



LESSONS IN PRESIDENTIAL AUTHORITY

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President Joseph R. Biden has launched his Administration with a pace of formal executive initiative not seen since the New Deal.¹ Pages and pages of public “executive actions”—taking the various forms of executive orders, proclamations, or presidential memoranda—have signaled profound changes in policy from his predecessor.² Congressional Republicans lost no time in alleging an inconsistency between President Biden’s exhortations to unity and his running start with executive action in so many areas.³ But Democrats have pointed to widespread public support for President Biden’s commitments—support apparently unifying voters well beyond the Democratic base.⁴

The body of presidential initiatives emerging so quickly from the Biden White House is instructive, however, about more than just the ambitions of one particular President. These executive initiatives also provide important clues as to both the reach and limitations of presidential power. Such lessons emerge yet more pointedly when President Biden’s opening flurry of actions is viewed in tandem with the closing burst from President Donald J. Trump.

Looking at President Biden’s first week against the backdrop of President Trump’s last actually points to six important lessons about the powers and frustrations of the contemporary presidency.

1. The immediate public impacts of executive action are mostly symbolic.

In the great majority of cases, executive orders, proclamations, and presidential memoranda have no direct, immediate consequences for the

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¹ Peter Baker, *Copying Roosevelt, Biden Wanted a Fast Start. Now Comes the Hard Part.*, N.Y. TIMES, Jan. 30, 2021, <https://www.nytimes.com/2021/01/30/us/politics/biden-administration-early-goals.html>.

² *Id.*

³ Greg Sargent, *Fake GOP Rage Over Biden’s ‘Unity’ Speech is a Sucker’s Game.*, WASH. POST, Jan. 21, 2021, <https://www.washingtonpost.com/opinions/2021/01/21/gop-response-biden-speech-unity>.

⁴ See Eli Yokley, *Biden’s Initial Approval Rating is Higher than Trump’s Ever Was.*, MORNING CONSULT (Jan. 25, 2021, 3:55 PM), <https://morningconsult.com/2021/01/25/morning-consult-political-intelligence-biden-job-approval-polling>.

legal rights or responsibilities for anyone outside the government. Instead, presidential actions typically set in motion some further government activity that may eventually produce the public impacts a President desires. The most apparent public impact of most executive “actions” is thus to underscore, implicitly or explicitly, what Presidents take to be their Administrations’ core values or policy priorities.

In his last week in office, President Trump signed fewer than two dozen published “executive actions,” but they hit nearly all of the high—or, depending on your perspective, low—notes of President Trump’s agenda, including tough stances on China,⁵ law enforcement,⁶ and immigration,⁷ as well as opposition to abortion⁸ and support for school choice.⁹ Two executive orders were intended to further President Trump’s ideas of regulatory reform. One would limit the initiation of major regulatory activity to an agency’s senior political officials, who would also be the only persons entitled to sign off on final rules.¹⁰

Another would carefully delimit the circumstances under which agencies would seek to impose criminal penalties for regulatory violations.¹¹ These orders are puzzling chiefly because it is not clear in either order whether President Trump responded to a significant problem or altered the way agencies had previously done business. They signal, however, the value President Trump placed on the political chain of command and leniency in holding rule violators accountable.

Among President Trump’s final executive orders is one that explicitly addresses matters of symbolism, namely, Executive Order 13,978, “Building the National Garden of American Heroes.”¹² In the order, President Trump commands the Secretary of the Interior to provide funding for a “beautiful new garden . . . to reflect the awesome splendor of our country’s timeless exceptionalism.”¹³

President Trump cast the “hero garden” order as a counterattack against unpatriotic assaults on monuments to great Americans: “When the forces of anti-Americanism have sought to burn, tear down, and destroy, patriots have built, rebuilt, and lifted up.”¹⁴ The order’s most remarkable section is a list of 244 individuals for whom new statues were to be created.¹⁵ It reads like the answer to future trivia questions, such as, “What do Whittaker Chambers and Alex Trebek have in common?” or “Where are Walt Disney and Frederick Douglass both memorialized?”

⁵ Exec. Order No. 13,974, 86 Fed. Reg. 4875 (Jan. 19, 2021).

