

RESEARCH ISSUE Brief

Issue 2, No. 1, February 2018

Executive Orders, Policy Implementation and the Role of the National Assembly

Terfa Abraham, PhD

Overview

The use of Executive orders by the President Mohammadu Buhari administration has become a regular point of interjection in the country's economic management toolkit. Whether or not these executive orders are effective in delivering service to the people and the implication for the National Assembly is the focus of this brief.

I. Introduction

1. The Constitution of the Federal Republic of Nigeria (1999) as amended, is the supreme and fundamental law of the country. It establishes a presidential system of government, with an executive arm, referred to as the Federal Government of Nigeria (FGN) headed by the President, a legislative arm referred to as the 'National Assembly', and the judiciary which comprises courts-of-law established for the federation, the 36 states and federal capital territory. One of the means through which the President

could carry-out its administrative and policy setting role is via executive orders, memoranda and guidelines for the relevant parastatals and agencies.

2. President Muhammadu Buhari on February 5th, 2018 signed an Executive Order to enhance local content in public procurement¹. Some times in May 2017, the Federal Government also endorsed and signed three Executive Orders expected to give boost to Nigeria's ease of doing business. The three executive orders are meant to: promote transparency and efficiency in the business environment designed to facilitate the ease of doing business in the country; ensure timely submission of annual budgetary estimates by all statutory and non-statutory agencies, including companies owned by the Federal Government; and support for local contents in public procurement by the Federal Government. In addition to their administrative law and rule-setting characteristics, executive orders are also useful in providing more

¹
<https://www.thisdaylive.com/index.php/2018/02/>

06/president-signs-executive-order-to-enhance-local-content-in-public-procurement/

specific guidelines and detailed directives to relevant government agencies and parastatals.

3. Executive orders and proclamations are directives or actions by the President¹. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law. In the narrower sense, Executive orders and proclamations are written documents denominated as such and are generally directed to Government officials and agencies with regards to a particular cause of action.

II. Cross Country Experience with the Implementation of Executive Orders

4. The most relevant jurisdiction where EOs have been used is in the United States. EOs are typically used in cases where the President deems the implementation of a new policy or providing more administrative clarity on existing law has been very essential. It has generally worked in the US and was mainly challenged in cases where questions about how such EOs breach separation of powers. Apparently, the U.S. Supreme Court intervened in the two cases. The two examples are as follows:

- a) An order by President Truman in 1952, was meant to prevent strikes during the Korean War by placing all the nation's steel mills under federal law. The Supreme Court held that the order was invalid because it attempted to make law, rather than to clarify or further the implementation of a law

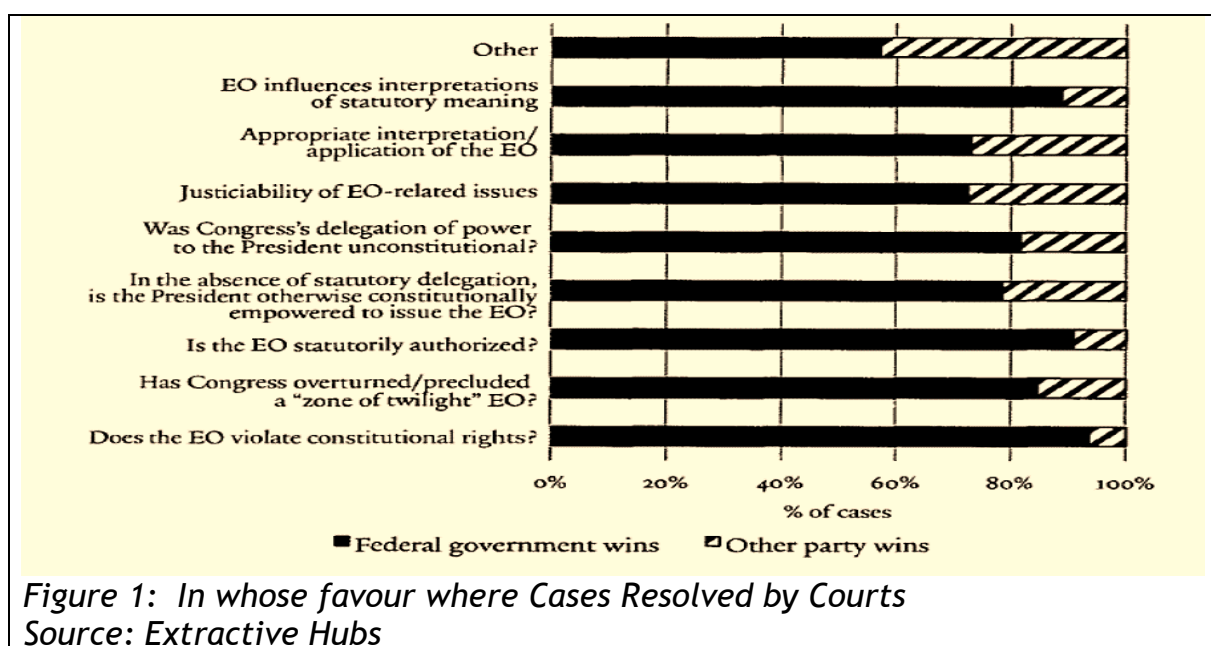
enacted by the Congress or the Constitution.

