

Executive Orders under Biden's Administration

by Antonia Baraggia

Abstract: *Gli Ordini Esecutivi durante la Presidenza Biden* – The article addresses the executive orders issued by US President Joe Biden during his four-year Presidency. It will also reflect about the role of executive orders in time of polarization.

Keywords: Biden; Executive Orders; U.S. Constitutions; executive aggrandizement

1. Introduction

Since his inauguration on January 20, 2021, Biden has issued a total of 143 EOs: 13 in 2024 (the most recent on September 26), 24 in 2023, 29 in 2022, and 77 in 2021. Comparatively, during their four-year terms in the 21st century, Donald Trump issued 220 EOs; Barack Obama signed 277 EOs between 2009 and 2017 (148 in his first term); and George W. Bush issued 291 EOs between 2001 and 2009 (171 in his first term).¹

Looking back on some of the most significant EOs from Biden's presidency, a notable distinction emerges between the first and second half of his term. In the initial two years (2021-2022), Biden's EOs were largely reactive, aiming to reverse some of the more controversial and conservative policies enacted during Trump's presidency (2016-2020). In contrast, the latter half of Biden's presidency features a more proactive approach, with EOs addressing broader initiatives in anticipation of the presidential elections scheduled for November 5, 2024.

It is important to note that the stark difference in the number of Executive Orders between the first and second half of Biden's presidency—37 in the initial two years and 106 in the latter two years—reflects the significantly different political contexts in which Biden and his administration operated. During the 117th Congress (2021-2023), the Democratic Party controlled both the House and Senate, marking the first government trifecta since 2017-2019 when the Republicans held the presidency and both Houses. However, in the 2022 mid-term elections, the Democrats narrowly lost control of the House of Representatives to the Republican Party, which adopted a highly aggressive, confrontational, and uncooperative stance toward the Biden administration.

¹ All EO issued by US Presidents since 1937 (F.D. Roosevelt's second Presidency) can be found at: <https://www.federalregister.gov/presidential-documents/executive-orders>.

In this lame-duck scenario of a divided government, the challenges of reaching reasonable compromises with a Republican Party, largely influenced by former President Trump and already focusing on the 2024 presidential elections, compelled Biden to rely more heavily on executive orders. As has been observed, this dynamic significantly shaped the administration's strategic approach during these years. As it has been noted, «like Barack Obama and Donald Trump before him, Biden has aggressively used executive power to cut the Gordian knot of partisan gridlock in Congress».²

However, an interesting connection can be drawn between some of the Executive Orders issued in the latter half of Biden's presidency and those from earlier in his term. Regarding their general themes, many of these EOs address the most pressing issues facing contemporary society. They cover areas such as Artificial Intelligence (AI), cybercrime/cybersecurity, and digital regulation; access to health care, particularly women's reproductive healthcare following the U.S. Supreme Court's decision in *Dobbs v. Jackson*, which overturned the 50-year precedent of *Roe v. Wade*; and the fundamental rights of minorities, especially LGBTQI+ and Black communities, alongside issues of equality and discrimination.

Before delving into a detailed analysis of these EOs, it is essential to provide a brief overview of the process by which the U.S. President issues Executive Orders and the potential for these orders to be subject to judicial review.

2. The legal nature and judicial review of Executive Orders: a brief overview

Since the adoption of the U.S. Constitution and the establishment of the Presidency, Executive Orders (EOs) have consistently existed in a state of legal ambiguity regarding their definition and application: being clear that the executive Power shall be vested in the President,³ «the question which has arisen is whether the term "Executive Power" refers merely to the specifically enumerated powers in article II, or whether it is an affirmative delegation [from Congress] of some all-pervasive independent power».⁴ In fact, «although executive orders are a common form of presidential action, neither the Constitution nor any statute provides an overarching definition of an "executive order," and no statute grants the President the general authority to issue executive orders. Nevertheless, it is widely accepted that the President has that power».⁵

We should not forget that some of the most significant actions in U.S. political history were implemented through Executive Orders, the most

² N.F. Jacobs, S.M. Milkis, *Get Out of the Way: Joe Biden, the U.S. Congress, and Executive-Centered Partisanship During the President's First Year in Office*, in 19(4) *The Forum* 709, 709 (2021).

