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**Civics 101**

**Episode X:**

# Ep 7 Executive Orders

[00:00:00] Who is the current speaker of the House? I don't even know.

[00:00:04] Will they rule in the president favor? Will they send to the Supreme Court?

[00:00:07] You can't refer to a senator directly by their name. Congressional redistricting operation of our executive order, the National Security Council Civil.

**Virginia Prescott:** [00:00:18] I'm Virginia Prescott and this is Civics 101,the podcast refresher course on some basics that you may have forgotten from your U.S. history and government classes back in 1976. ABC debuted the third installment in its educational series Schoolhouse Rock, which included a primer on how a bill becomes a law.

**Schoolhouse Rocks:** [00:00:38] Some folks back home decided they wanted a law passed, so they called their local congressman and he said, you're right, there ought to be a law. And he sat down and wrote me out and introduced me to Congress and I became a bill. And I'll remain a bill until they decide to make me a law. I'm just a bill.

**Virginia Prescott:** [00:00:56] A bill. Only a bill. But there is, of course, another more [00:01:00] immediate way in which American laws are created and enforced. This is an area that Schoolhouse Rock never covered. Maybe because it is not so easy to rhyme with executive order. So what are executive orders and what exactly is the president allowed to order without the consent of Congress? Let's find out with Karen Hult, a professor and chair of the Department of Political Science at Virginia Tech. Hello, Karen.

**Karen Hult:** [00:01:25] Hello.

**Virginia Prescott:** [00:01:26] So executive orders, are they, for all intents and purposes, laws?

**Karen Hult:** [00:01:31] Yes, they are. And the other thing I might add is that executive orders are technically a specific kind of law that a president can sign. They're not the only thing presidents can do. Sometimes presidents also sign presidential memoranda and presidential proclamations.

**Virginia Prescott:** [00:01:48] All right. So we'll get into those. But what one of the things that we're discovering while doing this podcast is that many of the details that we think of as built into the framework of our democracy or frequently used [00:02:00] in our democracy evolved from the constitution. But were not specified by the constitution, which includes the phrase executive order. So what does the Constitution say on the subject of executive orders?

**Karen Hult:** [00:02:15] As you say, nothing very explicitly. But what an executive order typically does is rely on a law that Congress has already passed. So what an executive order is doing is elaborating on that law and sending directions and guidance to executive branch agencies and executive branch officials about how they should implement that law. So in that sense, it's following the president shall execute the law parts of the constitution.

**Virginia Prescott:** [00:02:42] But they can differ and very significantly, from laws that are on the books, right?

**Karen Hult:** [00:02:47] They can, but technically they should not. They have to have some kind of statutory basis in most cases. That is, they have to be based on a law. And if one reads an actual executive order, say on the current White [00:03:00] House website, they will see that most of them start with the parts of either the constitution or laws passed by Congress on which the executive order flows.

**Virginia Prescott:** [00:03:10] Ok. So presidential powers that are not in the Constitution but exist because Congress has delegated responsibility to the executive. Correct?

**Karen Hult:** [00:03:19] Exactly.

**Virginia Prescott:** [00:03:20] So what would be some examples and how Congress delegates power to the president. And you can use a current example of the executive orders that President Trump signed so far.

**Karen Hult:** [00:03:31] Yes, certainly some of it varies. Now, sometimes Congress will be very explicit and say we want this to be done and we're delegating the power to the president. In other cases, the president looks at the law, which has to be put into workable form so that it actually can't be put in place by, say, Immigration and Customs Enforcement officials. Now, the way that a president may be interpreting a particular statute may be what surprises people. Certainly that was the case with with the [00:04:00] recent executive order on protecting the nation from foreign terrorist entry into the United States. I'm reading that off the White House Web site.

**Virginia Prescott:** [00:04:07] Meaning the executive order that barred immigration from people from different countries.

**Karen Hult:** [00:04:12] Exactly. But what the president was doing there was saying that the president was executing, as the executive is supposed to do under the Constitution, to faithfully execute the laws. The president would argue and the president's legal team is arguing that what the president is doing is enforcing and telling the government how to enforce immigration laws that the U.S. Congress has passed.

**Virginia Prescott:** [00:04:36] I see. So it's existing immigration law in a similar way that President Obama signed DACA, for example.

**Karen Hult:** [00:04:42] Exactly. And what that what that underscores is that the law itself, from a president's perspective, may allow different kinds of interpretation that reflect different presidential priorities.

**Virginia Prescott:** [00:04:54] So what we've seen with this law, it has caused a lot of chaos in airports on the ground with customs [00:05:00] agents.

