

## As Trump ups the ante, executive powers should worry Australians too

Written by Anna Boucher, Senior Lecturer in Public Policy and Political Science, University of Sydney

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The executive government in Australia has more power than most people realise, especially when it comes to immigration. [Cody Austin/flickr](#) , [CC BY-NC-ND](#)

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*. The project aims to stimulate fresh thinking about the many challenges facing democracies in the 21st century.*

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The US president's executive powers are a crucial way to fast-track immigration policies without congressional approval. But with Donald Trump's [executive orders](#) barring entry to people from selected countries, these powers are taking on a new flavour.

While we like to think we live in a democracy with a strong separation of powers, in both Australia and the US the executive government has more power than most people realise – especially when it comes to immigration.

In some respects, executive powers are greater in Australia than in the US. In Australia, executive orders relating to immigration are not subject to the same checks and balances as they would be in the US. There are a few reasons for this.

### Differences in transparency

In the US, all executive orders must be published in the [federal register](#) , the official journal of the federal government. This at least makes them visible to Congress and to the general public.

In Australia, there is no such obligation. A good [example of this](#) is the immigration minister's 2013 order authorising “turn-back” operations against vessels carrying asylum seekers as part of Operation Sovereign Borders.

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### Australia lacks a bill of rights

A second major difference is that Australia does not have a bill of rights, unlike the US. The US Bill of Rights is constitutionally entrenched as the first ten amendments to the US Constitution.

The success in striking down Trump's recent executive orders relied upon two main provisions: the [Fifth Amendment Due Process Clause](#), which requires a fair trial and prohibits the government indefinitely detaining people, and the [First Amendment Establishment Clause](#), which has been interpreted as prohibiting discrimination based on religion.

Australia's lack of such protections (constitutional or otherwise) stymies similar legal actions. Still, the Australian government can't do whatever it wants with immigration. In the absence of legislative authorisation, actions of the executive will only be authorised to the extent they fall under the executive power set out in [Section 61](#) of the Australian Constitution.

However, the precise scope of this power remains a matter of contention. Judges have generally been highly deferential in terms of what immigration measures they uphold.

[The Tampa affair](#) in 2001 provides a good example. The MV Tampa, a Norwegian freighter, rescued 433 asylum seekers from a vessel in distress in international waters north of Australia.

When the captain attempted to bring them to Australia, the prime minister, John Howard, ordered special forces to storm the vessel. The asylum seekers were detained at sea for several weeks and later sent to Nauru and New Zealand.

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While there was no legislative basis for this decision, the full bench of the Federal Court [upheld](#) the action. The decision was based on a broad interpretation of executive powers in the constitution. The High Court has avoided a clear judgment on this issue in [subsequent decisions](#).

### Trump tests limits of executive power

In contrast, consider the fate of a series of [executive orders](#) issued by President Trump. The most controversial include a 90-day travel ban on people from Iraq, Iran, Syria, Libya, Yemen, Somalia and Sudan, and a 120-day suspension of the refugee resettlement program.

The [original order](#), issued just seven days after Trump's inauguration, caused panic and chaos at airports all over the world.

Both measures were claimed to be necessary for the purpose of designing ["extreme vetting"](#) procedures to identify and exclude Islamic extremists. No evidence was provided to show how countries were selected, or why existing procedures were inadequate. Nor were the relevant government departments and agencies consulted in advance.

After just one week, the order was [suspended](#). A federal judge in Washington state issued a temporary nationwide restraining order.

The decision was based on two constitutional concerns. The first related to due process considerations arising from barring entry to US visa holders without providing them with notice or a hearing. The second was rooted in the prohibition of discrimination based on religion.

While the executive order did not specifically say it targeted Muslims, the court put two and two together, and found the measures discriminatory. The countries subject to the ban were all principally Muslim, and during his campaign Trump had [promised](#) a "total and complete shutdown of Muslims entering the United States".

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The Trump administration responded by issuing a [new executive order](#). This order provided more information justifying why nationals from the selected countries presented a heightened security risk.

The number of target countries was also reduced to six, with Iraq being removed, and permanent US residents were exempt. It was the inclusion of US residents in the original ban that had raised the most serious concerns about due process.

Despite these concessions, the courts also suspended the updated executive order. Appeals are [pending](#). The outcome will depend on how the courts apply the long-standing “[plenary power](#)” doctrine that gives the political branches a broad and largely exclusive authority over immigration.

In the past, the courts have used this doctrine to uphold discriminatory immigration laws, which would have been unconstitutional in other contexts. This applies particularly to laws targeting immigrants who are outside the US. However, recent decisions indicate that the scope of the [plenary power may be narrowing](#).

Trump’s other executive orders on immigration have largely flown under the radar. [The Executive Order on Border Security](#) authorises construction of a wall on the Mexican border and [expands](#) the use of mandatory immigration detention.

[The Executive Order on Interior Enforcement](#) punishes “[sanctuary cities](#)”, or municipalities that are unco-operative with federal authorities in enforcing immigration laws. It also extends the list of non-citizens prioritised for deportation.

## Other than court action, what protections are there?

In Australia, protections are provided first and foremost through parliamentary representation, an approach informed by Australia’s British constitutional history.

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The government of the day sits in parliament with the assumption that an executive that fails to act in the interests of the public can be thrown out of office at the next general election. The Senate, which is not always dominated by the government of the day, can offer oversight as well.

Unfortunately, these protections don't always work. New arrivals can't vote. Even if they become citizens, refugees remain a minority and have little influence over election results. It's also naive to assume that all waves of migrants operate as a cohesive voting bloc.

The immigration executive can also avoid Senate oversight. Operation Sovereign Borders again provides an instructive example. In 2013, citing national security concerns, the minister refused the Senate's request for information.

Furthermore, as a result of the way that [refugee politics](#) has unfolded in Australia, there is bipartisan support for draconian policies. The executive is unco-operative and the Senate does not always punish non-compliance.

For instance, when the minister refused to provide information about Operation Sovereign Borders, a [Senate committee](#) recommended "political" and "procedural" penalties. None of these were carried out.

The parliament is also often willing to retrospectively authorise immigration-related actions once judicial proceedings have begun. This happened during the recent [High Court challenge](#) to the executive's power to have asylum seekers detained on Nauru.

Once court proceedings were initiated, [legislation](#) was swiftly introduced with bipartisan support to retrospectively authorise the government's action. A similar approach was taken to [validate actions during the Tampa affair](#).

So, as the world reacts with shock each time Trump issues another far-reaching executive order, it is worth remembering that the use of executive power in Australia is, in many ways,

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more expansive and unchecked than in the US. This is not limited to immigration. Australian courts have been willing to take an expansive view of executive power in a [whole host of policy areas](#)

Both the Australian and the US public need to remain vigilant. Tolerance of the executive's attack on the rights of non-citizens threatens to pave the way for similar action against citizens.

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