

The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective

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Executive Summary

This article examines presidential immigration policy making through executive orders (EOs) and proclamations. Donald Trump's overall volume of EOs has been remarkably similar to that of other presidents, while his number of proclamations has been relatively high. His immigration-related EOs and proclamations, however, diverge from those of his predecessors in several ways. Of the 56 immigration-related EOs and 64 proclamations issued since 1945, Trump has issued 10 and nine, respectively. Overall, about 1 percent of all EOs and proclamations during this period have been immigration related, compared to 8 percent of Trump's EOs and 2.4 percent of Trump's proclamations.

In a sharp departure from previous presidents, a greater share of his EOs and proclamations have been substantive policy-making documents intended to restrict admissions of legal immigrants and increase enforcement along the border and in the interior of the United States. This article explores Trump's unorthodox use of executive tools to make immigration policy, circumventing Congress and even members of his own administration. It recommends that:

- Congress should hold oversight hearings and should consider revoking or modifying EOs and proclamations that have been issued pursuant to the authority provided to the president by Congress, as opposed to those based on the executive's constitutional authority.
- Advocacy organizations should continue to challenge the president's executive actions, the insufficient process and consultation leading to them, their statutory or constitutional justification, and their impact.
- Congress should take an inventory of the immigration authorities it has delegated, both explicitly and implicitly, to the executive branch and determine when this authority can and should be limited.
- Congress should pass legislation to update and reform the US immigration system, and thus clarify its intentions regarding US immigration law, policy, and executive authority in this area.

Keywords

immigration, Executive Order, Proclamation

Introduction

Donald Trump made immigration the centerpiece of his presidential campaign, and has continued to prioritize the issue well into his first term. Trump has made

significant changes to immigration policy in many areas, including high-skilled immigration, refugee policy, visa screening, and enforcement (American Immigration Lawyers Association 2018; Miner and Peterson 2018;

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Pierce, Bolter, and Selee 2018; Wadhia 2019). He has used a variety of executive tools, including executive orders (EOs) and presidential proclamations. Previous presidents have issued these instruments, but Trump's use of them is unconventional. A much larger share of his EOs and proclamations have been substantive policy-making documents, as opposed to delegating authority, creating task forces, or conducting more routine or symbolic tasks. Trump's actions amplify the need to understand better how presidents may use executive powers to create policy while circumventing Congress and even executive branch officials.

Research on Executive Orders and Proclamations

The US Constitution did not name or define EOs or proclamations, and there are no provisions specifically authorizing their issuance or setting forth a process for doing so. The distinction between the two instruments "seems to be more a matter of form than of substance" (Garvey and Chu 2014, 2). Generally, EOs govern the actions of government officials while proclamations affect private individuals (*ibid.*, 1). Both documents generally include a constitutional or statutory authority, and both are signed, numbered consecutively, and published in the *Federal Register*. Instructions for their form, preparation, transmittal, and processing are contained in the Code of Federal Regulations (1 CFR §19).

Executive orders are nimble and powerful tools that allow presidents to establish "new processes that alter the organizational position, powers, and incentives of other actors, or that create new institutional structures with new actors; in effect, the president's order channels behavior in order to ultimately produce results" (Mayer 2001, 29–30). They may allow presidents to circumvent Congress and advance their policy goals unilaterally, in a relatively quick and efficient manner. They also allow presidents to create a policy record that they may cite, even if they are unsuccessful in working with Congress to pass legislation. Presidents can also easily modify or revoke their own EOs, or those of a prior president (Warber 2006, 14–15).

Presidential proclamations are more likely to be symbolic; they may commemorate a national holiday (e.g., Citizenship Day or National Hispanic Heritage Month), recognize a relevant anniversary or national day of remembrance (e.g., National Day of Remembrance of

the Oklahoma City Bombing), or memorialize the death of a significant figure (e.g., "Death of Elijah E. Cummings: A Proclamation"). There are two exceptions: trade and immigration. Congress has delegated specific tariff- and international trade-related powers to the president, and the president exercises that authority through proclamation (Lewis 2016). Similarly, Section 212(f) of the Immigration and Nationality Act (the "suspension clause"), enacted in 1952, states,

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may *by proclamation*, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem appropriate. (Manuel 2017, 1; emphasis added)

Despite the fact that US presidents have issued thousands of EOs and proclamations, the scholarly work on them is relatively meager. Proclamations, in particular, have received very little analysis. The research tends to follow one of three paths: descriptions of presidents' use of EOs and proclamations, explaining presidential decisions to issue these documents, and the strategic use of them.