³ Art. II, sec. 1, Clause 1 Const.

⁴ W. Hebe, *Executive Orders and the Development of Presidential Power*, in 17 *Vill. L. Rev.* 688, 694 (1972).

⁵ Congressional Research Service, *Executive Orders: An Introduction*, <https://crsreports.congress.gov>, R46738, March 29, 2021, 1.

notable being the Emancipation Proclamation issued by President Abraham Lincoln on January 1, 1863. This order changed the legal status of more than 3.5 million enslaved African Americans in the secessionist Confederate states and played a crucial role in ending slavery in the U.S.

In modern times, on March 6, 1961, President J.F. Kennedy signed Executive Order 10925, that required government contractors to «take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin».⁶ This marked the beginning of affirmative action policies in the U.S., which have since been the subject of intense debate, particularly within political agendas and before the U.S. Supreme Court.⁷

Until the adoption of the Federal Register Act (1935), which for the first time provided a means for the formal registration of government acts, «the state of executive orders was one of chaos, which, to a great degree, was due to the informality with which they were treated by the presidents».⁸ Presidents themselves did not agree on how this power should be concretely interpreted: while Theodore Roosevelt (1901-1909) considered that the Executive power «was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers»⁹ – the President being «a steward of the people bound actively and affirmatively to do all he could for the people»¹⁰ – his successor W.H. Taft (1909-1913) favored a more restrictive interpretation of the President’s powers which implied that «the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise».¹¹ Recent analyses suggest that presidential control over the administration began to increase significantly during Ronald Reagan’s presidency (1981–1989)¹² and then «expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda».¹³

⁶ On the same topic, other EO were adopted by Kennedy (Executive Order 11114 of June 22, 1963) and President Lyndon B. Johnson (Executive Order 11246, of September 24, 1965).

⁷ Among the most relevant cases, we can mention: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), – which upheld affirmative action, as long as race was used as one of several factors in college admission policy to obtain «the educational benefits that flow from an ethnically diverse student body» (*ivi*, 306) – *Grutter v. Bollinger*, 539 U.S. 306 (2003), that confirmed *Bakke’s* approach and *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), with the companion case, *Students for Fair Admissions v. University of North Carolina*, which overruled those precedents and held that race-based affirmative action programs in those college admissions processes violated the Equal Protection Clause of the Fourteenth Amendment.

⁸ R.B. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, in 39 *Notre Dame L. Rev.* 44, 46 (1963).

⁹ T. Roosevelt, *An Autobiography*, New York, 1913, 388-389.

¹⁰ *Ivi*, 389.

¹¹ W.H. Taft, *Our Chief Magistrate and His Powers*, New York, 1916, 139-140.

¹² Cfr. K.A. Watts, *Controlling Presidential Control*, in 114 *Mich. L. Rev.* 683 (2016).

¹³ E. Kagan, *Presidential Administration*, in 114 *Harv. L. Rev.* 2245, 2248 (2001).

In this area of legal ambiguity and concrete consolidation of Presidential powers – which can be explained considering the decisive shift from the “original” US Congressional Government to the “modern” Presidential one¹⁴ – courts have sometimes been called to intervene on the merits and have tried to cut this knot.¹⁵ The most famous judgment on the issue is the US Supreme Court case, *Youngstown Sheet & Tube Co. v Sawyer* case¹⁶ on «whether President Harry S. Truman had acted constitutionally when he issued Executive Order No 10340, which instructed the Secretary of Commerce to take possession of and operate a number of privately owned steel mills».¹⁷

Even if the five-Justice majority opinion (penned by Justice Hugo Black)¹⁸ affirmed that «the President’s power, if any, to issue [an Executive] order must stem either from an act of Congress or from the Constitution itself» (which the Court considered did not happen in that case), Justice Robert Jackson’s concurring opinion has assumed the pivotal role of a “controlling opinion” on the topic,¹⁹ delineating for the future «a three-part framework for analyzing the constitutional validity of unilateral executive actions».²⁰ Starting from the “strongest” (and constitutionally “safest”) level of Presidential authority, Jackson affirms that «when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate».²¹

On different level, «when the President acts in absence of either a congressional grant or denial of authority [...] there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain». In this area, law in action prevails on law in the books, «as any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law».²² Finally, the “safety” of Presidential powers is at its lowest «when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress

¹⁴ Cfr. G. D’Ignazio, *La forma di governo degli Stati Uniti d’America: dal Congressional Government al Presidential Government*, in S. Gambino (cur.), *Forme di Governo. Esperienze europee e Nord-Americana*, Milano, 2007, 235-289.