⁶ Exec. Order No. 13,977, 86 Fed. Reg. 6803 (Jan. 22, 2021).

⁷ 86 Fed. Reg. 6557 (Jan. 21, 2021).

⁸ Proclamation No. 10,136, 86 Fed. Reg. 6795 (Jan. 22, 2021).

⁹ Proclamation No. 10,137, 86 Fed. Reg. 6797 (Jan. 22, 2021).

¹⁰ Exec. Order No. 13,979, 86 Fed. Reg. 6813 (Jan. 22, 2021).

¹¹ Exec. Order No. 13,980, 86 Fed. Reg. 6817 (Jan. 22, 2021).

¹² Exec. Order No. 13,978, 86 Fed. Reg. 6809 (Jan. 22, 2021).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Another Trump order that, perhaps ironically, had the most immediate impact is Executive Order 13,983, which was issued on President Trump's last full day in office.¹⁶ Its sole operational provision was the revocation of Executive Order 13,770, an order issued eight days into the Trump Administration which specified the ethical obligations President Trump would impose on his executive appointees.¹⁷ The seeming intent of President Trump's last-minute order was presumably to relieve appointees of their earlier commitments. But the 2017 order was itself a revocation of President Barack Obama's yet more stringent order on conflicts of interest from 2009.¹⁸ Read literally, President Trump's later order thus poses the question, whether the 2021 revocation of a 2017 revocation now subjects Trump Administration appointees to the 2009 Obama requirements previously revoked. In any event, President Biden's first-day executive orders included his own set of ethical requirements for executive branch appointees.¹⁹

In total, President Biden's first week occasioned the issuance of 23 executive orders, two proclamations, and eight presidential memoranda.²⁰ Like President Trump's final initiatives, these signal the policy priorities of their signatory, echoing the themes of Biden's campaign: responding to the COVID-19 pandemic,²¹ addressing racial and gender inequities,²² fighting climate change,²³ and changing direction on immigration policy.²⁴ President Biden's first proclamation was to declare January 20, 2021, a "National Day of Unity."²⁵ It explicitly echoed the themes of his inaugural address.²⁶

2. *Most "executive actions" bind only the executive branch and only in limited, albeit important ways.*

Because U.S. Presidents have no general decree power, executive actions must draw their authority either from narrower grants of presidential power in Article II of the U.S. Constitution or from statutes enacted by the U.S. Congress.²⁷ Other than the pardon power, however, Article II grants

¹⁶ Exec. Order No. 13,983, 86 Fed. Reg. 6835 (Jan. 25, 2021).

¹⁷ Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Feb. 3, 2017).

¹⁸ Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

¹⁹ Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

²⁰ Victor Reklaitis & Robert Schroeder, *All of President Biden's Key Executive Orders—In One Chart*, MARKETWATCH (Jan. 21, 2021), <https://www.marketwatch.com/story/all-of-president-bidens-key-executive-orders-in-one-chart-2021-01-21>.

²¹ Exec. Order No. 13,987, 86 Fed. Reg. 7019 (Jan. 25, 2021).

²² Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

²³ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

²⁴ Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 27, 2021).

²⁵ Proclamation No. 10,140, 86 Fed. Reg. 7003 (Jan. 25, 2021).

²⁶ President Joseph R. Biden, Inaugural Address (Jan. 20, 2021).

²⁷ *Executive Orders 101*, NAT'L CONST. CTR. (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them>.

Presidents virtually no peacetime domestic authority to alter the general public's legal rights or responsibilities.²⁸

What presidents can accomplish unilaterally in domestic affairs by solely relying on Article II power flows almost exclusively from whatever supervisory and coordinating authority over the bureaucracy that they enjoy because they are constitutionally vested with “executive power” and charged with taking care that the laws be faithfully executed.²⁹ That is why the typical executive action, regardless of format, is actually an assignment of work to subordinate administrators intended to bear fruit in the months and years ahead.³⁰

Of President Biden's first-week executive orders and proclamations, only about half a dozen appear to be rooted in statutory authority that Congress has vested specifically in the President. These actions include the new order on “Ethics Commitments by Executive Branch Personnel,”³¹ portions of the order on “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,”³² and an order on “Protecting the Federal Workforce and Requiring Mask-Wearing.”³³

Almost all the other first-week executive orders and proclamations instead create new policy coordinating structures and assign high-priority work to cabinet secretaries and others. These orders are quite specific about President Biden's medium- and long-term objectives, but the assignments they convey do not explicitly curtail his subordinates' legal discretion under whatever statutes Congress has charged them to implement.

