

Supplemental Notes to Lecture 13: The Executive Order as a Form of Presidential Power



ANTITRUST MAKES A COMEBACK

"Capitalism without competition isn't capitalism; it's exploitation," the president said.

I. Capitalism Without Competition = Exploitation?

On an episode of the *Deconstructed* podcast (produced by *The Intercept*) that [aired in July](#), the host, Ryan Grim, summarized the reaction of some members of the Washington Press Corps to Biden's Executive Order, entitled, "Promoting Competition in the American Economy": "when people hear executive order, they hear: OK, well, it's a piece of paper! . . . Congratulations to you for putting words down on paper! Nothing is going to change in the real world."

Nevertheless, he then adds that Biden's "Promoting Competition" order "does appear to have some teeth because . . . it's not just an order, it is an order to execute already existing laws in a way that they haven't been executed for decades."

Executive Orders are presidential directives that carry the force of law, so long as their provisions do not violate existing congressional statutes or the U.S. Constitution. (Court challenges to Executive Orders claim that the president has overreached their authority by misinterpreting a statute or undermining a constitutional principle, which would then mean that the commander-in-chief has in effect attempted to rule by decree.)

In the speech announcing the "Promoting Competition" order, Biden utilized what our text refers to on page 431 as the "bully pulpit." (As we saw in Lecture 13 and will discuss further below, Obama tried to use the bully pulpit to close [Guantanamo Bay prison](#)—to no avail.) In

terms of its rhetoric, Biden's address did put forth a critique of capitalism that has not been heard since the New Deal: "We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind; too many people who are poorer than their parents. I believe the experiment failed . . . Capitalism without competition isn't capitalism; it's exploitation."

These forceful words carry more weight than empty campaign promises in the sense that, as Grim indicated, the actions that they call for require federal agencies to enforce and modify existing regulations. Indeed, the Executive Order issues no less than 72 directives to over a dozen agencies in the Executive Branch.

However, only in some instances do those agencies fall directly under the control of the White House (e.g., the Food and Drug Administration); that is, if Biden directs the head of the FDA to do something, they are expected to comply. But Biden can only "encourage" or offer recommendations to the directors of independent agencies, like the Federal Trade Commission. To the FDA, the Executive Order gives directives; to the FTC, it makes requests.

Nonetheless, the FTC, *along with an increasing number of senators and representatives from both parties*, appears to share the Biden Administration's determination to enforce long dormant anti-trust laws that have been on the books *for over a century*: [the Sherman Act of 1890, the Federal Trade Commission Act of 1914 \(which created the FTC\), and, also in 1914, the Clayton Act](#). The language of these laws provides Biden with a legal foundation for taking aim at tech giants based in the Silicon Valley. (The Federal Trade Commission Act "bans unfair methods of competition" and the Clayton Act prohibits mergers and acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly.")

Determining what constitutes "unfair methods of competition" is a matter ultimately left to the courts, but for such rulings to be issued at all, lawsuits must of course first be filed, something which is already underway, now that the US Senate has confirmed ([by a 68-29 margin](#)) Jonathan Kanter to lead the Justice Department's Antitrust Division.

It appears, then, that as the [Washington Post article](#) puts it, "the most impactful part of the [Executive] order relates to Silicon Valley," insofar as it clears the way for the FTC to draw up rules that prevent further Big Tech mergers and target unfair competition in online marketplaces.

Biden's Executive Order may in fact succeed in initiating new anti-trust policies and diminishing the power of Big Tech, especially given the support the president will receive from the Antitrust Division of the Justice Department and a nascent bipartisan consensus in Congress.

II. The Detention Center at Guantanamo Bay

Two months after the attacks of September 11 in 2001 (on November 13), President Bush issued an Executive Order that established military tribunals and the detention center in Guantanamo Bay, Cuba. (Bush justified the Executive Order by invoking his powers as Commander-in-chief and citing the sweeping Authorization for the Use of Military Force that became law on September 18, 2001, after having passed both Houses of Congress by margins of 420-1 and 98-0,

vote tallies that provide an example of what sort of outcomes can be produced by what our text refers to on page 441 of the “rally around the flag effect.”)

Eight years later, the detention center remained in place, having survived two Supreme Court decisions that ruled against “unlawful detention,” thanks in part to passage of the Military Commissions Act of 2006, which in turn prompted new court challenges.

From out of this legal and political maelstrom, Obama emerged on the campaign trail in 2008, promising to close the detention center. Within weeks of taking office, he issued an Executive Order (entitled, “Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities”) that ordered the closure of the detention center camp.

