The U.S. President's Electoral Power Play

On Trump's Unlawful Election Intervention

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On March 25, President Trump signed an executive order (EO) purporting to restructure American election administration. The ironically titled "Preserving and Protecting the Integrity of American Elections" EO sets out to, among other things, require those registering to vote in federal elections to present documentary proof of citizenship, and threatens to penalize states that accept late arriving ballots (i.e., mail ballots that are sent prior to, yet not received until after, Election Day). The EO has several legal deficiencies and much of it should be invalidated by the federal judiciary. Several lawsuits challenging many of its provisions have already been filed. However, as is true regarding many of Trump's controversial EOs, the litigation challenging their legality will take time, and substantial disruption may result in the interim. As the world well knows, Trump's style of political theater often comes at a hefty price.

Trump oversteps

It is unsurprising that Trump took executive action on the electoral process. He and his supporters have been fixated on the fairness of elections since his loss in 2020, and continue to perpetuate a false narrative about elections being marred by corruption, fraud, and the illegal participation of noncitizens. Yet, unlike the legal authority the President possesses over, for example, tariff policy or military affairs, he has exceedingly little power when it comes to election administration.

For starters, there are limits as to what can be achieved through EOs, which are essentially instructions to federal agencies about how to execute the law. Crucially, however, EOs must be consistent with statutory or constitutional requirements. As explained below, this EO is not. Second, the United States Constitution gives primary authority over election regulations to the states (unlike in other federated nations, American elections are exceptionally decentralized); what power remains largely belongs to Congress. In short, the EO goes beyond what is legally permissible, in an area in which the President has minimal authority. On what bases, then, does Trump claim to act?

Much of the EO involves instructions that are directed at a federal agency, the Election Assistance Commission (EAC). The EAC was established by Congress in 2002 to help states with election administration, primarily by administering federal grant money. As a bipartisan agency (no more than two of the EAC's four Commissioners may belong to the same political party) the EAC has operated free from controversy. Trump seems to be of the view that he controls the EAC and can force its Commissioners to do his bidding. For example, the EO directs the EAC to update its national voter registration form to include the aforementioned documentary proof of citizenship requirement. In fact, though, Trump's power here is limited. Congress, in establishing the EAC, unambiguously designed it to be independent of direct presidential control. To put it simply, some federal agencies were structured by Congress to be directly subordinate to the President. Others, like the EAC, were intentionally designed to operate with significant autonomy. Yet Trump, in multiple executive orders, and in the context of various rounds of litigation, asserts that *all* federal agencies are beholden to him. To date, however, the law says differently. Trump's EO therefore assumes a power that he currently lacks.

There is a chance, however, that the Supreme Court overrules existing precedent and concludes that Trump *does* have the power to give direct instructions to the EAC. The Court's conservative majority has suggested in a series of cases that it is sympathetic to

the so-called "unitary executive theory," an interpretation of Article II of the Constitution that would give Trump the control over independent agencies that he desires. Even then, though, the President's commands must nevertheless be lawful. Here again, Trump oversteps. To recognize why, it is important to understand exactly what EOs can and cannot do. An EO is a presidential directive that communicates to federal agencies what actions they should take. Typically, that power derives from congressional statutes. In other words, conventionally, Congress enacts a statute that empowers the President in some fashion, and an EO lays out how the President intends for agency officials to enforce the law. Here, by contrast, Trump not only assumes powers that have not been given to him (and do not derive from any inherent presidential powers), but goes further and actually flouts Congress's clear intentions.

Returning again to the national voter registration form, the federal laws requiring the EAC to produce that form make clear that voter registrants *need not* show documentary proof of citizenship in order to register; again, Trump's EO requires the exact opposite. Whatever his pretensions, the President is not a lawmaker and cannot unilaterally amend federal laws. The EO additionally requires the EAC to freeze all federal funding for states that accept late arriving ballots (this would impact around one-third of states). This provision likely reflects Trump's longstanding, and unfounded, suspicions about the security of mail ballots. Yet, once Congress has appropriated money to the EAC to aid state election administrators, Trump has no legitimate basis for withholding it.

DOGE and further disruption

The EO invites further problems by empowering the Department of Homeland Security and the Elon Musk-led Department of Government Efficiency (DOGE) to "review each State's publicly available voter registration list and available records concerning voter list maintenance." This proposition resembles a 2017 "election integrity" commission led by then-Vice President Mike Pence that sought access to similar information. It was maligned by both Democrats and Republicans for being administratively onerous and invading voters' privacy rights, and was ultimately disbanded having identified nothing of value. There is no reason to think that this effort will prove different.

Also of concern is the EO's instruction to the EAC to evaluate, and if warranted, re-certify previously approved voting systems. Specifically, the EO precludes the use of voting systems that process ballots with "a barcode or quick-response code." Trump has long favored paper ballots that he believes are less susceptible to manipulation. But, given their vote counting efficiency and robust security features, electronic voting systems are commonplace, and experts fear that replacing them would be both enormously time consuming and expensive for states. And once again, Trump lacks the power to tell states which voting systems they must use in the first place.

Most of the above has focused on the legality of Trump's EO. But it is equally senseless as public policy. The concerns about noncitizen voting it reflects are erroneous. Noncitizens are already prohibited from voting in all but a handful of local elections. Existing penalties for noncitizen voting are severe. And as countless experts have empirically concluded, election fraud is exceedingly rare. Worse yet, eligible voters will have a hard time satisfying the proof of citizenship requirement, which essentially obligates registrants to produce a passport to confirm citizenship (the EO lists other documents, such as drivers' licenses, as alternative methods of proof, provided they indicate proof of citizenship, which they typically do not). As reported in a 2023 study by the Brennan Center for Justice, over 20 million people don't have easy access to documentary proof of citizenship. Nor do many members of the military and other U.S. citizens that are stationed or live abroad. Yet, under the terms of the EO, even these individuals are not exempted. The EO's citizenship obsession, therefore, has little to recommend it, and would disenfranchise a significant number of voters.

The attempted prohibition on late arriving ballots is equally foolhardy. States accept and count late arriving ballots as a means of accommodating voters who may not be able to make it to the polls on Election Day (which falls on a regular workday in the U.S.), or who

encounter postal delays. The EO provocatively likens the counting of late arriving ballots to "allowing persons who arrive 3 days after Election Day, perhaps after a winner has been declared, to vote in person at a former voting precinct, which would be absurd." The example itself is absurd, as no winner can be declared until all lawfully submitted ballots are counted, including those that arrive within the permissible post-election window.

Even if technically legal, DOGE's error-prone rooting around the federal government in recent weeks is certainly no model for a responsible approach to voter list maintenance. And as noted above, it is probable that certain degrees of access to voter information would run afoul of various privacy laws.

The voting machine provisions in the EO are also ill-advised, and would throw in flux election administration across the country, including in crucial battleground states such as Wisconsin, Pennsylvania, and Georgia (the entire State of Georgia utilizes voting systems that produce ballots with barcodes). Machines that have already undergone rigorous certification processes should remain in operation.

An attempted power grab that should be resisted

Election administration is the lifeblood of American democracy. Without the public-minded commitment of countless state and local officials, to say nothing of the many generous election volunteers who give their time, voters would be unable to fulfill their most profound democratic responsibility. The EO needlessly interferes with election administration and offends its importance. It is an attempted power grab that should be resisted.

In its opening section, the EO emphasizes that "elections must be honest and worthy of the public trust." Honesty and the public trust will be enhanced when this imprudent EO meets its demise.

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