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## GOVERNANCE IN AN AGE OF POLARIZATION: BIDEN’S USE OF EXECUTIVE ORDERS IN HIS FIRST 100 DAYS

*Ronald C. Lee, Jr.\**

Within hours of taking the oath of office, President Joe Biden signed nine [executive orders](#), followed by twenty-three more in his first month on the job. What this flurry of executive activity sought to accomplish was clear: undoing or at least initiating the process of undoing the policies of the Trump administration. On immigration, Biden signed executive orders that “[reset the policies and practices for enforcing civil immigration laws](#)”; halted the construction of the border wall between the United States and Mexico; ended a ban on immigration from seven predominantly Muslim countries; established new procedures for processing asylum seekers at the U.S. border; extended protections for immigrants who were brought to the country as children by their parents; and created a task force to reunite families separated at the U.S.-Mexico border. On the environment, Biden halted construction of the Keystone XL pipeline; imposed new limits on oil and gas drilling on federal lands; reversed rollbacks to vehicle emission standards; and recommitted the United States to the Paris Agreement on climate change. On health care, Biden allowed eligible Americans more time to sign up for federally subsidized health insurance coverage by reopening enrollment in the Affordable Care Act, and he rescinded the so-called “global gag rule” that barred U.S. funding for groups overseas that perform abortions or offer information on them. On issues of equality, Biden lifted the ban on transgender troops serving in the military; extended existing federal nondiscrimination protections to LGBTQ people; revoked Trump’s executive order limiting the ability of federal agencies and contractors to hold diversity and inclusion training; and called on government agencies to allocate federal resources “to address the historic failure to invest sufficiently, justly, and equally in underserved communities.” In response to the coronavirus pandemic, Biden required social distancing and the wearing of masks on all federal property, and he restored U.S. ties with the World Health Organization.

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The record pace at which Biden was signing executive orders in his first weeks in office drew comparison to another president known for his energetic use of executive power in a time of national crisis and whose portrait is featured prominently in Biden's Oval Office. Franklin D. Roosevelt signed [thirty executive orders](#) in his first month as president, two fewer than Biden in the same period of time. In fact, Biden [reportedly](#) spent time before taking office studying FDR's iconic first 100 days for guidance on how to act quickly and decisively in leading a country in crisis. It is unlikely that Biden will keep pace with [FDR's average of 307 orders a year](#). But the record-setting use of executive orders in the early weeks of Biden's presidency could signal one important way he intends to pursue his policy agenda in a polarized political environment, with his party holding the slimmest of majorities in Congress and the room for bipartisan compromise narrow at best.

Executive orders are written presidential directives that instruct executive branch officials on how to manage agency operations or implement the law. The president's authority to issue them flows from the Constitution or federal statute. Though the Constitution does not include an express power to issue executive orders, it does vest "the executive Power" in the "President of the United States of America" and directs the president to "take Care that the Laws be faithfully executed." These clauses, taken together, form the constitutional basis for the authority to issue executive orders. The first president to issue an executive order was George Washington, who based his authority to do so in part on his interpretation of the vesting clause of Article II. The statutory basis for issuing executive orders rests on laws enacted by Congress: an executive order may be issued to direct the executive branch in the execution of law or to carry out a delegation of authority granted by Congress. The legal basis for executive orders may also stem from a federal court decision. For example, in announcing his executive order to combat discrimination on the basis of gender identity or sexual orientation, President Biden [cited](#) the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 in its decision in *Bostock v. Clayton County* (2020), according to which the prohibition against discrimination based on sex also prohibits discrimination based on gender identity or sexual orientation. There may arise a question as to whether an executive order was issued with sufficient constitutional or legal authority, in which case the executive order may be challenged in court. This was seen, for example, in the legal challenges prompted by President Trump's ban on travel from certain Muslim-majority countries.

The record pace at which Biden issued executive orders in the first days of his presidency drew sharp criticism not only from his opponents but also from some of his supporters. [GOP lawmakers](#) were quick to point out the discrepancy between Biden's unilateral executive action and his calls on the campaign trail and in his inaugural address for national unity and working across party lines to support legislative action. [A New York Times editorial](#) gave voice to criticism from those who otherwise support him. While acknowledging that "undoing some of Mr. Trump's excesses is necessary," it called on Biden to ease up on the executive actions. "This is no way to make law," the newspaper's editorial board

wrote. Executive orders are “more limited in what they can achieve than legislation,” and they are “more ephemeral and easily discarded than legislation” because they can be reversed by a new president with a different policy agenda.

Although governance by executive order has clear limitations, it is likely that President Biden will continue to rely on it, especially when faced with critical issues demanding more immediate attention than a divided Congress with little appetite for bipartisan compromise would be able to address. For example, a series of mass shootings across the nation this year has put pressure on the White House to take steps to curb gun violence. “I don’t need to wait another minute, let alone an hour, to take common-sense steps that will save lives in the future and to urge my colleagues in the House and Senate to act,” [Biden declared](#) following a shooting rampage in March at a grocery store in Boulder, Colo. Recognizing that any executive action Biden might take on guns will face a legal challenge from gun-rights advocacy groups, the administration will need to take steps to ensure that any new regulatory rules it issues and the rulemaking process they go through can withstand judicial scrutiny. Despite the legal challenge any gun control measures are certain to face, Biden will find it easier to take unilateral executive action to at least show a commitment to addressing the problem of gun violence in America than to wait for action by a hyperpartisan Congress with a diminished capacity to enact bipartisan legislation.