¹⁵ Cfr. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, in 135 *Harv. L. Rev.* 937 (2022) and D.M. Driesen, *Judicial Review of Executive Orders’ Rationality*, in 98 *Boston University Law Review* 1013 (2018).

¹⁶ 343 U.S. 579 (1952).

¹⁷ L. Manheim, K.A. Watts, *Reviewing Presidential Orders*, in 86(7) *University of Chicago Law Review* 1743, 1775 (2019).

¹⁸ Dealing with Executive Orders, Black wrote previously the Court’s infamous opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the internment of Japanese Americans during World War II through Roosevelt’s EO 9066 (February 19, 1942).

¹⁹ Even the current US Supreme Court affirmed in *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) that «in considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*».

²⁰ G. Goelzhauser, *Silent Concurrences*, in 31 *Const. Comment.* 351, 354 (2016).

²¹ U.S. Supreme Court, *Youngstown Sheet & Tube Co. v Sawyer*, cit., 635.

²² *Ivi*, 637.

over the matter»: ²³ this situation carries on the burden that «Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system». ²⁴

Justice Jackson's criteria have been recently judicially applied in the first part of Trump's Presidency by the Ninth Circuit Court of Appeals in the *San Francisco v. Trump*²⁵ on whether, in the absence of congressional authorization, the Executive Branch may withhold all federal grants from so-called "sanctuary" cities and counties through Executive Order 13768, "Enhancing Public Safety in the Interior of the United States".²⁶ The reference to Trump's Presidency is very important while analysing the possible judicial review of EOs, since «many Trump-era litigants have elected to challenge the legality of the President's orders, rather than (or along with) the legality of subsequent agency action». ²⁷

In *San Francisco v. Trump*, the Court was therefore very clear in saying that such an EO violated the constitutional principle of the separation of powers: in detail, «because Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants [...], the President's "power is at its lowest ebb" [...]. And when it comes to spending, the President has none of "his own constitutional powers" to "rely" upon». ²⁸ In this sense, it can still be said that «the *Youngstown* framework is relevant to assessing the allocation of constitutional powers between Congress and the President». ²⁹

3. Executive Orders under Biden's Administration (first part): revoking Trump's legacy

During the first two years of his Presidency (2021-2022), Biden issued some "milestone" EOs that defined in a very clear way the main goals of his political action and broke with many of the most contentious policies of his predecessor. Starting from the very first EO 13985 – a sort of political Manifesto of his Administration issued on the same day of the inauguration (January 20, 2021) – "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government", Biden showed his great commitment to racial and sexual minorities, revoking Trump's EO 13950, "Combating Race and Sex Stereotyping" (September 22, 2020) which, among other things, prohibited federal contractors and subcontractors from providing certain workplace diversity training and programs. The interest

²³ *Ibid.*

²⁴ *Ivi*, 638.

²⁵ 897 F.3d 1225 (9th Cir. 2018).

²⁶ On sanctuary cities, punitive federalism and conditionality, cfr. A. Baraggia, *La condizionalità come strumento di governi negli Stati composti. Una comparazione tra Stati Uniti, Canada e Unione europea*, Torino, 2023, 89 ff.

²⁷ L. Manheim, K.A. Watts, *Reviewing Presidential Orders*, cit., 1782, who also tell us that at least ten EOs issued by Trump in the first year of his Presidency were challenged before Courts (*ivi*, 1784).

²⁸ *Ivi*, 1233-1234.