For example, in President Biden's very first order, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” the President assigns the Director of the Office of Management and Budget a variety of tasks to “identify” best practices, “consider” recommendations, and “assess” existing policies.³⁴ These tasks and similar activities assigned to others are intended to yield plans to address the order's objectives. The details of implementation are necessarily left for future elaboration.

Assignments to “review,” “consider,” “assess,” “report,” and the like are also conspicuous elements of other Biden orders such as those entitled “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,”³⁵ “Revision of Civil Immigration Enforcement Policies and Priorities,”³⁶ “Protecting Worker Health and Safety,”³⁷ and “A Sustainable Public Health Supply Chain.”³⁸

²⁸ U.S. CONST. amend. II.

²⁹ *Id.* at § 1.

³⁰ JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 35 (2018).

³¹ Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 25, 2021).

³² Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

³³ Exec. Order No. 13,991, 86 Fed. Reg. 7045 (Jan. 25, 2021).

³⁴ Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

³⁵ Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

³⁶ Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 25, 2021).

³⁷ Exec. Order No. 13,999, 86 Fed. Reg. 7211 (Jan. 26, 2021).

³⁸ Exec. Order No. 14,001, 86 Fed. Reg. 7219 (Jan. 26, 2021).

To the extent that President Biden seeks to instigate more direct agency action, he typically orders agencies receiving his assignments to act as is “appropriate and consistent with applicable law,” leaving primary discretion in implementation to the agencies. Examples include the orders entitled “Improving and Expanding Access to Care and Treatments for COVID-19,”³⁹ “Promoting COVID-19 Safety in Domestic and International Travel,”⁴⁰ and “Economic Relief Related to the COVID-19 Pandemic.”⁴¹

The main significance of first-week orders of this type rests not on any direct improvement in COVID-19 response, the mitigation of climate change, or greater equity in the administration of government programs. What makes these first-week orders powerful is their inevitable impact on the time and attention of federal administrators in the coming weeks, months, and years. The sheer number of assignments to specific departments and agencies will necessarily have dramatic impacts on the allocation of staff time and resources throughout the executive establishment.

Executive agenda-setting power is reinforced by the many new consultative structures that President Biden’s orders create. In just his first week, President Biden assigned a large number of existing federal officers to 11 new administrative bodies, whether called working groups, task forces, boards, or councils. They will focus on issues relating to the COVID-19 response, racial equity in government programs, global health security and biodefense, federal workforce safety, climate policy (including economic revitalization in coal communities), and scientific integrity.⁴²

By executive order, President Biden has also created new positions within the White House including a COVID-19 Response Coordinator and Counselor to the President, and a Senior Director for Global Health Security and Biodefense working with the National Security Council (NSC).⁴³

The scarcest commodity for high-level administrators is time, and these orders foreshadow where the time of high-level policymakers and their staffs will be spent.

3. *Easy come, easy go.*

It is an intriguing and often overlooked feature of the administrative state that, although Presidents serve for constitutionally limited terms, their executive orders and memoranda do not necessarily lose force when they leave office. For example, the executive branch still follows President Ronald Reagan’s executive actions on the organization of intelligence activities and on the process for dealing with potential executive privilege claims against

³⁹ Exec. Order No. 13,997, 86 Fed. Reg. 7201 (Jan. 26, 2021).

⁴⁰ Exec. Order No. 13,998, 86 Fed. Reg. 7205 (Jan. 26, 2021).

⁴¹ Exec. Order No. 14,002, 86 Fed. Reg. 7229 (Jan. 22, 2021).

⁴² See, e.g., Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 27, 2021); Exec. Order No. 13,991, 86 Fed. Reg. 7045 (Jan. 25, 2021); Exec. Order No. 13,995, 86 Fed. Reg. 7193 (Jan. 26, 2021); Exec. Order No. 13,996, 86 Fed. Reg. 7197 (Jan. 26, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021).

