

## Constitutional Corner –100 Days of Trump -- and the Constitution

Well, Mr. Trump has survived his first 100 days in office -- many on the Left were hoping otherwise -- but at least two American cities are now formally [calling for his impeachment](#).<sup>1</sup> What has he accomplished? Better yet, what has he done to deserve calls for impeachment after such a short period? And how does all this relate to the Constitution?

I'm sure you, my alert readers, realize that there is nothing magic about a President's first 100 days in office; the milestone is an artificial contrivance, totally arbitrary, and essentially worthless in determining the effectiveness of a President and/or his administration. In fact, that we are even stopping to perform an assessment of the President, no matter what the timeframe, points to a hopelessly warped perspective on the office. Did the Founders take time to assess Washington's, or Adams' or Jefferson's first 100 days in office? Of course not; such would be a complete waste of time, as will this one. Part of me wants to stop right here and instead discuss something of actual importance to the future of America. But the precedent has set (first suggested by FDR) and the various media organizations have each filed their reviews, so why don't I do so as well? Besides, it is doubtful that any of the "professional" assessments will compare Trump's performance with his Constitutional duties: who cares what the Constitution says anyway? Why is that even relevant?

But Trump did set himself up for this by announcing a [100-Day Plan](#)<sup>2</sup> on October 23, 2016, as previous Presidents have done. I was surprised to find there's even a [Wikipedia page](#)<sup>3</sup> devoted to this subject, and a [similar one on Obama](#);<sup>4</sup> but apparently none on earlier Presidents. (Spoiler Alert: as might be expected, there is a decidedly negative tone to Trump's Wiki page when compared to Obama's).

[The Economist](#), [The Wall Street Journal](#), [CBS](#), [NBC](#), [ABC](#) and [Fox](#) all did assessments; [even the White House posted one](#).<sup>5</sup>

Today, we see the President as the leader of the government, even those who should know better. On election night, November 2, 2010, Rep. John Boehner, celebrating the Republican victory in Congress, said: "while our new majority will serve as your voice in the people's House, **we must remember it is the president who sets the agenda for our government.**" [emphasis added]. The Founders would disagree. To the Founders, Congress, as, to quote Boehner, the "voice of the people," should set the agenda for the government, not the President.

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<sup>1</sup> <http://www.nbcbayarea.com/news/local/Richmond-City-Council-Passes-Resolution-Calling-for-Trump-Impeachment--414514223.html>

<sup>2</sup> <https://www.usatoday.com/story/news/politics/elections/2016/10/22/trumps-gettysburg-address-outlines-first-100-days/92596734/>

<sup>3</sup> [https://en.wikipedia.org/wiki/First\\_100\\_days\\_of\\_Donald\\_Trump%27s\\_presidency](https://en.wikipedia.org/wiki/First_100_days_of_Donald_Trump%27s_presidency)

<sup>4</sup> [https://en.wikipedia.org/wiki/First\\_100\\_days\\_of\\_Barack\\_Obama%27s\\_presidency](https://en.wikipedia.org/wiki/First_100_days_of_Barack_Obama%27s_presidency)

<sup>5</sup> <https://www.whitehouse.gov/100-days>

But before we ask: “How’d Trump do?” Let’s first ask: “What should he have done?” To paraphrase Hamilton: “Why get all excited about someone with the “confined authorities of a President of the United States?””<sup>6</sup>

### **Presidential Activity**

The President’s Constitutional powers are found in Articles 1 and 2 of the Constitution. I’m not going to take the time to list those few powers there; I encourage you to review them. But I will mention what I feel is the President’s most important duty beyond keeping the country safe from sudden attack: he is to “take care that the laws be faithfully executed.”

You’ll notice in reviewing the President’s powers and responsibilities that there is no mention of issuing Executive Orders, giving speeches, firing officials he has appointed, etc. Although some scholars insist that the mention of “executive power” in Article II Section 1 grants the President no specific power, the Courts have decided the phrase implies certain “traditional powers of executives,” among them being the power to issue orders that direct the activities of executive agencies, i.e. Executive Orders.

So, assuming Executive Orders to be a legitimate implied power of the President, how has Mr. Trump done in this category?

First, you can find an explanation of each of the twenty-four Executive Orders issued by Mr. Trump in his first 100 days [here](#).<sup>7</sup> This was the most EOs issued in the first 100 days by any President since FDR.

Trump also signed 22 presidential memoranda, 20 presidential proclamations, and signed 33 bills into law. About a dozen of those bills rolled-back regulations finalized during the last months of Barack Obama’s presidency using the authorization provided by the 1996 [Congressional Review Act](#).<sup>8</sup> [Here’s a report](#)<sup>9</sup> which concludes the Congressional Review Act could even be used to reverse actions going back to the beginning of the Obama administration. The report concludes: “every regulation, policy statement, and the like that in Congress’s opinion has not yet been properly submitted for its review remains open for invalidation...”