As for the first, scholars have provided rich descriptions of individual presidents' use of EOs and proclamations (Marcus 1994; Dodds 2008, 2013; Robinson 2009), how the use of EOs evolved throughout time (Fleishman and Aufses 1976; Cooper 1986; Krause and Cohen 2000), and the legal or constitutional issues surrounding their use (Neighbors 1964; Cooper 1986).

More recently, political scientists have turned to questions regarding the factors that influence a president's decision to issue an EO. Empirical models have examined the role of presidential approval ratings, the economy, political party, electoral environment, and divided versus unified government (Mayer 1999; Krause and Cohen 2000; Fine and Warber 2012). Several studies have further classified EOs into various subgroups — significant or nonsignificant, and symbolic, routine, or policy — to account for the variables' effects on different types of EOs (Mayer 2001; Mayer and Price 2002; Howell 2003; Warber 2006; Warber, Ouyang, and Waterman 2018). These categorizations allow scholars to describe the strategic use of EOs by presidents to advance their policy and political goals (Deering and

Maltzman 1999; Mayer 1999; Cooper 2001; Fine and Warber 2012): for example, to circumvent a hostile Congress (Deering and Maltzman 1999), hide the true nature of their actions (Cooper 2001), or create policy “when the preferences of the president and Congress diverge” (Fine and Warber 2012, 272).

Within the political science literature, there is relatively little research on how EOs and proclamations are used with respect to specific issue areas. Exceptions include Dodds (2013, 132–34), who examined Theodore Roosevelt’s use of EOs to restrict Japanese laborers; Morgan (1970), who examined the use of EOs to advance civil rights; and Rodgers (2001), who looked at environmental policy. Ragsdale (2014, fig. 8-2 “Executive Orders by Policy Type”) categorized EOs by broad policy areas but did not analyze them.

With respect to immigration, there is a small but rich legal literature on the use of executive authority to create immigration policy (Cox and Rodriguez 2009, 2015; Family 2016; Johnson 2017). While Congress has “largely retained a monopoly over these formal legal criteria” governing admission and deportation of noncitizens, Congress has also delegated broad authority to the executive branch regarding the specifics of how the laws are implemented (Cox and Rodriguez 2009, 511). At the “front end” of the migration system, the executive can exercise its power regarding the entry of noncitizens by using a number of executive tools, including the parole power,¹ the inherent executive authority over foreign affairs, and Section 212(f) of the Immigration and Nationality Act. Yet, according to Cox and Rodriguez, “The President’s power to decide which and how many noncitizens should live in the United States operates principally at the *back end* of the system,” meaning through exercising discretion with respect to which potentially “removable” noncitizens to prioritize for removal; this is opposed to the “*front end* of the system, through decisions about whom to admit” (2009, 511; emphasis added). For example, the

executive has the ability to determine how to implement the law, set priorities, and determine how to allocate resources. Thus, on the front end and back end, “The President has used powers expressly delegated to him by Congress to advance his own immigration agenda. Importantly, these uses have often been innovative, accomplishing objectives Congress almost certainly did not intend and expanding or repurposing Congress’s original design” (Cox and Rodriguez 2015, 116).

Cox and Rodriguez (2009) examined the use of executive power to create the Bracero program and during the Caribbean refugee crises. Specific EOs, such as Trump’s “travel ban,” have received attention from legal scholars (Ayoub and Beydoun 2016; Margulies 2018; Wadhia 2018, 2019), while policy and advocacy organizations have summarized and analyzed them (Pierce, Bolter, and Selee 2018; Pierce 2019). Still others have documented their implementation and impact (Masri and Senussi 2017; Kerwin and Warren 2019). A comprehensive analysis, however, of presidents’ use of EOs and proclamations to craft immigration policy does not exist.

Trump’s Executive Activity in Historic Perspective

After being critical of President Barack Obama’s executive actions on immigration, candidate Trump claimed he would use EOs sparingly, adding that “Obama, because he couldn’t get anybody to agree with him, he starts signing them like they’re butter. So I want to do away with EOs for the most part” (Shear, Goodnough, and Haberman 2018; Green 2019).