⁴³ Exec. Order No. 13,987, 86 Fed. Reg. 7019 (Jan. 25, 2021).

Congress.⁴⁴ The White House continues to review proposed agency regulations under an executive order President Bill Clinton signed in 1993.⁴⁵

There are, however, no formal procedural steps that presidents need to take in issuing their own, new executive orders, proclamations, and memoranda—even ones repealing earlier executive orders. Whatever one President creates with a stroke of the presidential pen can be revoked just as summarily.⁴⁶

A conspicuous feature of President Biden’s first-week executive actions is the sheer number of Trump executive actions they explicitly revoke. Among the Trump initiatives revoked are executive orders and memoranda establishing a “1776 Commission,”⁴⁷ asking individuals about their citizenship status as part of the 2020 census,⁴⁸ allowing oil drilling in the Arctic Refuge lands,⁴⁹ disciplining “sanctuary jurisdictions,”⁵⁰ and setting forth President Trump’s vision for the President’s Council of Advisors on Science and Technology.⁵¹

One Biden order revoked a dozen Trump Administration orders and memoranda on environmental policy.⁵² One revoked half a dozen Trump orders on federal regulatory processes.⁵³ Another revoked five Trump initiatives on the federal workforce, including the intended creation of a civil service Schedule F, which threatened to significantly politicize the federal bureaucracy.⁵⁴ Another revoked or limited the impact of five Trump initiatives on government purchasing.⁵⁵ Of both immediate practical and symbolic significance, President Biden, in his first week, also revoked both the Trump travel ban order and the March 2019 permit for the Keystone XL pipeline.⁵⁶

President Biden took an ax even to executive actions President Trump issued in his final week. Five days before leaving office, President Trump officially announced the continuation of a national emergency over the U.S. southern border.⁵⁷ President Biden terminated the emergency declaration on Inauguration Day.⁵⁸

⁴⁴ Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 8, 1981); Memorandum from Ronald Reagan to the Heads of Executive Departments and Agencies (Nov. 4, 1982), <https://www.justice.gov/ola/page/file/1090526/download>.

⁴⁵ Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁴⁶ *What is an Executive Order?*, AM. BAR ASS’N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-.

⁴⁷ Exec. Order No. 13,995, 86 Fed. Reg. 7009 (Jan. 25, 2021).

⁴⁸ Exec. Order No. 13,986, 86 Fed. Reg. 7015 (Jan. 25, 2021).

⁴⁹ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁵⁰ Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 25, 2021).

⁵¹ Exec. Order No. 14,007, 86 Fed. Reg. 7615 (Feb. 1, 2021).

⁵² Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁵³ Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

⁵⁴ Exec. Order No. 14,003, 86 Fed. Reg. 7231 (Jan. 27, 2021).

⁵⁵ Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 28, 2021).

⁵⁶ Proclamation No. 10,141, 86 Fed. Reg. 7005 (Jan. 25, 2021); Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁵⁷ 86 Fed. Reg. 6557 (Jan. 22, 2021).

⁵⁸ Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 27, 2021).

Six days before leaving office, President Trump issued a directive on the “Buy American” policies applicable to the United States Postal Service.⁵⁹ That order lasted five days into the Biden Administration.⁶⁰ Among President Trump’s few initiatives rooted in specific statutory authority was a proclamation on his last full day in office on “Adjusting Imports of Aluminum into the United States.”⁶¹ Technically, that proclamation did survive President Biden’s first week—he did not revoke and replace it until February 1.⁶²

Institutionally, perhaps the most curious feature of President Trump’s final week of output is the frequency with which he issued orders purporting to set up structures and to demand reports and plans extending well beyond the end of his term.

