



Trump can redress Obama's executive overreach – here's how

BY ALLEN MENDENHALL, CONTRIBUTOR - 11/22/16 04:05 PM EST

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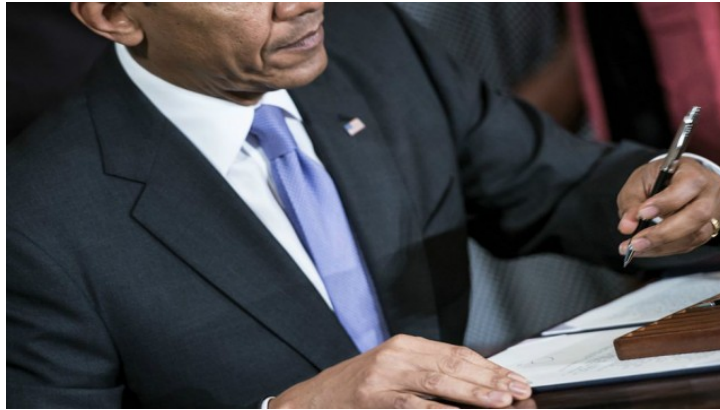
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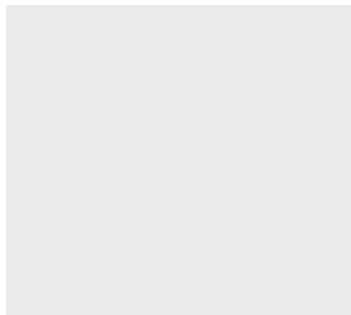
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“I’ve got a pen and I’ve got a phone. I President Obama declared in 2014, I and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward. I His point was that he, as president, could make laws and facilitate agency policies without going through legislative processes or awaiting congressional approval.

Obama may regret those words. President-elect Donald Trump will, after all, have a pen and a phone when he takes office. We don’t yet know what he’ll do with them I besides tweeting with the phone I but if he follows in the footsteps of his predecessor, he could undo much of what Obama accomplished during his eight years in office.



Obama has suggested he’ll remain involved in Democratic politics even after Jan. 20 of next year. He may find himself working against the very practices he utilized to achieve his political goals. Although statistics show that he has issued, to date, fewer executive orders than did former President George W. Bush I indeed than many of his predecessors I those numbers don’t tell the whole story. In fact, Obama has issued more

presidential or executive memoranda than any other president. The effect of an executive order and a presidential or executive memorandum is often indistinguishable; both instruments operate as legally binding upon the agencies and departments to which they’re directed, unless or until a court determines otherwise, as happened with Obama’s memoranda regarding relief from deportation for eligible undocumented workers.

The sheer number of binding memoranda issued by Obama, on issues ranging from LGBT protections and benefits to mitigating impacts on ecological resources, belies his claim that I’m issuing executive orders at the lowest rate in more than 100 years. I While technically accurate, this statement is deceptive and evasive in light of his resort to memoranda, which appear, by name and medium, to be less like imperative commands than like

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Calling something a memorandum, in other words, seems less threatening than calling it an order.

Imagine what a President Trump can do with these memoranda. Besides abrogating all executive actions initiated through Obama's memoranda, Trump could direct the Department of Homeland Security to increase rates of deportation or halt the implementation of provisions of the Affordable Care Act. And these are just modest options. Our 44th president has set an unprecedented precedent for his successor, who could take the memorandum power to a whole new level and without a hostile Congress to hold him in check.

Republicans learned a tough lesson when President Obama built on the executive powers that President George W. Bush arrogated to himself. Now Democrats are rightly frightened that the game will turn around again, this time more forcefully than before.

Fortunately for both parties, the Constitution sets important limits on presidential power. The president may not legislate, for instance, as Article I of the Constitution reserves that power for Congress. Although Article II grants the president broad authority, in part because the framers envisioned George Washington as occupying that office, Article I contemplates that certain powers exceed executive prerogative: e.g., the power to declare war or raise an army.

The president, who embodies the executive branch, executes the law; he or she is not the source of law. Being just one person, the president is accountable in ways that members of Congress and judges are not. The buck truly does stop with the president, who is elected by the people, through the Electoral College, and not by the Congress.

The President is an elective magistrate. Alexis de Tocqueville explained to his French audience in the 19th century. His honor, goods, liberty, life answer continually to the people for the good use that he will make of his power. While exercising his power, moreover, he is not completely independent because the Senate watches over him in his relations with foreign powers, as well as in the distribution of positions.

Specifically, a supermajority of the Senate must approve the president's power to enter into treaties, and presidential appointments are conditioned on Senate confirmations. Even the president's veto power is subject to congressional override.

We've heard various iterations and complaints about the imperial presidency since Arthur M. Schlesinger popularized that term in 1973. These are not without merit.

We are, or should be, a nation of laws, not men; those laws should bind the ordinary person and the president alike. Thomas Paine intoned in Common Sense that in absolute governments the King is law, but that in free countries the law ought to be king. We left the monarchy behind long ago, but the principle articulated by Paine remains: rulers and ruled are equally bound to follow the law, which is antecedent to the arbitrary will of powerful leaders. Or so the theory goes.

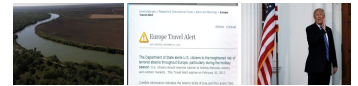
Our system wasn't designed to effectuate a dangerously escalating game of what goes around comes around. Yet both political parties and multiple presidents over decades have created a power imbalance that incentivizes each new president to state on Day 1 of his term, it's payback time.

Trump has the unique opportunity to restore the balance of power and, as a businessman accustomed to delegation and management, he's surprisingly equipped to minimize executive authority. With Republicans controlling both houses of Congress and most state governments, the incoming president can defer to others to carry out his policy preferences. He'll have no gridlock on key Republican issues regarding devolution and the protection of property against taxation. And the Republican Party is exceptionally positioned to do what no party has done before: curb the excesses of government regulation and reverse trends in spending and government growth.

As George Washington demonstrated in 1797, sometimes the most daring acts of power involve letting it go. If power's made perfect in weakness, let's hope Republicans, led by Donald Trump, succeed in weakening our federal



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