So how does Trump’s EO activity compare to that of other presidents? His 125 EOs in the first 33 months of his first term fall on the low side, and his yearly average of 46.9 is slightly higher than that of the four most recent presidents but lower than every other previous president (Table 1). Research has found that Democrats are more likely to issue EOs, and Trump’s relatively low total number of EOs is in line with previous Republican presidents (Deering and Maltzman 1999; Mayer 1999; Warber 2006; Fine and Warber 2012). Fine and Warber (2012) found that presidents are more likely to sign major policy EOs during periods of divided government to overcome presidential-congressional adversity and

¹ INA 212 §(d)(5)(A) authorizes the secretary of Homeland Security to exercise discretion to temporarily allow certain noncitizens to physically enter the United States for a one-time entry for a specific purpose if they are applying for admission but either are inadmissible or do not have a legal basis for being admitted to the United States.

Table 1. Executive Orders by Presidents Truman through Trump.

President	Total Number of Executive Orders	Yearly Average	First 33 Months	First 2 Months
Truman	901	116.3	390	31
Eisenhower	486	60.8	209	8
Kennedy	214	75.5	206	14
Johnson	324	63.7	173	12
Nixon	346	62.9	169	9
Ford*	169	69.9	169	16
Carter	320	80.0	198	12
Reagan	381	47.6	157	13
G.H.W. Bush	166	41.5	107	4
Clinton	364	45.5	141	8
Bush	291	36.4	120	8
Obama	276	34.5	97	18
Trump**	125	46.9	125	17

*Was in office 29 months.

**Through September 2019.

Source: National Archives (2019) and Federal Register (n.d.-a, n.d.-b).

move forward with their policy agendas. Paradoxically, Trump's monthly average from January through September 2019 (after the Democrats took the majority of the House) is 3.7 EOs per month, which is lower than in 2017 (4.6) and only slightly higher than in 2018 (3.1), when the White House and both houses of Congress were in Republican control.

Potter et al. (2019) concluded that Trump's use of EOs in his first year was very similar to that of previous presidents. "Despite efforts to chart a new course in American politics," they write, "the Trump White House continues to largely fall in line with recent presidencies regarding development of an administrative strategy to shape the policy process" (Potter et al. 2019, 6). Like other new presidents, he used EOs to revoke, amend, or supersede the EOs of his predecessors, but did so more modestly than other presidents since Ronald Reagan. The authors note, however, that a greater share of Trump's EOs were immigration related.

Trump's use of proclamations has been more robust. He issued 376 in his first 33 months in office, averaging 141 EOs per year. Only Obama and George H.W. Bush issued proclamations at higher annual rates (Table 2).

Table 2. Presidential Proclamations by Presidents Truman through Trump.

President	Total Number of Proclamations	Yearly Average
Truman	357	46.1
Eisenhower	383	47.9
Kennedy	173	61.1
Johnson	330	64.9
Nixon	416	75.6
Ford	175	72.4
Carter	335	83.8
Reagan	1118	139.8
G.H.W. Bush	589	147.3
Clinton	606	75.8
Bush	941	117.6
Obama	1,228	153.5
Trump*	376	141.0

*Through October 4, 2019,

Source: American Presidency Project (n.d.) and Federal Register (n.d.-a).

Immigration Policy Making by Executive Order and Proclamation

When focusing on immigration-related EOs and proclamations, Trump is indeed an outlier. I have identified 56 immigration-related EOs issued by presidents Harry Truman through Trump, or slightly more than 1 percent of all EOs (Table 3). After only 33 months in office, Trump had signed 10. As of September 30, 2019, 8 percent of Trump's EOs were immigration related. Obama is second with 6.5 percent. If, however, Obama's 17 "suspension clause" EOs are removed from the total, he signed only one immigration-related EO, accounting for a mere 0.4 percent of his total EOs. Jimmy Carter, with six immigration-related EOs accounting for 1.9 percent of all of his EOs, comes in a distant third.

With respect to proclamations, I have identified 63 since 1945 that are immigration related, or 0.9 percent of all proclamations issued. Trump is again an outlier; 2.4 percent of Trump's proclamations have been immigration related. This is second only to Truman, although Presidents Dwight D. Eisenhower and Bill Clinton come close to Trump's average. Obama's immigration proclamations constituted only 0.2 percent of his proclamations (Table 3).

Table 3. Immigration-Related Executive Orders and Proclamations.

President	Immigration EOs	Total EOs	Immigration as a Percentage of Total	Immigration Proclamations	Total Proclamations	Immigration as a Percentage of Total
Truman	6	901	0.7	11	357	3.1
Eisenhower	0	486	0.0	8	383	2.1
Kennedy	1	214	0.5	3	173	1.7
Johnson	0	324	0.0	6	330	1.8
Nixon	0	346	0.0	0	416	0
Ford	2	169	1.2	0	175	0
Carter	6	320	1.9	0	335	0
Reagan	4	381	1.1	5	1,118	0.4
G.H.W. Bush	2	166	1.2	1	589	0.2
Clinton	3	364	0.8	12	606	2.0
Bush	4	291	1.4	6	941	0.6
Obama	18	276	6.5	2	1228	0.2
Trump*	10	125	8.0	9	376	2.4
Total	56	4,363	1.3	63	7,022	0.9

*EOs through September 2019. Proclamations through October 4, 2019.