**Karen Hult:** [00:05:01] Yes

**Virginia Prescott:** [00:05:01] In countries. So. So if a law is not, let's say, practical, does that grant the president a lot of wiggle room just to make executive orders on the subject?

**Karen Hult:** [00:05:12] It can. I mean, some of it has to do with the practicality. Congress did not specify in writing the kind of executive order that that President Trump has released. Congress did, however, indicate that immigration law needed to be enforced. And this is how Mr. Trump is trying to enforce it. So it turns out that presidents do have the opportunity to interpret those somewhat vague laws. The difficulty with this particular executive order, many would argue, is not that it's inconsistent with congressional law, but the way it was produced and put in place was where that where the problems came in.

**Virginia Prescott:** [00:05:48] Karen, help us understand the process of an executive order, how it moves through the executive branch or executive office to the legislature or where does it go?

**Karen Hult:** [00:05:59] Well, that's [00:06:00] a great question. Executive orders start in the executive branch. Typically, though, not always. They may start in the office of the White House counsel. And so the White House counsel, in consultation with people that are related to the policy the executive order is trying to put in place, will be consulting about the language of the executive order, how to we put in place and when and if to roll it out. Then there's a pretty complex clearance process, if you will, where the executive orders typically are shown to the legislative affairs people in the White House, the policy people in and around the White House. And the important people in executive branch agencies, for example, with this this recent immigration executive order that has caused a great deal of tumult and contention, it appears as though it did not go through the complete vetting process. The homeland security secretary did not know about it until reportedly he read about it in the newspaper. [00:07:00] Well, the Immigration and Customs Enforcement officers did not know how they were supposed to enforce it. Those kind of problems might have been picked up if they'd done a little bit more systematic and thorough vetting process.

**Virginia Prescott:** [00:07:12] If the president has the right or is within the right to take care of the laws to be executed faithfully, what can knock down an executive order?

**Karen Hult:** [00:07:22] Well, an executive order can be challenged in court on a variety of bases. Among those challenges will be that it is inconsistent with the statute or the bill that Congress passed in some way or another. Another way an executive order can be challenged in court can, of course, be on constitutional grounds that it's violating, for example, the rights of citizens who must comply with the law or that it's violating some other part of the constitution.

**Virginia Prescott:** [00:07:49] Let's talk a little bit about the history, because I've read that executive orders have grown in importance over the years. But looking through American history, it actually looks like the overall use has been steadily [00:08:00] declining since Franklin Delano Roosevelt, who signed an average of 291 a year.

**Karen Hult:** [00:08:06] Actually, presidents since the very beginning have used executive orders. It was only under Franklin Roosevelt, however, that we've started to count them, give them numbers, and then finally to publish them in the federal register. The number of executive orders has been declining. In fact, among recent presidents, Jimmy Carter probably made the heaviest use of executive orders. And since 1981, they've been used a little bit less frequently. When, when Republican presidents come into office as President Trump has done, they will reverse some of their Democratic predecessors. Executive orders is a key one. With that is the so-called Mexico City policy that Ronald Reagan put into effect, which basically prohibits federal money from going into any international family planning organization that funds abortions. That that goes back into effect under Republican presidents. It is taken out of effect under under Democratic presidents. [00:09:00]

**Virginia Prescott:** [00:09:00] So they kind of ping pong back and forth by it from administration to administration, at least some of them,.

**Karen Hult:** [00:09:06] At least some of them not very many. The interesting thing about executive orders is that only about eleven percent are changed significantly or abolished by the next president. And so much like statutory law that it's law that Congress passes, they have pretty long lasting power.

**Virginia Prescott:** [00:09:25] So if you do go to the whitehouse.gov web site, you will find a list of the president's recent executive orders. Yet there are also a list of presidential proclamations, such as the proclamation that February of 2017 shall be American Heart Month and presidential memoranda, for example, the memorandum regarding construction of the Keystone XL pipeline. How do these proclamations and memoranda differ from an executive order?

**Karen Hult:** [00:09:50] They differ technically, but they're kind of mixed up with each other, both by those of us that look at the folks in the media and things like that. Technically, presidential [00:10:00] proclamations are usually used for a more ceremonial kind of announcements, like declaring the National Heart Month and things like that. Presidential memoranda are meant to be more giving guidance rather than direction, but especially under Presidents George W. Bush and Barack Obama. They tended to be used more frequently. And part of the reason seems to be for that is that they do not have to be published in the federal register.

**Virginia Prescott:** [00:10:28] Well, one of the claims made by both George W. Bush and by President Obama was that Congress wasn't doing anything. So they had to make the law happen. Is there any validity to that?