This behavior is not entirely unheard of. President George W. Bush, during his final week in office, established a U.S. Department of Defense working group for strengthening biosecurity.⁶³ President Obama, with about six weeks left to go, issued a memorandum directing the key departments and agencies involved in protecting national security to “prepare for the President a formal report that describes key legal and policy frameworks that currently guide the United States use of military force and related national security operations, with a view toward the report being released to the public.”⁶⁴ President Obama further ordered NSC staff to update and release such a report annually.⁶⁵

Yet President Trump’s initiatives stand out for the greater frequency with which he appeared to issue directions to administrators no longer under his supervision. For example, he directed the Attorney General, by February 17, 2021, to propose a regulation that would permit federal prosecutors concerned about the risk of harm to themselves or to their families to be given special deputations within the U.S. Marshal Service that would enable them to carry firearms.⁶⁶ President Trump also directed the Attorney General to “develop and propose federal legislation providing additional protection for judges, prosecutors, and law enforcement officers.”⁶⁷

With two days left in his term, President Trump purported to order the Administrator of the Federal Aviation Administration to propose regulation “within 270 days” on the use of unmanned aircraft systems.⁶⁸ On President

⁵⁹ Exec. Order No. 13,975, 86 Fed. Reg. 6547 (Jan. 21, 2021).

⁶⁰ See Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 28, 2021).

⁶¹ Proclamation No. 10,139, 86 Fed. Reg. 6825 (Jan. 25, 2021).

⁶² Proclamation No. 10,144, 86 Fed. Reg. 8265 (Feb. 4, 2021).

⁶³ Exec. Order No. 13,486, 3 C.F.R. 185 (2010).

⁶⁴ Presidential Memorandum from Barack Obama to the Heads of Executive Departments and Agencies, *Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations* (Dec. 5, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/presidential-memorandum-steps-increased-legal-and-policy-transparency>.

⁶⁵ *Id.*

⁶⁶ Exec. Order No. 13,977, 86 Fed. Reg. 6803 (Jan. 22, 2021).

⁶⁷ *Id.*

⁶⁸ Exec. Order No. 13,981, 86 Fed. Reg. 6821 (Jan. 22, 2021).

Trump’s last full day of office, he purported to give the Secretary of Defense a year to “conduct a rigorous study investigating toxic exposure by members of the Armed Forces” deployed in Uzbekistan.⁶⁹

It remains to be seen whether these assignments will be fulfilled, modified, revoked, or just ignored—not to mention, of course, the Trump directive to finance the creation of those 244 statues to be placed in a National Garden of American Heroes.

4. *Technical complexity can obscure Presidents’ consequential actions about regulatory policy.*

Outside of Washington, D.C., the executive actions that attract the most headlines are those that plainly signal an incumbent President’s highest priorities and most important substantive values, especially if those priorities and values are controversial.⁷⁰ It is hardly surprising, therefore, when public attention is paid to presidential actions affecting climate policy, immigration, public health, and race and gender equity.

For the last forty years, however, some of the most important executive orders have been those shaping the process by which administrative agencies regulate in the public interest.

In a nutshell, President Ronald Reagan used an executive order to revolutionize the relationship of the White House to the bureaucracy.⁷¹ He directed the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to oversee an elaborate process of cost-benefit analysis that was intended to be a prerequisite to the overwhelming bulk of major federal regulation going forward.⁷² That system, calling for OIRA clearance of agency cost-benefit analyses before issuing significant public-binding rules, has now been in place under Presidents of both major parties.⁷³

President Bill Clinton—who was less hostile to regulation than President Reagan—amended the process with the avowed aims of increasing its efficiency and transparency.⁷⁴

From the start to the finish of his Administration, President Trump issued executive orders intended to stymie the regulatory process and subject the bureaucracy to tighter presidential control. Executive Order

⁶⁹ Exec. Order No. 13,982, 86 Fed. Reg. 6833 (Jan. 25, 2021).

⁷⁰ Zeke Miller & Amer Madhani, *Watch: Biden Signs Executive Orders on Climate, Virus*, PBS (Jan. 20, 2021, 8:22 PM), <https://www.pbs.org/newshour/politics/watch-biden-signs-executive-orders-on-climate-virus>.

⁷¹ Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 19, 1981).

⁷² *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, EVERY CRS (last updated Mar. 21, 2011), <https://www.everycrsreport.com/reports/RL32397.html>.

⁷³ Susan Dudley, *A Brief History of Regulation and Deregulation*, REGUL. REV. (Mar. 11, 2019), <https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation>.