- b) The second order, from Clinton in 1995, prevented the federal government from executing contracts with organisations that hire replacements for striking workers. The U.S. Court of Appeals for the District of Columbia said it was regulatory in nature and pre-empted by the National Labour Relations Act, which guarantees employers the right to hire permanent replacements.
5. Apart from the legal validity challenge of an EO or the actions of government agencies implementing an EO, an executive order's objectives may not be accomplished in reality if the relevant agencies themselves are not properly equipped to function or carry out their duties. An EO's objective may also not be realised where there is a change in government, and the new President overturns the EO such as in the case of Donald Trump overturning some of President Obama's EOs.
 6. In the United States, an executive order (EO) is an official document which is numbered consecutively, and through which the President administers and issues binding policy guidelines on the operations of the Federal Government as envisaged under existing law(s) and the Constitution. The text of EOs appear in the daily Federal Register as each order is signed by the President and received by the Office of the Federal Register. The text of EOs beginning with Executive Order 7316 of March 13,

1936, also appears in the sequential editions of Title 3 of the Code of Federal Regulations (CFR).ⁱⁱ

7. As a result of its law or rule-setting attribute, the use of EOs by Presidents in the US and elsewhere have often raised questions bordering on the principle of separation of powers in a presidential system of governance. Such questions typically include-whether a president has usurped

more than the powers permitted by law and the Constitution? In the US, there is nowhere in the Constitution where it is expressly stated that the President can issue an EO, or neither is there a specific definition of EOs by statutes. This is also same in Nigeria, and like in the US the powers to issue EOs stem from existing law and the powers conferred on the President to initiate national policy, as well as manage and implement laws and regulations.



8. All US presidents have at one point or the other issued directives that could be classified as EOs. They have been called by other names such as presidential ordinances and directives, presidential regulations, administrative orders, general orders, and military orders. Presidents have typically issued EOs when there is an urgent matter of national and economic significance or the need to avoid a potential political gridlock and time-consuming disputes which

may occur during the process of considering a legislation.

9. In the US, President Franklin D. Roosevelt was reported to have on several occasions extended his use of EOs and believed the President should act when the Congress failed to act. Over the years, US presidents have used executive orders to suspend habeas corpus,ⁱⁱⁱ integrate the military, implement affirmative action requirements for government contractors, centralise the review of proposed agency

regulations, stall stem cell research, create the nation's first cybersecurity initiative, etc. While the President can make EOs in accordance with the law and constitution, the legislature can also carry-out necessary oversight functions pertaining to the implementation of such EOs.

10. EOs are as old as the U.S. Constitution and every president, from George Washington to Donald Trump, has used them. Both President John F. Kennedy and President Lyndon Johnson used EOs in the 1960s to bar racial discrimination in federal housing, hiring and contracting. Ronald Reagan used an executive order in 1984 to bar the use of federal funds for advocating abortion. President Bill Clinton reversed it when he took office in 1993. President

Obama's executive orders include one in 2012 halting the deportation of hundreds of thousands of illegal immigrants who were brought to the U.S as children. He also issued one to raise the minimum wage for federally contracted workers to \$10.10 from \$7.25 an hour.

11. The legislature is not obliged to approve any executive order, nor can it overturn an order. In cases where the lawmakers are not in favour of particular EOs, they can pass a law to cut funding for the order's implementation. Although, in such a scenario, the president can veto such a defunding law. The legislature that supports the President's actions can also either make new laws or amend current ones to foster the ideals of such EOs or policy agenda.