Source: National Archives (2019), Federal Register (n.d.-a, n.d.-b), and American Presidency Project (n.d.).

I have placed each immigration EO into one of five categories. In cases when a single EO may contain multiple provisions falling into different categories, I have chosen the category that best represents the spirit of the entire EO.

- **Government administration:** Assigns functions to or reorganizes government entities. These EOs may be issued alongside a policy-making EO, proclamation, memorandum, or other executive announcement. Thus, while it is related to a new policy, the EO is not the vehicle for the new policy.
- **Task force or reporting:** Creates a task force, terminates a task force, or requires a government entity to write a report. Like government administration EOs, these may be related to policy changes but do not contain the new policies.
- **Military naturalization:** Designates a period of conflict during which immigrants in the military are eligible for expedited naturalization, or the termination of such a period. This authority was specifically delegated to the president by Congress (8 USC 1440).
- **Policy making:** Creates a new immigration policy, alters how laws or policies are enacted,

enables or restricts the entry of a group or groups of migrants, or provides specific instructions to government entities on how to apply and enforce particular laws. Policy-making EOs are those for which the “main function is presidential law-making” (Warber 2006, 143).

- **Section 212(f):** While the legislative language of the suspension clause specifies proclamations as the vehicle, only Obama suspended the entry of certain immigrants and/or nonimmigrants through EO. While primarily related to national security and sanctions, these EOs include one provision finding that the “unrestricted immigrant and non-immigrant entry into the United States of aliens . . . would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons.” They apply to small groups of individuals such as those “responsible for the situation in Burundi” or those “with specified connections to North Korea” (Bier 2017; Manuel 2017). Therefore, it is unclear whether they should be included in the count of immigration-related EOs.

As for the 46 pre-Trump EOs (Table 4):

Table 4. Immigration-Related Executive Orders by President and Category.*

Executive Order	Number	President	Category
Termination of the War Refugee Board	9614	Truman	Task force/reporting
Providing for the Investigation of and Report on Displaced Persons Seeking Admission into the United States	10003	Truman	Government administration
Revoking in Part Executive Orders No. 589 of March 14, 1907, and No. 1712 of February 24, 1913	10009	Truman	Policy making
Providing for the Investigation of and Report on Displaced Persons and Persons of German Ethnic Origin Seeking Admission into the United States	10131	Truman	Government administration
Providing for the Liquidation of the Affairs of the Displaced Persons Commission	10382	Truman	Task force/reporting
Establishing the President's Commission on Immigration and Naturalization	10392	Truman	Task force/reporting
Administration of the Migration and Refugee Assistance Act of 1962	11077	Kennedy	Government administration
Establishing the President's Advisory Committee on Refugees	11860	Ford	Task force/reporting
Amending Executive Order No. 11077 of January 22, 1963, Entitled "Administration of the Migration and Refugee Assistance Act of 1962"	11922	Ford	Government administration
Termination of Expeditious Naturalization Based on Military Service	12081	Carter	Military Naturalization
Delegation of Authority with Respect to Entry of Certain Aliens into the United States	12172	Carter	Government administration
Amendment of Delegation of Authority with Respect to Entry of Certain Aliens into the United States	12206	Carter	Government administration
Consultations on the Admission of Refugees	12208	Carter	Government administration
Cuban and Haitian Refugees	12244	Carter	Government administration
Cuban and Haitian Entrants	12251	Carter	Government administration
Exemption for Fort Allen	12327	Reagan	Government administration
Interdiction of Illegal Aliens	12324	Reagan	Government administration
Cuban and Haitian Entrants	12341	Reagan	Government administration
Naturalization Requirements Exceptions for Aliens and Noncitizen Nationals of the US Who Served in the Grenada Campaign	12582	Reagan	Military Naturalization
Interdiction of Illegal Aliens	12807	G.H.W. Bush	Policy making
Delegation of Reporting Functions Under the Immigration Reform and Control Act of 1986	12789	G.H.W. Bush	Government administration
Revocation of Executive Order No. 12582	12913	Clinton	Military naturalization
Expedited Naturalization of Aliens and Noncitizen Nationals Who Served in an Active-Duty Status During the Persian Gulf Conflict	12939	Clinton	Military naturalization
Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions	12989	Clinton	Policy making
Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism	13269	Bush	Military naturalization
Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region	13276	Bush	Policy making
Assignment of Functions Relating to Arrivals in and Departures From the United States	13323	Bush	Government administration
Task Force on New Americans	13404	Bush	Task force/reporting
Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness	13597	Obama	Task force/reporting

