration Day
Donald J. Trump	26	January 20, 2025
Joseph R. Biden, Jr.	9	January 20, 2021
Donald J. Trump	1	January 20, 2017
Barack Obama	2	January 21, 2009
George W. Bush	0	January 20, 2001
William J. Clinton	1	January 20, 1993
George H.W. Bush	0	January 20, 1989
Ronald Reagan	0	January 20, 1981

How to Challenge an Executive Order

- Affected parties can sue to challenge an unlawful Executive Order
- Seminal case - *Youngstown Sheet & Tube Co. v. Sawyer* (1952)
 - Truman nationalized steel mills to keep munitions flowing for Korean War
 - Supreme Court ruled the EO unlawful
- Justice Jackson's concurrence – 3-part framework:
 1. President aligned with Congress → maximum power
 2. Congress is silent → “zone of twilight” with uncertain authority
 3. Acting in contravention of Congress → “lowest ebb”



Case Study: President Trump's 2017 EO re Sanctuary Jurisdictions

- In 2017, President Trump issued an EO cutting off all federal funding to “sanctuary jurisdictions”
- Santa Clara County and San Francisco sued, seeking an injunction
- Counties win. District court holds EO:
 - Violates the separation of powers; Congress controls the spending power, not the president.
 - Violates the 10th Amendment by coercing states to enact federal program
 - Violates due process as vague
 - Had no basis in existing congressional law; Congress had in fact refused to enact laws cutting off funding for these reasons
- 9th Circuit affirms on separation of powers grounds

Today's Landscape

- **~135 lawsuits filed to date** responding to the Trump Administration
- Challenging **many forms of policies and actions**: Executive Orders, regulations, agency statements, Dear Colleague letters, interpretative guidance, initiations of investigations, etc.
- The vast majority have been filed in **D.D.C.**, but other frequent courts include **D. Md. and D. Mass.**, as well as N.D. Cal., S.D.N.Y., and W.D. Wash.
 - Recurring plaintiffs include state Attorneys General, federal employee labor unions, and nonprofits affected by the executive actions
 - Defendants are generally the agencies, their leaders, and the president
- **Successes and failures** for preliminary relief



Key Policy and Litigation Themes

- **DOGE** — Appointments Clause, Separation of Powers, access to information, FOIA, etc.
- **Civil rights** — Transgender ban in military, ban on gender affirming care for youths, rescission of trans passport policy, free speech violations, etc.
- **Immigration** — Sanctuary cities, birthright citizenship, Guantanamo, immigration enforcement in religious institutions and schools, etc.
- **Attorneys** – EO's attacking specific law firms and lawyers in general

DOGE

DOGE - Policies Announced and Actions Taken

- Executive Orders
 - EO 14158 - Establishing and Implementing the President's "Department of Government Efficiency"
 - EO 14219 - Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Regulatory Initiative
- Challenges to DOGE under:
 - Appointments Clause
 - Federal Advisory Committee Act



DOGE - Appointments Clause Challenges

- The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const., art. II, § 2, cl. 2.
 - Plaintiffs argue that that Musk and the DOGE staff are exercising “significant authority” by controlling agency operations, making personnel decisions, and directing federal spending, all powers the plaintiffs claim can be wielded only by properly appointed officers of the United States.
 - Defendants argue that Musk does not occupy an office that is itself entrusted with any actual sovereign power, he is not an “officer” at all and cannot be working in violation of the Appointments Clause.



DOGE - Appointments Clause Challenges

- On February 18, 2025 in *New Mexico et al. v. Musk*, Judge Chutkan (D.D.C)) **denied** 14 plaintiff-states' motion for TRO for lack of irreparable harm, but stated, "Plaintiffs raise a colorable Appointments Clause claim with serious implications." The case is now in discovery.
- On March 18, 2025 in *J. Does 1-26 v. Musk*, Judge Chuang (D. Md) **granted** a preliminary injunction on behalf of 26 current and former USAID employees, ordered DOGE to reinstate email and system access to current employees, and blocked DOGE from taking any actions relating to the agency. Defendants' appeal is pending before the 4th Circuit.

"If a president could escape Appointments Clause scrutiny by having advisors go beyond the traditional role of White House advisers who communicate the president's priorities to agency heads and instead exercise significant authority throughout the federal government so as to bypass duly appointed officers, the Appointments Clause would be reduced to nothing more than a technical formality."

Civil Rights

Civil Rights – EOs Targeting Transgender Rights

- **Prisons and Passports:** [Executive Order 14168](#) – defining “sex” and “gender” as binary
- **Military:** [Executive Order 14183](#) – banning transgender military members
- **Children’s Healthcare:** [Executive Order 14187](#) (w/context of [EO 14168](#))—bans gender affirming health care for children 18 and younger and cuts funding
- **Sports:** [Executive Order 14201](#) —bans transwomen and transgirls from participating in sports

Civil Rights - Trans Rights Cases

- Plaintiffs are mostly **individuals diagnosed with gender dysphoria**.
 - Health care cases also feature organizational plaintiffs, state AGs, and physicians.
- All cases assert **Fifth Amendment Equal Protection claims**, and most assert that **sex discrimination includes discrimination based on transgender status** (Fifth Amendment and Ultra Vires—conflicts with statutory law claims). *Cf. Bostock v. Clayton County*, 590 U.S. 644 (2020).
 - Also include claims not based on sex or gender, like First, Fifth (travel, privacy, parental rights), Eighth, Tenth, and Fourteenth Amendments; APA, Rehabilitation Act - disability discrimination; and *Ultra Vires*
- Government argues:
 - Prisons - **differential treatment is permissible** if “reasonably related to legitimate penological interests”
 - Healthcare - president is **directing implementation of policy**, not mandating spending requirements
 - Military - **foreign policy decisions** are beyond the purview of the courts