⁷⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2247 (2001); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

13,771, issued ten days into the Trump Administration, purported to add two requirements beyond cost-benefit analysis as speed bumps to the issuance of new rules.

One of these new requirements was a “cut-go” or “one-in-two-out” requirement which directed agencies to identify two existing rules that could appropriately be rescinded as an offset for each new rule.⁷⁵ The other requirement empowered OIRA to impose on non-independent executive agencies a so-called regulatory budget that would determine the aggregate economic cost that each agency could impose on the national economy in a single year.⁷⁶ It is far from clear that either requirement had the kind of deregulatory impact intended, but the signaling was clear: President Trump wanted less regulation.⁷⁷

To help steer the bureaucracy in his intended direction, President Trump also ordered significant changes in agency management. Most notably, Executive Order 13,957, issued roughly two weeks before Election Day 2020, ordered the creation of a so-called Schedule F for federal employees.⁷⁸ Schedule F was to comprise “career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character,” all of which would become part of the “excepted service.”⁷⁹ The political appointees atop each agency would then have fewer limitations on the selection of officials to fill those positions, and those holding Schedule F positions would enjoy fewer protections against demotion or discharge.⁸⁰

If issuing this order just before the election was a sign of President Trump’s optimism, it is yet more remarkable that, in the last week of his term, he issued two more executive orders on regulatory process. One of these—an order issued two days before the end of his term—was specifically intended to tighten the control of political officials over agencies’ regulatory process.⁸¹ It would have permitted only an agency’s senior political officials to initiate the development of, or to sign off on, new final rules.⁸²

With the proverbial stroke of a pen, President Biden eliminated the one-in-two-out and regulatory budget requirements on Inauguration Day.⁸³ The same instrument revoked five other Trump executive orders also intended to make regulation more difficult, to tighten political control over the bureaucracy, or both.⁸⁴

⁷⁵ *Id.*; see also *A Debate Over President Trump’s “One-In-Two-Out” Executive Order*, REGUL. REV. (June 6, 2017), <https://www.theregreview.org/2017/06/26/debate-one-in-two-out-executive-order/>.

⁷⁶ Exec. Order No. 13,771, 3 C.F.R. 284 (2018).

⁷⁷ Amit Narang, *Trump’s Regulatory Budgeting Experiment Has Categorically Failed*, REGUL. REV. (Mar. 23, 2020), <https://www.theregreview.org/2020/03/23/narang-trumps-regulatory-budgeting-experiment-categorically-failed/>.

⁷⁸ Exec. Order No. 13,957, 85 Fed. Reg. 67631 (Oct. 26, 2020).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Exec. Order No. 13,979, 86 Fed. Reg. 6813 (Jan. 22, 2021).

⁸² *Id.*

⁸³ Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

⁸⁴ *Id.*

But potentially the most notable action President Biden took on the administrative process was an Inauguration Day presidential memorandum titled, “Modernizing Regulatory Review.” Unlike the Reagan regulatory review executive order, which was plainly skeptical of regulation, and unlike the more evenhanded but still cautionary Clinton version, President Biden in his memorandum set out a strikingly positive philosophy concerning both public interest regulation and the role of the White House in advancing it.⁸⁵

In his memorandum, President Biden called for OMB to initiate a process “for improving and modernizing regulatory review,” including “concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.”⁸⁶

Rather than casting the role of the White House as merely checking regulatory excess, the memorandum seeks “proposals that would ensure that regulatory review serves as a tool to affirmatively promote regulations that advance these values.”⁸⁷

President Biden’s pro-regulatory stance is conspicuous in three other provisions. In one, he calls for improvements to the regulatory review process that “fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects.”⁸⁸

In the second, President Biden seeks procedures “that take into account the distributional consequences of regulation . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”⁸⁹

In the third, he asks OMB to “consider ways that OIRA can play a more proactive role in partnering with agencies to explore, promote, and undertake regulatory initiatives that are likely to yield significant benefits.”⁹⁰ These are goals that could have enormous substantive impacts, even as the memorandum also invokes traditional good-government values of “efficiency, transparency, and inclusiveness.”⁹¹

Whether these changes to the review process will yield dramatically different outcomes or dramatically shift regulatory approaches remains to be seen.