(continued)

Table 4. (continued)

Executive Order	Number	President	Category
17 EOs: 13726, 13722, 13712, 13694, 13692, 13687, 13685, 13667, 13664, 13662, 13661, 13660, 13645, 13628, 13619, 13608, and 13606		Obama	212(f) Suspension
Border Security and Immigration Enforcement Improvements	13767	Trump	Policy making
Enhancing Public Safety in the Interior of the United States	13768	Trump	Policy making
Protecting the Nation From Foreign Terrorist Entry Into the United States	13769	Trump	Policy making
Protecting the Nation From Foreign Terrorist Entry Into the United States	13780	Trump	Policy making
Buy American and Hire American	13788	Trump	Policy making
Amending Executive Order 13597	13802	Trump	Policy making
Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities	13815	Trump	
Affording Congress an Opportunity to Address Family Separation	13841	Trump	Policy making
Collecting Information About Citizenship Status in Connection with the Decennial Census	13880	Trump	Government administration
Enhancing State and Local Involvement in Refugee Resettlement	13888	Trump	Policy making

*Through September 2019.

Source: National Archives (2019) and Federal Register (n.d.-b).

- Thirteen (28 percent) are categorized as government administration. For example, in 1962 President John F. Kennedy designated the Department of State to perform certain functions related to the Migration and Refugee Assistance Act of 1962. In 1992 President George H.W. Bush delegated to various agencies certain reporting functions required by the Immigration Reform and Control Act of 1986 (EO 12789).
- Six (13 percent) create task forces or reporting requirements or terminate existing task forces or reporting requirements.² Truman's President's Commission on Immigration and Naturalization, Ford's President's Advisory Committee on Refugees, and George W. Bush's Task Force on New Americans were established by EO. Obama's one immigration EO called for an interagency task force to coordinate and implement regulatory improvements and evaluate legislative proposals to improve "visa and foreign visitor processing and travel promotion to create jobs and spur economic growth."
- Five (11 percent) deal with expedited military naturalizations of noncitizens serving in active duty status during a war or conflict. This authority was specifically delegated to the president by Congress (8 USC 1440).
- Five (11 percent) are policy-making EOs. One is a Truman EO that revoked Theodore Roosevelt and William Taft EOs limiting the entry of noncitizens through third countries. Three were issued with respect to the interdiction of Caribbean nationals attempting to enter the United States by sea without necessary documentation (discussed below). One is a 1996 Clinton EO that prohibits federal contracts with employers that hire unauthorized workers, directs government agencies to enforce existing laws, and creates an additional penalty for employers that unlawfully employ immigrant workers.
- Seventeen (40 percent) are Obama's 212(f) suspension EOs.

Immigration-related proclamations fall into similar, but not identical, categories as EOs:

- **Immigration quotas:** Under Sections 11 and 12 of the Immigration Act of 1924 and Section

²It should be noted that other important task forces and commissions were not established through EO. The Dillingham Commission, the Select Commission on Immigration (Hesburgh Commission), and the US Commission on Immigration Reform (Jordan Commission) were established by Congress.

201(b) of the Immigration and Nationality Act of 1952, presidents were required to determine the annual quotas for each independent country, self-governing dominion, mandated territory, and other territories, as prescribed by law. A large share (22 of 28) of immigration-related proclamations prior to passage of the Immigration and Nationality Act of 1965 were quota related, particularly as newly independent countries were created in the 1950s and 1960s. In fact, all of the immigration-related proclamations by Presidents Eisenhower, Kennedy, and Lyndon B. Johnson fall into this category.

- **Policy making:** Only seven of the pre-Trump immigration proclamations created new immigration policies. Truman's six policy-making proclamations dealt with the removal of alien enemies following World War II, and Reagan issued a proclamation regarding interdiction in the Caribbean.
- **Section 212(f):** A large share of immigration proclamations issued since 1952 (28 of 53) implemented the suspension clause and suspended the entry of certain immigrants and/or nonimmigrants. The first was not issued until 1985, when Reagan suspended officers or employees of the government or Communist Party of Cuba. Every president since Reagan has issued at least one suspension proclamation.