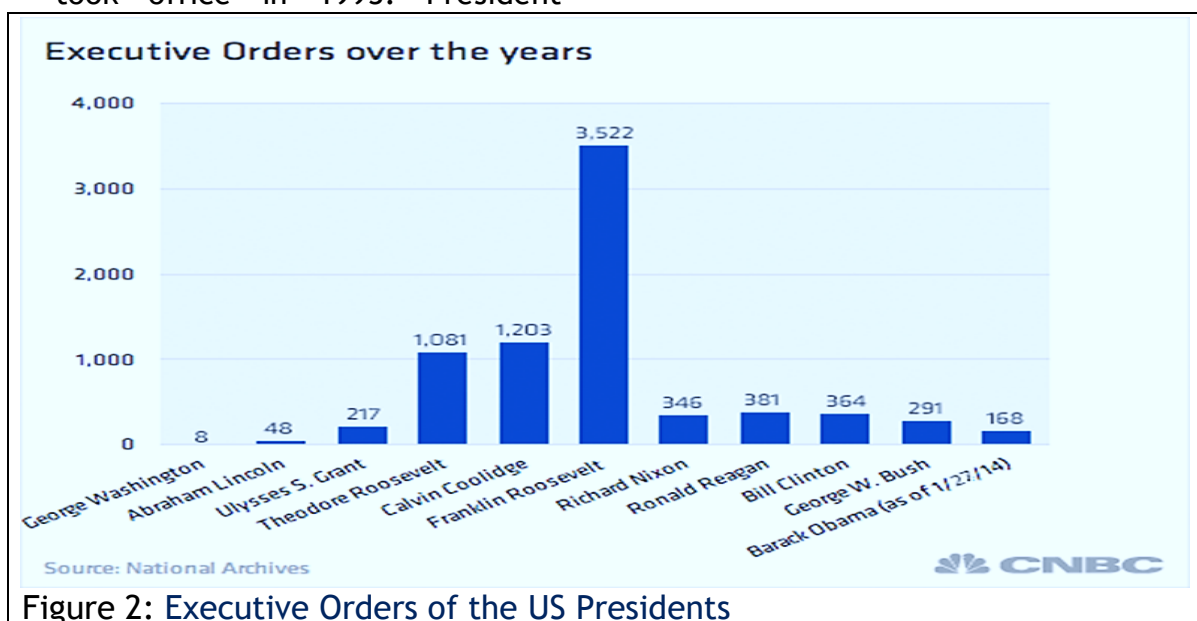


Figure 2: Executive Orders of the US Presidents

III. How Nigeria use Executive Orders to Enhance Good Governance

12. It is the business of democratic governments to create enabling

environment that supports business activity. Like other governments in best practice systems the world over, while the Federal Government of Nigeria can use Executive Orders (Eos) to provide

apt and necessary directives to its agencies and parastatals; it is important to implement existing laws touching or pass new laws to ensure continuous adherence.

13. Although EOs have the advantage of by-passing the arduous and often political contentions or time-consuming process of passing law(s) through the Senate and the House of Representatives, it suffers easy set back during regime change as it lacks a framework for sustainable implementation. As a means of strengthening Nigeria's democratic formation, the National Assembly could through resolutions ensure that the Presidency adopts the use of numbered orders. The Eos should also be publicly available for thorough scrutiny and evaluation.
14. The EOs can also be used in directing relevant agencies and authorities within the executive arm to address identified challenges bordering on corruption, host community disturbances and sabotage of facilities, and inefficiencies within its subsidiaries.
15. It is not compulsory to enact a law to make the Executive Orders (EOs) more impactful. However, the National Assembly could make requisite law(s) that prescribes the minimum standards of transparency, accountability and effectiveness in the process of issuing, announcing, publicising and implementing EOs. Such a legislation could be useful in providing further legal clarity on the implementation and scope of EOs. In this regard, the National Assembly may choose to evaluate

the EOs provisions vis-à-vis the relevant laws affecting the ease of doing business in the sector and those dealing with investment promotion. Where necessary, amendment can be made to existing laws or new ones enacted.

16. Nevertheless, it should be reiterated that EOs are administrative rule-making tools directed at executive institutions. Such FGN agencies and institutions already have considerable latitude and discretionary powers to make further guidelines if necessary. As such, additional law-making actions by the National Assembly will need to be carried out in collaboration with the concerned Ministries, Departments or Agencies.

IV. Conclusion and Lessons for the Nigerian National Assembly

17. The use of Executive orders (Eos) by the Executive arm of government in Nigeria in recent time is consistent with democratic practices. Although EOs have the advantage of by-passing the arduous and often political contentions or time-consuming process of passing law(s) through the Senate and the House of Representatives, it suffers easy set back during regime change as it lacks a framework for sustainable implementation.
18. It is not compulsory to enact a law to make the Executive Orders (EOs) more impactful. However, the National Assembly could make requisite law(s) that prescribes the minimum standards of transparency, accountability and

effectiveness in the process of issuing, announcing, publicising and implementing EOs. Such a legislation could be useful in providing further legal clarity on the implementation and scope of EOs. In this regard, the National Assembly may choose to evaluate the EOs provisions vis-à-vis the relevant laws affecting the ease of doing business in the sector and those dealing with investment promotion. Where necessary, amendment can be made to existing laws or new ones enacted.

EOs are administrative rule-making tools directed at executive institutions. Such FGN agencies and institutions already have considerable latitude and discretionary powers to make further guidelines if necessary. Hence, additional law-making actions by the National Assembly will need to be carried out in collaboration with the concerned Ministries, Departments or Agencies.

The views expressed in this Research Issue Brief are those of the author(s) and do not necessarily represent the views of the Institute and its Management.

Contact

National Institute for Legislative and Democratic Studies (National Assembly)

14/18 Danube Street, Off IBB Way, Maitama

Abuja, Nigeria.

Email: info@nils.gov.ng

Website: <http://nils.gov.ng/>

Tweeter: [@nilsnigeria](https://twitter.com/nilsnigeria)

i Rudaleveige, Andrew. (2011), 'Opening the Black Box: How Unilateral Are Executive Orders?', Pennsylvania: Dickinson College, paper presented at APGAC, (January)

ii Erica Newland, 'Executive Orders in Court' Yale Law Journal, Vol. 124, Issue 6 (April 2015), pp. 2026-2099.

iii A writ of habeas corpus is used to bring a prisoner or other detainee before the court to determine if the person's imprisonment or detention is lawful.