On January 30, 2009, a newly inaugurated President Barack Obama issued a memorandum directing the Director of OMB “to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review” to replace the Clinton order.⁹² He heightened expectations

⁸⁵ Memorandum, 86 Fed. Reg. 7223 (Jan. 26, 2021).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Memorandum, 3 C.F.R. 343 (2010).

by appointing as the head of OIRA Cass Sunstein, the most prolific contemporary U.S. administrative law scholar.⁹³

But no new order emerged in 100 days, nor even a year or eighteen months. Instead, just two days short of his second anniversary in office, President Obama issued Executive Order 13,563, intended to “reaffirm” and supplement “the principles, structures, and definitions governing contemporary regulatory review that were established in” the Clinton order.⁹⁴ The Obama order did not modify the regulatory review process significantly.

President Biden’s appointment of Sharon Block to a senior OIRA position holds out a promise of unprecedented progressive outlook in OMB leadership.⁹⁵ OMB’s response to President Biden’s memorandum on regulatory review may produce a substantial reorientation of OMB’s relationship to the regulatory bureaucracy—just one that will not make many headlines.

5. *Preparation pays off.*

Another lesson of President Biden’s first week is the most obvious: preparation pays off. President Biden’s roster of executive actions is impressive not just in its volume, but also in its attention to detail and craft in drafting. This rollout could not have been accomplished without intense effort by the lawyers and policy professionals engaged in President Biden’s transition efforts.

President Biden’s first-week performance stands in marked contrast to the opening rounds of the Trump Administration. For example, President Trump’s travel ban order,⁹⁶ issued a week into his term, had to be redrafted twice before taking a form that the U.S. Supreme Court ultimately approved.⁹⁷

The Trump Administration’s corner-cutting approach to administrative process persisted throughout President Trump’s term, leading to an unprecedented loss rate for the federal government in court. One study of 194 lawsuits challenging Trump administrative initiatives found that the Trump Administration won only 31 lawsuits without having to withdraw the challenged action.⁹⁸ Two *Washington Post* reporters summarized the Trump Administration’s court challenges this way: “In case after case, judges have rebuked Trump officials for failing to follow the most basic

⁹³ Office of the Press Secretary, *President Obama Announces Another Key OMB Post*, THE WHITE HOUSE (Apr. 20, 2009), <https://obamawhitehouse.archives.gov/the-press-office/president-obama-announces-another-key-omb-post>.

⁹⁴ Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

⁹⁵ Ben Penn & Courtney Rozen, *Sharon Block, Union Ally, Named to White House Regulatory Post*, BLOOMBERG L. (Jan. 21, 2021, 3:55 PM), <https://news.bloomberglaw.com/daily-labor-report/sharon-block-union-ally-named-to-white-house-regulatory-post>.

⁹⁶ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

⁹⁷ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁹⁸ *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL’Y INTEGRITY, <https://policyintegrity.org/trump-court-roundup>.

rules of governance for shifting policy, including providing legitimate explanations supported by facts and, where required, public input.”⁹⁹

This lesson, however, will continue to have significant implications for the pace of President Biden’s initiatives going forward. It will take time and care to insulate important administrative actions from judicial reversal when they are likely to be challenged before a federal judiciary which is more conservative than it was even four years ago.

Michael Regan, President Biden’s new Administrator of the U.S. Environmental Protection Agency has signaled an understanding of this reality, telling the U.S. Senate Committee on Environment and Public Works that the Biden Administration would not try to reinstate the Obama Clean Power Plan but work on a new plan to reduce carbon dioxide emissions from power plants.¹⁰⁰ The obvious goal is to take the time needed to create a plan that will endure, rather than plunge ahead at a more aggressive, but legally less promising, pace.

6. *Form is fluid and counting “actions” can be misleading.*

The final lesson lies with the difficulties involved in assessing either the ambition or impact of an administration by counting formal documents. For one thing, there is no legally authoritative definition for “executive action,” which has entered the language of Washington, D.C. largely as a way for Presidents to claim political ownership of a policy initiative legally authorized anywhere in the executive branch. The label is often unhelpful to the public because it obscures the role of the administrative agency or agencies actually responsible for implementing the President’s goals.