While measuring the volume of executive actions and categorizing them are useful, it is also important to understand how these tools have been used by presidents. Three cases are instructive to understanding the unique nature of Trump's policy-making EOs and proclamations at both the "front end" and "back end": the case of Caribbean migrants in the 1980s through the early 2000s, the case of Iranian migrants during the hostage crisis, and the case of interior enforcement priorities.

Caribbean Migrants

At least five US presidents have used a variety of executive actions to respond to influxes of unauthorized migrants from Haiti and Cuba traveling to the United States in boats.

When the Carter administration faced the dual problems of 150,000 Mariel Cubans arriving in the United States and increasing numbers of Haitians, the president worked with Congress to legislatively create the new

designation of "Cuban-Haitian Entrant," allowing thousands of Cubans and Haitians to gain permanent resident status. The related EO 12251 is a government administration EO that delegates funding and authority for carrying out the policy. Carter also proposed diverting Cubans and Haitians from Florida to Fort Allen, Puerto Rico, and issued an EO to delegate responsibilities aimed at preparing Fort Allen for this purpose.

By 1981, the Mariel Boatlift had ended, but Haitians continued to arrive, and the Reagan administration returned to a policy of interdiction at sea. He issued Proclamation 4865 on September 29, 1981, stating that "the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens." EO 12324 was issued the same day, ordering the US Coast Guard to patrol the waters surrounding Haiti to carry out the interdiction policy. Two additional government administration EOs were issued in the following months to designate authority to carry out the policy set forth by proclamation.

During the George H.W. Bush administration and following the military coup against President Jean-Bertrand Aristide in September 1991, large numbers of Haitian migrants once again fled for the United States. In response, a camp was erected at the US Naval Base in Guantánamo Bay, Cuba, where credible fear interviews were conducted. In May 1992, however, the number of Haitians intercepted rose considerably. In response, Bush issued an EO directing the Coast Guard to intercept all Haitians at sea and return them to Haiti unless the attorney general, "in his unreviewable discretion," determined that the individual was a refugee and would not be returned (Kerwin 2012, 20–22). Unlike EOs of the previous two presidents, this EO did set the policy. Later that year, Bush issued EO 13276, which delegated responsibility for the policy to various government agencies.

Clinton did not issue any EOs or proclamations related to his changing Caribbean migrant policies. George W. Bush signed a government administration EO in 2002 delegating responsibilities for migrant processing in Guantánamo. Following a wave of violence in Haiti and another large exodus, however, Bush returned to the policy of interdicting and returning Haitian migrants starting in February 2005: "I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore"

(Frelick, Kysel, and Podkul 2016, 199). No EOs or proclamations accompanied this policy announcement.

In summary, during the course of two decades, several administrations were engaged in policy making regarding Caribbean migrants, leading Cox and Rodriguez (2009) to conclude that “the Executive acted as an agenda setter implementing its preferences with respect to the types of migrants the United States should admit” and “throughout the management of the Haitian and Cuban crises, the Executive has dominated the policy-making process” (509). Yet EOs and proclamations were seldom used to announce policy changes. Rather, they were generally used for government administration purposes in conjunction with policy decisions.

Iranian Migrants

The second case involves Iranian migrants. In April 1980, in response to the Iranian hostage crisis, Carter announced that visas for Iranian nationals would be cancelled and no new visas would be issued (*Public Papers of the Presidents of the United States: Jimmy Carter* 1981, 611). Earlier, on November 10, 1979, he had ordered his attorney general to deport Iranian students who were not in compliance with the terms of their visas (Goshko 1979), and on November 13, 1979, the attorney general ordered all Iranians in the United States on student visas to report to immigration officials or be subject to deportation (Rosenbaum 1979). These restrictions on Iranian nationals were not created through EO or proclamation. Carter did, however, issue EO 12170, which declared a national emergency to deal with the Iranian threat, and EOs 12172 and 12206 delegated the authority to the secretary of state and attorney general to carry out such actions. As in the Caribbean case, the immigration-specific policies were not explicitly laid out in EOs, but the responsibilities for carrying out those actions were delegated via EO.