²⁹ Congressional Research Service, *Executive Orders*, cit., 11.

in protecting sexual minorities arises also from two other EO: 14004 (January 25, 2021), “Enabling All Qualified Americans to Serve Their Country in Uniform” and 14075 (June 15, 2022), “Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals”.³⁰

Through the first, transgender people are (again) allowed to serve in the military. This EO revokes the *Presidential Memorandum* of August 25, 2017 (Military Service by Transgender Individuals) issued by President Trump, which barred transgender people from serving in the military: concretely, Trump revoked the policies of the previous Obama Administration, that permitted transgender individuals to serve openly in the military, authorizing the use of the Departments’ resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals.³¹

With the second one, the Federal Government aimed at taking action to address the significant disparities that LGBTQI+ youth faced in the foster care system, the misuse of State and local child welfare agencies to target LGBTQI+ youth and families, and the mental health needs of young people. Specific attention is dedicated to the practice of the so-called “conversion therapies”, which imply efforts to suppress or change an individual’s sexual orientation, gender identity, or gender expression. This EO also addressed the discrimination and barriers that LGBTQI+ individuals and families had to face, by expanding access to comprehensive health care, including reproductive health, aiming at protecting the rights of LGBTQI+ older adults and preventing and addressing homelessness and housing instability.³²

Another relevant area of Biden’s intervention through EO is that of health. In fact, on the Inauguration Day EO 13991 was adopted, establishing mandatory measures to tackle the spread of COVID-19 such as wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention. Once again, this EO overrules the policies of the previous Administration, which refused to adopt any restrictive measure and even questioned the deathly seriousness of the pandemic.³³

Some days later, Biden issued EO 14009 (January 28, 2021), “Strengthening Medicaid and the Affordable Care Act”, which repealed Trump’s EO 13765 (January 20, 2017, “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal”), and 13813 (October 12, 2017, “Promoting Healthcare Choice and Competition Across the United States”). Especially important was the revocation of EO 13765 – the very first EO of Trump’s Presidency – which aimed (waiting for

³⁰ For a more detailed account of the Biden’s policies directed towards the protection of sexual minorities see the contribution of D. Zecca in this issue of the journal.

³¹ Cfr. M. Goodwin, E. Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, in 114 *Nw. U. L. Rev.* 751 (2019).

³² A.S. Leonard, *The Biden Administration’s first hundred days: an LGBTQ perspective*, in *University of Illinois Law Review Online* 127 (2021).

³³ On the US response to the pandemic (between Federation and States), F. Clementi, *Gli Stati Uniti e la risposta al Covid-19, tra Federazione e Stati, nell’anno delle elezioni presidenziali*, in *DPCE online*, 2, 2020, 1875-1895.

a legislative repeal that never happened)³⁴ at dismantling the greatest heritage of Obama's Administration (the Affordable care Act), taking «all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepar[ing] to afford the States more flexibility and control to create a more free and open healthcare market». On April 5, 2022 another EO was adopted by Biden (14070 "Continuing To Strengthen Americans' Access to Affordable, Quality Health Coverage"), following the footsteps of EO 14009 and the adoption of the American Rescue Plan Act (March 11, 2021).

More specifically, health – concretely, women reproductive healthcare – has been very present in the agenda of the Biden Administration especially after the Supreme Court, through the *Dobbs v. Jackson Women's Health Organization* judgment (June 24, 2022),³⁵ controversially decided that the precedents of *Roe v. Wade* and *Planned Parenthood v. Casey* had to be overruled, devolving the regulation of abortion to the States. As a first reaction, EO 14076 (July 8, 2022), "Protecting Access to Reproductive Healthcare Services" and EO 14079 (August 3, 2022), "Securing Access to Reproductive and Other Healthcare Services" were adopted.

In EO 14076 Biden directed the Secretary of Health and Human Services and the Director of the Gender Policy Council to establish an Interagency Task Force on Reproductive Healthcare Access to coordinate these efforts across the Administration, whereas EO 14079 aims at supporting women's access to reproductive healthcare services, including their ability to travel to seek abortion care in States where it is legal, directing also the Administration to take further action to protect access to reproductive healthcare services and to address the crisis facing women's health and public health more broadly.