Of the twenty-four EOs, four bear mention:

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<sup>6</sup> Federalist 71

<sup>7</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>

<sup>8</sup> [https://en.wikipedia.org/wiki/Congressional\\_Review\\_Act](https://en.wikipedia.org/wiki/Congressional_Review_Act)

<sup>9</sup> [http://www.heritage.org/government-regulation/report/the-reach-the-congressional-review-act?utm\\_source=THF\\_Email&utm\\_medium=email&utm\\_campaign=TheAgenda&mkt\\_tok=eyJpIjoiTWpKbU1HUmpORE16WldVeilsInQiOiJkdzFNcW8yV0dZdHA1MmRIQW1HOVFyXC9nMkFLUU96eHpcLzZldTBuSERuS1dsd1hZYU9pa1lyVTB4ekM0b0FuTFI4UDIxVUFOMXY3NEwTcVJyTVhydJjQcFlkQmZHT1B4R0d2Tys4SXBFdEIMNUUpjWIRGK1FWZFRoS HNRZFpFU002In0%3D](http://www.heritage.org/government-regulation/report/the-reach-the-congressional-review-act?utm_source=THF_Email&utm_medium=email&utm_campaign=TheAgenda&mkt_tok=eyJpIjoiTWpKbU1HUmpORE16WldVeilsInQiOiJkdzFNcW8yV0dZdHA1MmRIQW1HOVFyXC9nMkFLUU96eHpcLzZldTBuSERuS1dsd1hZYU9pa1lyVTB4ekM0b0FuTFI4UDIxVUFOMXY3NEwTcVJyTVhydJjQcFlkQmZHT1B4R0d2Tys4SXBFdEIMNUUpjWIRGK1FWZFRoS HNRZFpFU002In0%3D)

Trump's very first order, signed on his first day as President and responding to a campaign pledge, ordered the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies having authorities and responsibilities under Obamacare, to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications." Translation: find ways to waive Obamacare's mandates. Did Trump have the authority to issue this order? Remember, his foremost duty is to take care that the law is faithfully executed. Fortunately for Trump (and Obama before him), the law was written to allow the Secretary of HHS enormous discretion in granting waivers; the Obama administration set precedent by granting waivers to politically favored groups and businesses.

Perhaps Trump's most controversial orders were his two efforts to impose a temporary ban on issuing visas for immigrants from, first seven, then six predominantly Muslim countries. Both orders were halted by federal courts on patently specious reasoning that the temporary bans amounted to bans on Muslims.

Last week we were entreated to listen to oral arguments broadcast on CSPAN from the 4<sup>th</sup> Circuit Court of Appeals, which had been asked by the administration to overturn a nationwide injunction placed on the EO by a federal district judge in Maryland. From the judges' questions of first, Acting Solicitor General Jeffrey Wall (who did an amazing job, in my view) and then ACLU lawyer Omar Jadwat, it quickly became clear that several of the judges had already decided that statements made by then-candidate Trump established the irrevocable motivation for the Order, and that it amounted to a ban on Muslims -- period.

That the EO does not amount to a ban on Muslims is easily shown by the fact that Christians, Jews, Animists, even Atheists from the six listed countries are as affected as are Muslims from those listed countries, while Muslims from any of the scores of the other predominately-Muslim countries around the world not listed in the ban are not affected. In the face of this argument, how anyone can still insist that the order is a ban on Muslims is beyond me. Yet the Left clings to that accusation like a child clinging to his "blanket." Sad. And a sad commentary on the health of political debate in this country. Perhaps the most revealing testimony during the 4<sup>th</sup> Circuit hearing was the admission by Omar Jadwat that Trump's EO would likely be constitutional – **if it had been issued by President Hillary Clinton!**

Another controversial order is [Executive Order 13768](https://www.federalregister.gov/executive-order/13768),<sup>10</sup> signed on January 25, 2017. It directed the Justice Department to review federal funding given to cities and other localities which declare themselves as sanctuaries for illegal immigrants. I discussed this EO in [a previous](#)

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<sup>10</sup> <https://www.federalregister.gov/executive-order/13768>

[essay](#)<sup>11</sup> so I won't go further than to mention that, sure enough, the EO was [challenged in court](#)<sup>12</sup> and a partial injunction issued.

The last EO I'll mention, technically issued two days after the "100 Days" ended on May 1<sup>st</sup>, is a bit more problematic. It attempts an end-run around what is called the [Johnson Amendment](#),<sup>13</sup> put in place by then-Senator Lyndon B. Johnson to make sure ministers who opposed his re-election would be prevented from doing so, at least from their pulpits. The amendment empowered the IRS to revoke the 501(c)(3) tax-exempt status of any church which takes a position in favor of or in opposition to any candidate for office. Rarely invoked,<sup>14</sup> the amendment is widely mis-understood by ministers across the country and results in a silencing of even permissible political speech from the pulpit.

