# General Regulatory Review and Coordination

# Learning Objectives

## Learn the power and limits of executive orders.

## Learn the basic structure of regulatory review through executive orders.

## Learn the basic statutory structure for general regulatory review.

# Reading Assignment

## The reminder of Chapter 2.

# Issues to be addressed

## Background

### The same review structures have specific application to rulemaking, which we will review later in the course.

### We are not going into great detail because the executive review does not have significant practice implications. While OIRA is making more information available, executive review is not reviewable in court nor subject to APA challenge.

### This is meant to be a quick review to familiarize you with the process.

## Executive Orders

### Orders from the President to agency heads

### Sets policy on discretionary decisions

### Not defined by the Constitution or legislation

## Types of Executive Orders

### Domestic Policy Orders

#### http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders

### National Security Orders

#### http://www.fas.org/irp/offdocs/direct.htm

## Limits on Executive Orders

### Cannot change budgetary allocations

### Cannot change statutory duties, only the interpretation of statutes.

#### The Gag Rule controversy (Rust v. Sullivan, 500 U.S. 173 (1991)

#### As Republican and Democratic administrations alternate, the new president issues an executive order to change the interpretation of the Family Planning Act’s application to Planned Parenthood and other agencies that counsel about abortions.

#### The Court ruled that both interpretations were possible, so that there was no constitutional violation in changing them by executive order.

### Cannot abrogate due process

#### No directing the result of an adjudication

### Cannot legislate

#### President cannot make binding regulations by Executive Order

#### The President can order an agency to make rules, following the usual agency procedures.

### Cannot use them to change policy for Independent Agencies, unless the agency wants to voluntarily follow the order.

## OMB/Executive Order Review

### Executive branch review done through executive orders

### The purpose is to “reform and make more efficient the regulatory process"

### We are going to look at this in more detail in Chapter 5, since the big debates over cost benefit analysis are in rulemaking.

## “Principles of Regulation”

### These principles require agencies to consider many factors when devising a regulation, including the costs and benefits of the regulation; alternatives to the regulation; and the impact of the regulation on state, local, and tribal governments and officials.

#### Each agency designates a “Regulatory Policy Officer” (“RPO”).

#### The RPO reports to the head of the agency and must be involved “at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles [for regulation].”

## Regulatory Agenda

### The regulatory agenda is “an inventory of all regulations under development or review” by that agency.

### The “regulatory plan” identifies “the most important significant regulatory actions” that the agency plans to take in the next year or so.

### The regulatory agenda (with its regulatory plan) goes to the Office of Information and Regulatory Affairs (OIRA)

#### OIRA circulates it to other agencies and conducts its own review for conflicts

#### OIRA also has meetings with the agency and Vice President to coordinate agency action

## OIRA Review of Significant Regulatory Actions

### Significant regulatory actions are proposed regulations:

#### (1) that have a major effect on the economy; the environment; public health; state, local, or tribal governments; communities; or existing federal programs;

#### (2) that conflict with other agency actions; or

#### (3) that raise novel legal issues or policy issues.

### OIRA considers whether the planned regulation:

#### complies with the applicable law, the President’s priorities, and the principles for regulation.

#### conflicts with the actions or planned actions of any other agency.

### OIRA sends the written results of this review back to the agency and involves the president if it cannot resolve problems

## OIRA and Independent Agencies

### OIRA reporting requirements, which can be waived

### OIRA can make recommendations

### If the agency rejects the recommendations, the president or vice-president are not involved

### What is the problem with OIRA review of independent agencies?

## Information (Data) Quality Act

### The Act requires OMB to issue guidelines to agencies ‘‘for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies.’’

### Agencies, including independent agencies, must implement these guidelines

#### Includes provision for individuals to challenge and correct information about themselves

#### Since this is statutory, not an EO, it is Congress modifying the status of independent agencies and poses no constitutional problem.

## Judicial Review of Executive Review

### E.O. 12866 states that it “does not create any right or benefit . . . enforceable at law or equity” against the government or its officials.

### This prevents direct judicial review of alleged violations of E.O. 12866

#### This also means that citizens cannot challenge OIRA/OMB review or failure to review.

#### There can be review of actions by OIRA if these otherwise raise constitutional or administrative law issues.

## Line Item Veto - Clinton v. City of New York, 524 U.S. 417 (1998)

### What is a line item veto?

### Why was a line item veto unnecessary in the founders vision of the operation of federal budget?

#### How have things changed, i.e., are spending bills still simple documents concerning only one topic?

### Why do presidents want a line item veto?

#### What does Jindal do with his?

#### How might a line item veto cause a president problems?

### What separation of powers issues does the line item veto raise?

### How did the court rule in this case?

# Evaluation Questions

## Executive Orders

### What is an executive order?

### What are the limits on an executive order, i.e., what can the president do by executive order without legislation by Congress?

### In simple terms, what does executive order: E.O. 12866 address?

### What are OIRA and OMB and what do they do?

### How is presidential control of independent agencies different from control over cabinet level agencies? (Remember OIRA and OMB review.)

## What is a line-item veto?

### Why was a line-item veto unnecessary in the founders’ vision of the operation of federal budget?

### Why do modern budget bills make this vision obsolete?

### What separation of powers issues does a line item veto raise?

### Did the Court allow a line item veto in *Clinton v. City of New York*, 524 U.S. 417 (1998)?