Furthermore, the formats that Presidents choose for executive actions are largely arbitrary. Observers noted, for example, that President Obama appeared to be less aggressive than other Presidents in issuing executive orders.¹⁰¹ But that appearance was deceiving because President Obama frequently issued presidential memoranda that could just as easily have been executive orders.

Similarly, it is hard to discern any bright line between President Biden’s executive orders and memoranda. Beyond his executive orders and memoranda, President Biden used a set of “proclamations.”¹⁰² One, entitled,

⁹⁹ Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST, Mar. 19, 2019, https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html.

¹⁰⁰ Jenn Chemnick, *Biden Won’t Revive Obama’s Clean Power Plan. So Now What?*, E&E NEWS (Feb. 9, 2021), <https://www.eenews.net/stories/1063724547>.

¹⁰¹ Kristen Bialik, *Obama Issued Fewer Executive Orders on Average Than Any President Since Cleveland*, PEW RSCH. CTR. (Jan. 23, 2017), <https://www.pewresearch.org/fact-tank/2017/01/23/obama-executive-orders/>.

¹⁰² *2021 Joseph R. Biden Jr. Proclamations*, FED. REG., <https://www.federalregister.gov/presidential-documents/proclamations/joe-biden/2021>.

“Ending Discriminatory Bans on Entry to the United States,” revoked three Trump proclamations and one Trump executive order on immigration.¹⁰³

What seemingly dictates the use of the proclamation format—except for those proclamations that are simply declarations of presidential sentiment—is that the wording of a statute authorizes the President to “proclaim” whatever the proclamation is announcing.¹⁰⁴ Many proclamations, however, are also indistinguishable from executive orders.¹⁰⁵

Also, it is impossible for outside observers to count the number of classified presidential orders or memoranda. President Biden could have issued an important set of first-week presidential directives on foreign and national security policy that are simply not public. The Trump Administration called such documents National Security Policy Memoranda,¹⁰⁶ although earlier administrations have called them Presidential Policy Directives or Presidential Study Directives.¹⁰⁷

And most important, the presidential initiatives captured in formal documents represent but a fraction of the informal communications that direct or otherwise motivate the initiatives of other executive branch actors. The events of January 6, 2021, for example, provide dramatic evidence that the full measure of President Trump’s ambition or the impact of his statements cannot be assessed fully by counting pages of presidential prose.¹⁰⁸

President Biden has set forth a progressive policy agenda more reminiscent of Presidents Franklin D. Roosevelt or Lyndon B. Johnson than President Obama.¹⁰⁹ His first week’s output amply demonstrated the scope of his ambitions. By their terms, however, President Biden’s actions broke no obvious new ground in the nature or form of presidential authority being asserted. Whether President Biden will remain reliably consistent with earlier presidential norms or exercise more ambitious executive power than those of his pre-Trump predecessors will make for careful study over the next four years.

¹⁰³ Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 25, 2021).

¹⁰⁴ *Executive Orders: A Beginner’s Guide*, LIBR. CONG. <https://guides.loc.gov/executive-orders/order-proclamation-memorandum> (last updated Aug. 5, 2020).

¹⁰⁵ *Id.*

¹⁰⁶ *National Security Presidential Memoranda [NSPMs]*, Donald J. Trump Administration, FED. AM. SCIENTISTS, <https://fas.org/irp/offdocs/nspm/index.html>.

¹⁰⁷ *Presidential Directives and Where to Find Them*, LIBR. CONG. (July 25, 2020), <https://www.loc.gov/rr/news/directives.html>.

¹⁰⁸ Shelly Tan, Youjin Shin & Danielle Rindler, *How One of America’s Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST, Jan. 9, 2021, <https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/>.

¹⁰⁹ John T. Woolley & Gerhard Peters, *Biden in Action: The First 100 Days*, AM. PRESIDENCY PROJECT (Apr. 25, 2021), <https://www.presidency.ucsb.edu/analyses/biden-action-the-first-100-days>.