Immigration Enforcement Priorities

Decisions regarding how to enforce the law and expend law enforcement resources have generally been left to the law enforcement agencies within the executive branch. Or, at the very least, those decisions have been announced by the law enforcement agencies, not by the president, and not via EO. For example, Obama’s Deferred Action for Childhood Arrivals (DACA) initiative was not mandated by EO, as commonly suggested. Rather, it was

published as a memo from the secretary of Homeland Security, which provided guidance to various agencies on the exercise of prosecutorial discretion. It begins, “By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.” While the president was clearly involved in the decision-making process, the secretary provided the instructions for how to enforce the law.

Enforcement priorities offer another example (Family 2016, 64–65; Wadhia 2019, chap. 3). The DHS and its predecessor, the Immigration and Naturalization Service (INS), have issued numerous memos laying out the administration’s enforcement priorities. For example, in 2000, INS Commissioner Doris Meissner issued a memorandum entitled “Exercising Prosecutorial Discretion” (Meissner 2000). In 2009, Immigration and Customs Enforcement (ICE) announced a new Worksite Enforcement Strategy that would focus resources on the criminal prosecution of employers, not workers (Forman 2009). Later that year, ICE issued a memorandum entitled “National Fugitive Operations Program: Priorities, Goals, and Expectations” (Morton 2009). In all these cases, the directive came from the agency, not the president.

Trump’s Immigration Executive Orders and Proclamations

Seven of the 17 EOs issued within Trump’s first two months were immigration related. No other president issued an immigration-related EO in his first two months in office. Notably, Trump’s were issued at a time when Republicans controlled both branches of Congress, yet there was no attempt to produce legislation before issuing these early EOs (Trump would eventually support the RAISE Act and task Jared Kushner with formulating immigration reform legislation, but neither effort was fruitful). Moreover, four of Trump’s EOs were drafted during the transition period before he took office in January 2017 (Davis and Shear 2019). According to reports, these EOs were written by a small group of advisors who forewent normal processes and bypassed the National Security Council, the Office of Legal Counsel, and other bureaucracies with subject matter expertise, as well as the relevant cabinet secretaries who would be tasked

Table 5. Immigration-Related Executive Orders by Category.

Category	All Other Presidents	Trump
Task force/reporting	6	0
Policy making	5	8
Government administration	13	2
Military naturalization	5	0
212(f) suspension	17	0
Total	46	10

with enforcing the new policies (ibid.). Additional immigration EOs were drafted, but were never issued as EOs. No immigration-related proclamations were issued until September 2017, when Trump issued the final iteration of the travel ban as a proclamation.

Not only is Trump an outlier in terms of the volume of immigration-related EOs, but also the content of those EOs is markedly different from that of previous presidents. Trump has not issued any immigration-related military naturalization, task force, or reporting EOs, and has signed only two EOs classified as government administration (Table 5). The first, entitled “Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities,” initiated refugee admissions after the president’s January 27, 2017, EO suspended admissions for 120 days. The EO did not include new vetting practices — those were included in a separate presidential proclamation (Proclamation 9645, signed on September 24, 2017). Trump’s second government administration immigration EO, entitled “Collecting Information about Citizenship Status in Connection with the Decennial Census,” was issued July 11, 2019, following a failed effort to include a citizenship question in the 2020 US Census (Wines 2019). The EO clearly states that the information is necessary for immigration policy-related reasons, but it does not spell out any new immigration policies. Rather, it instructs various agencies to work together to compile data.

The majority of Trump’s EOs have been used to set new policy directions, reinterpret current laws, or direct law enforcement agencies. I have categorized eight as policy making. Through September 2019, he has signed more policy-making EOs than all other presidents combined (Table 5).

Of Trump’s nine immigration-related proclamations, seven are policy making. In fact, other than Trump, only

Table 6. Immigration-Related Proclamations by Category.

President	Total		Policy Making	212(f) Suspension
	Immigration Proclamations	Quotas		
Truman	11	5	6	0
Eisenhower	8	8	0	0
Kennedy	3	3	0	0
Johnson	6	6	0	0
Nixon	0	0	0	0
Ford	0	0	0	0
Carter	0	0	0	0
Reagan	5	0	1	4
G.H.W. Bush	1	0	0	1
Clinton	12	0	0	12
Bush	6	0	0	6
Obama	2	0	0	2
Trump*	9	0	7	2
Total	63	22	13	28

*Through October 4, 2019.

Truman and Reagan issued immigration-related policy-making proclamations (Table 6).