Finally, on an institutional level we cannot forget the adoption of EO 14023 (April 9, 2021), "Establishment of the Presidential Commission on the Supreme Court of the United States". This EO looked like a sort of political reaction to the quick confirmation, on October 26, 2020 – just a few days before the Presidential election – by the (Republican-controlled) Senate of Supreme Court nominee Amy Coney Barrett, proposed by President Trump to replace the liberal Justice Ruth Bader-Ginsburg. The EO directed the Commission to provide an account of the current debate over the «role and operation of the Supreme Court in our constitutional system» and an «analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals». On December 8th, 2021 the

³⁴ The final vote took place on July 28, 2017 in the Senate and is famously remembered for the decisive "thumbs-down vote" casted by Arizona Republican Senator John McCain, together with fellow Republican "moderate" Senators from Alaska (Lisa Murkowski) and Maine (Susan Collins). The final count was 49 votes in favour of repealing the whole ACA and 51 against. Had McCain voted in favour, ACA would have been repealed thanks to Vice-President Pence (President of the Senate *ex officio*) tie-breaking vote.

³⁵ 597 U.S. 215 (2022).

Commission issued the Final Report: no reforms resulted from the Commission's proposals.³⁶

4. Executive Orders under Biden's Administration (second part): trying to implement a new agenda

In the second half of Biden's presidency (2023-2024), several key areas of political intervention through Executive Orders can be identified, including gun violence and Artificial Intelligence. The recent Executive Order 14127 (issued on September 26, 2024, the most recent EO adopted by Biden to date) represents a significant step in his commitment to reduce gun violence and save lives. In 2023, another EO was issued (EO 14092 on March 14, 2023, titled "Reducing Gun Violence and Making Our Communities Safer"), which followed the passage of the Bipartisan Safer Communities Act, a collaborative effort between Democrats and Republicans that introduced various modifications to federal firearms laws. These changes include expanding background check requirements, broadening the scope of existing restrictions, and creating new criminal offences. EO 14127 focuses on enhancing coordination to address two critical challenges: combating emerging firearms threats and improving school-based active shooter drills.

It is also well known that firearm regulations have been frequently discussed – through the text and meaning of the Second Amendment – on various occasions in front of the current Supreme Court (Roberts Court), starting from *District of Columbia v. Heller*³⁷ and *McDonald v. City of Chicago* (2010), passing through *Caetano v. Massachusetts* (2016) and *New York State Rifle & Pistol Association v. Bruen* (2022)³⁸ and arriving to *Garland v. Cargill*³⁹ and *United States v. Rahimi* (2024).⁴⁰ On October 8, 2024, the Supreme Court heard *Garland v. VanDerStok*, on whether «a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive» is a "firearm" regulated by the Gun Control Act of 1968».

Another area which has been deeply explored by Biden's EO is that of Artificial Intelligence (AI). EO 14110 of October 30, 2023 (36 pages long!)

³⁶ On the reform proposals of the Commission, A. Baraggia, *Reshaping the US Judiciary in times of polarization: Biden's Judicial nominations and Supreme Court reform*, in *DPCE online*, Special issue, *The American Presidency After Two Years of President Biden*, 2023, 97-107.

³⁷ 554 U.S. 570 (2008). The Court established that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

³⁸ 597 U.S. 1 (2022), which affirmed that New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

³⁹ 602 U.S. 406 (2024), which established that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) exceeded its statutory authority by issuing a Rule that classifies a bump stock as a "machinegun" for the purposes of federal gun control laws.

⁴⁰ 602 U.S. 680 (2024), which held that when an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.

aims at establishing new standards for AI safety and security, protecting Americans' privacy, advancing equity and civil rights, standing up for consumers and workers, promoting innovation and competition, advancing American leadership around the world.⁴¹

In a broader perspective dealing with security, this EO was followed by EO 14117 (February 28, 2024), "Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern", «to restrict access by countries of concern to Americans' bulk sensitive personal data and United States Government-related data when such access would pose an unacceptable risk to the national security of the United States».