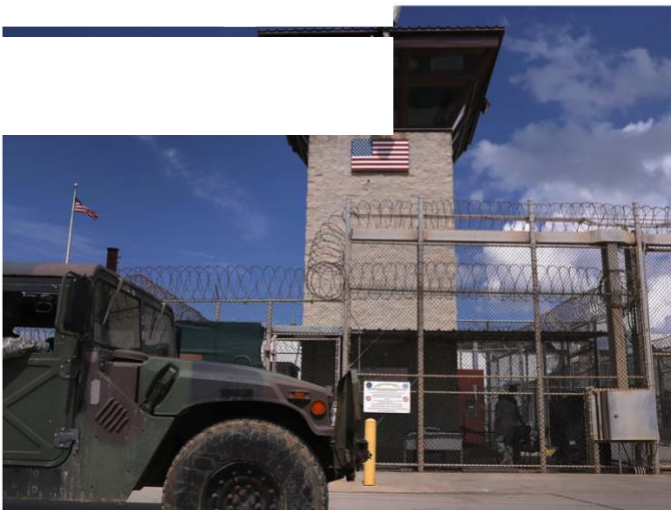
However, the facility remains open [to this day](#). As discussed in Lecture 13, Congress successfully thwarted Obama’s attempt to use Executive Orders to close the detention center; however, many critics have argued that the blame for this outcome rests primarily with the Obama Administration. (One such critique appeared in the *Guardian*; that analysis from Spencer Ackerman can be found [here](#).)

Note: In [January of 2018](#), President Trump issued a largely symbolic Executive Order that asserted there was a need to keep the Guantanamo facility open, even though, of course, Obama had not closed it. The 2018 Executive Order thus reinforces the claim made in Lecture 13 that Trump *would have reversed* an Executive Order issued by Obama to close the detention center.

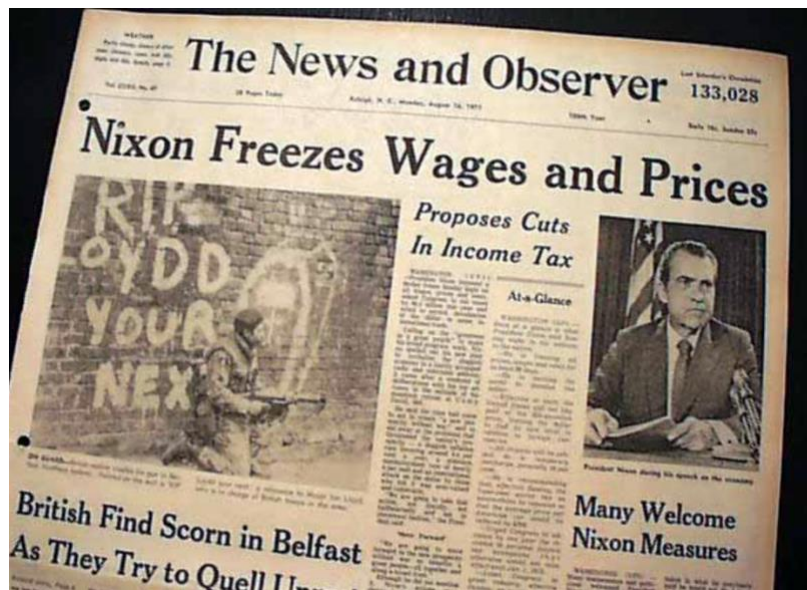
Trump Signs Order To Keep Prison At Guantanamo Bay Open

January 31, 2018 · 1:10 AM ET

SCOTT NEUMAN 



III. The Executive Order that Imposed Wage and Price Controls



On August 15, 1971, [President Nixon issued an Executive Order](#) that imposed a ninety-day wage-price freeze, which would seem to silence those who claim that such presidential directives amount to “pieces of paper” incapable of doing anything to bring about “change in the real world.”

“No person,” the text of Nixon’s order reads, “shall charge, assess, or receive, directly or indirectly, in any transaction prices or rents in any form higher than those permitted . . . and no person shall directly or indirectly pay . . . in any transaction wages or salaries in any form . . . higher than those permitted.”

Though the order was issued to federal agencies that were created to administer the controls (the Price Commission and Pay Board), the encompassing Executive Order directly affected individuals, a reminder that although Executive Orders are officially given to “officials in the Executive Branch,” they can have a profound and direct impact on the public at large (as is the case, in a different context, with Biden’s Vaccine Mandate.).

You might think that such a radical if not unimaginable act of federal government intervention was quickly blocked by a court injunction or overturned by the passage of a veto-proof Congressional law or met with a deafening public outcry and great civil unrest. You might think that the Executive Order was met by all the above.

However, the legality of Nixon’s Executive Order was never in doubt. Why? Because year earlier, during a time of economic turmoil, Congress passed the Economic Stabilization Act of 1970, which conferred upon the president the authority to impose price controls in an attempt to fight inflation. Without that law on the books, Nixon could not possibly have issued the Executive Order, whose short-term success and popularity contributed to his 1972 landslide victory over Democrat George McGovern. (As it happened, the Democratic-controlled Congress that passed the law erroneously assumed there was no chance a Republican president would impose wage and price controls, even in the face of an ongoing economic crisis. The Democrats had planned to attack Nixon in the upcoming presidential election for what they thought would

prove to be his failure to avail himself of the authority granted to him in the Economic Stabilization Act. But Nixon turned the tables on Congressional Democrats.)

Quiz Question 6: What is one antitrust law that provides the Biden Administration with a legal justification for carrying out the Executive Order on “Promoting Competition”?

Quiz Question 7: Upon what legal basis did President Bush issue the Executive Order on November 13 of 2001 that established military tribunals and the detention facility in Guantanamo Bay?

Quiz Question 8: Why was the legality of Nixon’s August 15, 1971 Executive Order not in doubt?