The Order directs all executive departments and agencies to "respect and protect the freedom of persons and organizations to engage in religious and political speech." In particular, the Secretary of the Treasury is restricted from taking "any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective, where speech of similar character has ... not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office ..." The President was immediately sued by the Freedom from Religion Foundation, which argued that the order was unconstitutional because it grants preferential treatment to religious organizations while requiring secular non-profit organizations to still abide by the law. Since there is nothing in the Constitution which prohibits the federal government from favoring a religion or even religion over non-religion, I would hope the argument gets thrown out. But it is more likely that FFRF will find a favorable judge to hear their complaint and Trump will gain yet another nationwide injunction.

The problem I have with this particular EO is that it amounts to an order to "take care that the laws **not** be faithfully executed." A better approach would be to pursue something like the [Free Speech Fairness Act \(H.R. 781/S. 264\)](#)<sup>15</sup> or just urge Congress to repeal the Johnson Amendment outright. Instead, the President chose to use an EO to effectively repeal the amendment. The President is thus legislating in place of Congress. Barack Obama was rightfully criticized for not enforcing illegal immigrant deportation law; Trump can and should be similarly criticized.

### **Congressional Activity**

Presidential candidates can and do make outlandish pledges during their campaigns, promises they have no hope of delivering, at least not by themselves; but that's politics. A successful

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<sup>11</sup> <http://constitutionleadership.org/2017/04/09/constitutional-corner-sanctuary-cities-and-the-constitution/>

<sup>12</sup> <http://www.cnn.com/2017/04/25/politics/sanctuary-cities-injunction/>

<sup>13</sup> [https://en.wikipedia.org/wiki/Johnson\\_Amendment](https://en.wikipedia.org/wiki/Johnson_Amendment)

<sup>14</sup> Only one church is known to have lost its tax-exempt status as a result of the law, and then only temporarily.

<sup>15</sup> <https://www.congress.gov/bill/115th-congress/house-bill/781>

President, even one whose party enjoys a majority in Congress, must still propose legislation that a majority in Congress will support. Given that, Trump's pledge to "repeal and replace" Obamacare was on shaky ground from the outset since some Republicans in Congress were bent on outright repeal, others on replacement, while the Democrats in Congress insisted on retaining the current law despite its many faults and impending failure. The first version of "repeal and replace" in the House failed while the second passed, only to arrive DOA on the Senate floor. Who knows what the final version will look like?

Nevertheless, Congress has been otherwise busy since January 20<sup>th</sup>. The 115<sup>th</sup> Congress has passed [33 bills](#) that have been signed into law, 13 of them revoking rules passed by the Obama administration. By contrast, the 114<sup>th</sup> Congress passed only [11 bills](#) during its first 100 days, none invoking the CRA. This difference is largely due to whether the Congress and President were members of the same party. But compare this with the [111<sup>th</sup> Congress](#) which, in the first 100 days of Barack Obama's first term, revoked not a single rule passed in the waning days of the Bush administration.

The other major accomplishment of the administration's first 100 days was passage of a budget which avoided a government shutdown. But how much of the spending in this budget was constitutional and how much was not? The vast majority of Americans appear to have accepted the claim that everything Congress spends money on is constitutional, and from a Court perspective they are right. Two decisions in the 1930s<sup>16</sup> gave Congress the authority to spend money on anything which enhanced the "general welfare" – **as Congress defined it!** Perhaps we'll examine the details of the budget in a future essay.

### **Judicial Activity**

President Trump's greatest success in the judicial arena had to be his successful nomination and confirmation of Judge Neil Gorsuch to fill Antonin Scalia's empty seat on the Supreme Court. In unprecedented fashion, the appointment was opposed en masse by Senate Democrats as retribution for Senate Republicans not proceeding with a confirmation hearing for Obama appointee Judge Merrick Garland. Justice Gorsuch has already made his mark on the Court, joining Justice Alito in not participating in a traditional sharing of law clerks to pool their resources in deciding which cases to hear or deny from the thousands of petitions that are sent to the high court every year. This means Gorsuch's law clerks will be tasked with reviewing every petition in search of cases warranting the high court's notice. As a former clerk of Justice Kennedy,<sup>17</sup> Gorsuch is very familiar with the process.

Gorsuch joined the court in time to hear the last 14 cases on the Court's docket, including one important case for religious freedom proponents: *Trinity Lutheran Church vs. Comer*.

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<sup>16</sup> U.S v. Butler (1936), *Helvering v. Davis* (1937)

<sup>17</sup> Gorsuch clerked for Justice Anthony Kennedy

Of concern now for the President, will be filling the 129 federal judgeships that remain open and by doing so provide some balance for the overwhelmingly liberal federal judiciary.

A list of the opinions rendered by the Court this term can be found [here](#).<sup>18</sup>

A President's first 100 days may in fact provide a useful measuring stick for some; I'm not impressed. There are 1360 days remaining in Trump's (first?) term; plenty of time for great success -- and great failure.

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<sup>18</sup> <https://www.supremecourt.gov/opinions/slipopinion/16>