Civil Rights - Trans Rights Cases

- **Preliminary relief has succeeded** so far in trans rights cases
 - **Eighth Amendment** (prisons)
 - **Ultra vires—funds authorized by Congress/separation of powers** (healthcare)
 - **Ultra vires—contrary to existing statutes** (healthcare)
 - **Equal Protection** (healthcare, military)
- D.C. Circuit granted a stay in the military case while Ninth Circuit denied a stay



Immigration

Immigration - Birthright Citizenship



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Trump takes birthright citizenship to the Supreme Court

- “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” - 14th Amend. Sec. 1.
- Trump EO focuses on phrase “subject to the jurisdiction thereof”
- Trump EO seeks to end birthright citizenship for children whose (1) mother was “unlawfully” in the U.S. and whose father was neither a citizen nor LPR; or (2) mother was lawfully but temporarily in the U.S. and whose father was neither a citizen nor LPR.

Immigration - Birthright Citizenship

- 10 cases filed in 8 jurisdictions
 - 22 State AGs (W.D. Wash.)
 - ACLU (D. N.H.)
 - Casa, Inc. (D. Md.)
 - Lawyers for Civil Rights (D. Mass.)
- Pls/TROs were granted including 3 nationwide injunctions
- 14th Amendment long understood to grant citizenship to anyone born in the United States, other than children born to alien enemies in hostile occupation, Indian Tribes, and foreign diplomats. *See U.S. v. Wong Kim Ark* (1898).
- SCOTUS considering a partial stay of the nationwide Pls

Immigration - Alien Enemies Act

- March 15 Presidential Proclamation: “**Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua**”

“Whenever there is a **declared war** between the United States and any foreign nation or government, or any **invasion or predatory incursion is perpetrated, attempted, or threatened** against the territory of the United States by any foreign nation or government, **and the President makes public proclamation** of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, **shall be liable to be apprehended, restrained, secured, and removed** as alien enemies.”

- Alien Enemies Act, 50 U.S.C. § 21.

Immigration - Alien Enemies Act

J.G.G. v. Trump, 25-cv-766 (D.D.C.) (Boasberg, J.)

- March 15 order requiring defendants to “not remove any of the individual Plaintiffs from the United States”
 - Issued orally at hearing then reaffirmed in written order, which also certified the class.
 - Deportation flights departed the same evening.
- March 17 hearing and order requiring government to file a sworn declaration regarding the timing of flights
 - Government frames as “dispute . . . over the President’s authority to protect the national security and manage the foreign relations of the United States” and argues the Court’s orders presume “that the Judicial Branch is superior to the Executive Branch”
- March 24 gov’t notice seeks to invoke “state secrets privilege”

Immigration - Alien Enemies Act

J.G.G. v. Trump, No. 25-5067 (D.C. Cir.)

- D.C. Circuit refused to lift Judge Boasberg's order blocking the Administration from deporting migrants under the Alien Enemies Act
- "The theme that rings true is that an invasion is a military affair, not one of migration." – Judge Karen LeCraft Henderson
- "If the government can choose to abandon fair and equal process for some people, it can do the same for everyone." Judge Patricia Millett

Trump Administration now seeking a stay from the Supreme Court



Immigration - Unique Considerations

- Federal government generally has wide latitude over immigration policy and courts often defer to executive decisions
- Cases are teeing up complaints over nationwide preliminary injunctions
- Courting constitutional crises
- Delegitimization of judicial independence
- Potential to significantly remake what it means to be an American

The Practice of Law

Executive Orders Targeting Private Law Firms

- Feb. 25 – Presidential Memo targeting Covington & Burling
- Mar. 6 – EO targeting Perkins Coie
- Mar. 14 – EO targeting Paul Weiss
 - Mar. 21 – EO revoked after “settlement” with Paul Weiss
- Mar. 22 – Presidential Memo re “Preventing Abuses of the Legal System and the Federal Courts”
- Mar. 25 – EO targeting Jenner & Block
- Mar. 27 – Presidential Proclamation targeting WilmerHale

Skadden and Willkie Farr both “settled” with Trump to forestall executive actions

Executive Orders Targeting Private Law Firms

- Perkins Coie, Jenner & Block, and WilmerHale have all sued
- Argue that the EOs violate:
 - **The First Amendment**
 - Retaliation for constitutionally protected conduct
 - Violates the Petition Clause
 - Viewpoint discrimination
 - Freedom of association
 - **Separation of Powers**
 - **Fifth Amendment right to Due Process and Equal Protection**
 - **Clients' Sixth Amendment right to counsel**



Courts have granted TROs in all cases thus far

Closing Thoughts

Conclusion and Takeaways

- Onslaught of executive actions → deluge of litigation
- Courts generally striving to apply the law, with wins and losses turning on application of established law to facts
- Many ways for courts to dodge or avoid deciding hot-button issues
- Maintaining the rule of law requires lawyers willing to challenge potentially unlawful orders and governmental overreach
- Trump's recent attacks on the private bar appear designed to cow attorneys from playing this vital role in our democracy

Thank you!