Dealing with equality and racial justice, to strengthen the Federal Government's ability to address all those obstacles that underserved communities still face, Biden signed EO 14091 (February 16, 2023), "Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government". This EO reaffirms the Administration's very first commitment of EO 13985, «extending and strengthening equity-advancing requirements for agencies, and it positions agencies to deliver better outcomes for the American people». In this perspective, the EO: establishes that different Departments shall have Agency Equity Teams within their respective agencies to coordinate the implementation of equity initiatives and ensure that their respective agencies are delivering equitable outcomes for the American people; creates a White House Steering Committee on Equity (Steering Committee); asks Agencies to use their respective civil rights authorities and offices to prevent and address discrimination and advance equity for all, including to increase the effects of civil rights enforcement and to increase public awareness of civil rights principles, consistent with applicable law.

Finally, the topic of healthcare comes back again. Through EO 14101 (June 23, 2023), "Strengthening Access to Affordable, High-Quality Contraception and Family Planning Services", the President directs his Administration to build on this progress and further strengthen and bolster access to affordable, high-quality contraception, therefore insisting on the policy of supporting access to reproductive healthcare services and protecting reproductive rights. More concretely, this EO looks at improving access and affordability under ACA and supporting access through Medicaid and Medicare (both adopted by President Johnson in 1965 to provide health insurance for people with limited income and resources).

This EO can also be linked to the broader Executive Order 14120 of March 18, 2024 "Advancing Women's Health Research and Innovation", «to advance women's health research, close health disparities, and ensure that the gains we make in research laboratories are translated into real-world clinical benefits for women», as well as «to ensure that women have access

⁴¹ This EO has been specifically commented by C. Sbailò, *Executive Order 14110. Security Implications of Responsible AI Innovation* (see note 1); see also Congressional Research Service, *Highlights of the 2023 Executive Order on Artificial Intelligence for Congress*, <https://crsreports.congress.gov>, R47843, April 3, 2024. On the US approach on Artificial Intelligence and its relationship with the European regulation, S. Akram Ibrahim El Sabi, *IA e Data Protection nei dispositivi elettronici: riconoscimento delle emozioni e prospettive di tutela per i soggetti vulnerabili*, in *DPCE online*, 2, 2024, 1059 ff.

to high-quality, evidence-based health care and to improve health outcomes for women across their lifespans and throughout the country».

5. Conclusions

The analysis of EOs give us back an interesting picture of the main areas of intervention of the Presidential policies, dealing mainly with rights protection and the challenges posed by new phenomena like AI and climate change.

However, EOs are not only powerful but neutral instruments: we should not underestimate that EOs, for their nature, circumvent the traditional parliamentary procedure, empowering the role of the executive and the administrative agencies. In other words, the use of EOs may be the expression of presidential unilateralism, and they may foster the phenomenon of executive aggrandizement,⁴² exacerbating conflicts and polarization.

One of the most pressing issues in this regard revolves around the role of executive orders in time of polarization.

It is well known that in the last decade the US have been experiencing a period of enormous polarization: this situation of instability has progressively degenerated into something more than a time-limited crisis, becoming what Jack Balkin defined as a “constitutional rot”, that is «a degradation of constitutional norms that may operate over long periods of time».⁴³ The use of EOs further fuels such polarization since many of the legislative choices are today taken under a Presidential EO - being perceived as “*extreme*” by the opposition – and not as the outcome of a deliberative and participatory exercise.

Despite their controversial nature, EOs are perceived as effective tools for Presidential policymaking, and they will probably continue to perform a pivotal role in the months to come, marked by the transition from Biden to Trump’s administration.

If it is true that «Executive orders have developed into one of the most expedient tools available to a new President to change federal policies, priorities, and operations, including during that closely watched early window»,⁴⁴ this will certainly be the case in the near future, at the beginning of a new course of US constitutional democracy.

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⁴² T. Khaitan, *Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism*, in 17(1) *Int.’l J. Const. L.* 342 (2019).

⁴³ J.M. Balkin, *Constitutional Crisis and Constitutional Rot*, in 77 *Md. L. Rev.* 147, 151 (2017).

⁴⁴ Congressional Research Service (CRS), *Executive Orders and Presidential Transitions*, 2 (2024).