**Karen Hult:** [00:10:39] Well, there is some I mean, certainly is the case if when Congress is gridlocked. A president certainly may enter the fray by saying, based on current statutory law, I can go ahead and try to push the process further.

**Virginia Prescott:** [00:10:52] Why then, Karen, aren't. All laws made by executive order. You know, a president could conceivably I mean, what is the check and balance on [00:11:00] a president coming in and saying Congress isn't doing what I want or isn't doing anything. I'm just gonna make up these laws?

**Karen Hult:** [00:11:06] Well, I think I think the main check and balance is Congress itself. So Congress can though it does rarely. Congress can reverse executive orders or forbid them from being put into effect. And when Congress does that, Congress wins.

**Virginia Prescott:** [00:11:19] What do you think of an issue recently or an executive order that was turned around by Congress?

**Karen Hult:** [00:11:24] There have been some civil rights executive orders that Congress has tailored or responded to. There have been other situations often in, with regard to some of the environmental efforts that the Obama administration was was trying to make that some in Congress thought were too stringent. Congress either passed legislation or passed a joint resolution criticizing what the administration had done. So that's one way that executive order can be challenged. A second way is what we've been seeing with the immigration enforcement, is that certainly federal court cases can and have been filed as well.

**Virginia Prescott:** [00:11:58] One of Donald Trump's executive [00:12:00] orders is called Core Principles for Regulating the United States Financial System. Did you read this over?

**Karen Hult:** [00:12:07] I have it on my screen. And so, yeah, I'm I'm clicking on it now. This is an interesting executive order because in fact, it's more like it's closer to a campaign statement and a statement of principles. I will argue and I don't know if this could be directly relevant. It seems to me that many of these executive orders came out of earlier preparation in various interest group and advisory communities that were put in place very quickly as almost a signaling device, saying this is really what the president thinks is important. And the president is telling executive branch officials, as well as members of Congress, that this is what I'm going to emphasize and this is what I want you to emphasize as well.

**Virginia Prescott:** [00:12:46] Okay. So it seems purely politically motivated.

**Karen Hult:** [00:12:50] Well, I don't, but politically in a good sense, because what it's doing is telling executive branch officials as well as others that the president, the United States, believes that these [00:13:00] are the core priorities. And to the extent we hold presidents responsible for what the government does, that's probably you can argue that that's a defensible thing.

**Virginia Prescott:** [00:13:09] Executive orders and the process have been dominating the news recently. What do you think people do not understand about how they operate?

**Karen Hult:** [00:13:18] Well, you know, part of it is, as we've been talking about, this is pretty complicated and it gets down in the weeds pretty quickly. I think there's a sense in which that that executive orders are seen as automatically something that presidents shouldn't do. And yet I would argue they are a way of of allowing presidents to add specificity to what what Congress does, because Congress can't, you know, provide every single detail on what's going on. The other thing that might be of interest is that it turns out that more executive orders have been issued by Democratic than Republican presidents. And presidents are more likely to issue executive orders when [00:14:00] their party controls Congress, which is something that's kind of a curious finding. But not everybody fully, fully picks up.

**Virginia Prescott:** [00:14:07] Karen Hult, professor of political science and core faculty member in the Center for Public Administration and Policy. She's also chair of the Department of Political Science at Virginia Tech. Thank you so much for speaking with us.

**Karen Hult:** [00:14:19] Thank you. It's been great.

**Virginia Prescott:** [00:14:21] That's it for today. This episode of Civics One A One was produced by Taylor Quimby and edited by Maureen McMurray. Music from Broke for Free. An uncanny valley's own. Before you go, we want to let you know that there is extra credit available for those of you who are interested. You can sign up for this civics one or one newsletter for more reading and to make sure that you have your facts straight. There's even a pop quiz you can sign up for the extra credit email at civics one a one dot org. I'm Virginia Prescott Civics 101 is a production of NHPR. [00:15:00] everybody. If you like this podcast or if you like the way it's hosted just a little bit, you might want to check out another one of NHP as podcasts. It's the 10 Minute Writers Workshop. Each episode I speak with authors from all across the literary spectrum and learn about their process and their bad habits and their best advice for aspiring writers. It's a super-fast way to learn tips from the best people, from Judy Blume to Salman Rushdie to the reigning National Book Award winner. Colson Whitehead. So even if you're not a writer or a devout reader, you'll hear about how the creative process is lived day to day by some consistently imaginative and, by the way, really influential people. You can subscribe to the Ten Minute Writers Workshop on i-Tunes or wherever you download your podcasts.

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