Trump has broken from the patterns and processes of his predecessors by using EOs and proclamations to create new immigration policies. For example, the border security and interior enforcement EOs both called for increased staffing and infrastructure (subject to appropriations), expansion of interior enforcement agreements with local police, and increased detention, among other provisions. The latter EO also sought to deny federal grants to so-called sanctuary cities. The “Buy American and Hire American” EO called on cabinet agencies to propose new laws and issue guidance that would revise temporary work visa classifications toward the explicit policy goal of ensuring that these visas are “awarded to the most-skilled or highest-paid petition beneficiaries.” This language goes beyond the legislative language governing the visas. The “travel ban” EOs and proclamation go well beyond the traditional implementation of the suspension clause, barring large numbers of individuals from several countries (Bier 2017). They also suspended refugee admissions and significantly reduced the refugee cap. Trump’s October 2019 proclamation, “Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System,” goes beyond the usual scope of suspension proclamations, applies to a much larger population, and makes

significant changes to the “front end” criteria for admission (Hesson and Diamond 2019). The refugee resettlement EO went well beyond the routine assignment of refugee admissions ceilings to alter the role of states and localities as well as other aspects of the resettlement process (Rose 2019).

Trump declared a national emergency along the southern border via proclamation and called on the military to assist with border enforcement. He also issued a proclamation and two extensions addressing “Mass Migration through the Southern Border.” Similar to the interdiction proclamations of the 1980s, these proclamations suspended the entry of all individuals except at ports of entry.

With the exception of Clinton (whose EO was quite narrow in scope), previous presidents did not set immigration enforcement priorities via EO or proclamation. Trump’s EOs set policies and priorities and direct law enforcement personnel. For example, the Interior Enforcement EO clearly states in Section 4, “I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.” It also set forth new enforcement priorities, and it ended the Priority Enforcement Program and reinstated Secure Communities (both are information-sharing programs between DHS and local police departments), neither of which were created via EO. Similarly, Trump’s Border Enforcement EO orders DHS to “obtain complete operational control” of the southwestern border. The family separation EO, issued in response to public outcry, overturned an agency decision and instructed law enforcement agencies to detain families together and reduce the practice of family separation.

Discussion and Recommendations

All presidents and their administrations have at their disposal and regularly use executive mechanisms to create and reinterpret immigration policy. Trump has used a full arsenal of tools, including EOs, proclamations, regulatory changes, policy memos, presidential memoranda, agency memoranda, agency action, and even tweets (Johnson 2017; Pierce, Bolter, and Selee 2018; Pierce 2019; Potter et al. 2019). To a large extent, the manner in which he initiates policy making is not as important as its impact. His immigration policies have been harmful for nearly every category of immigrants

and nonimmigrants, as well as those who serve them and advocate on their behalf (Johnson 2017; Kerwin and Warren 2019; Wadhia 2019). The impact of Trump’s immigration policies will be felt for many years beyond his presidency.

Moreover, Trump often exercises his executive authority without much process, circumventing the well-established procedures for consultation and securing input from Congress, federal agencies, White House staff, and the public. As a result, his decisions do not fully benefit from the experience, expertise, and perspective of these bodies.

Because his actions continue to push the limits of executive authority, they have been challenged in the courts, which has had the effect of holding up at least parts of his agenda. Some of these cases will make their way to the Supreme Court, which, to this point, appears unwilling to push back on presidential power in immigration matters. In its decision on the travel ban, for example, the Court explained, “[F]or more than a century, [it] has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”³

The legislative branch possesses several mechanisms for challenging executive actions. For example, Congress can pass new laws or defund implementation of new policies (Warber 2006, chap. 4; Garvey and Chu 2014, 10). Members of Congress can continue to condemn the use of EOs and proclamations and their content. They may, however, be reluctant to do so because they recognize that they may have to rely on the executive’s authority when a member of their own party occupies the White House and faces a hostile legislature.

It is outside the scope of this article to offer recommendations regarding the content of Trump’s immigration-related executive actions. Nonetheless, Congress can and should take the following steps to push back on his use of executive power and recalibrate the executive’s ability to set immigration policy through EO.

- Congress should hold oversight hearings and should consider revoking or modifying EOs and proclamations that have been issued pursuant to the authority provided to the president by

³ *Trump v. Hawaii et al.*, 138 S.Ct. 2392 (2018), citing *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977).

Congress, as opposed to those based on the executive's constitutional authority.

- Advocacy organizations should continue to challenge the president's executive actions, the insufficient process and consultation leading to them, their statutory or constitutional justification, and their impact.
- Congress should take an inventory of the immigration authorities it has delegated, both explicitly and implicitly, to the executive branch and determine when this authority can and should be limited.
- Congress should pass legislation to update and reform the US immigration system, and thus clarify its intentions regarding US immigration law, policy, and executive authority in this area.

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