# Limits on Congressional Control of Agencies

## Learning Objectives – Limits on Congressional Control of Agencies

### Learn how to determine how Congress can control an agency.

### Learn to distinguish proper Congressional oversight from unconstitutional control of an executive branch.

### Learn about the Great Compromise and how is it embodied in the legislative process.

### Learn when the House and Senate can act without presentment to the president.

### Learn what an earmark is and how they fit into the legislative process.

## Reading

Chapter Two Section III, A. Congress.

## Congressional Power over agencies

### Congress creates and finds the executive branch

#### Without specific appropriations, there would be no White House and the president would have to rent space from his own pocket

### Congress delegates its power to agencies

#### The office of the president has its own powers for national security and international relations.

#### This powers still depend on congressional funding for implementation.

### The Appointments Clause - Art II, sec. 2, cl 2 - prevents Congress from making appointments to executive branch agencies.

#### "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... all other [principal] Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law:

#### but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

### Congress can impose requirements on executive branch appointments

#### Limitations on who can be appointed, such as requiring political balance on the FEC

#### Limitations on removal, which creates independent agencies (discussed in another module)

## Civil Service

### Congress developed the Civil Service to protect workers from losing their jobs every time the administration changed

### Most executive branch personnel are civil service and can only be fired for cause with due process (discussed later)

### Pros and Cons of the Civil Service

#### Why is civil service important to you if you want to be a government lawyer?

#### What about jobs without lucrative outside parallels to allow a revolving door?

##### Public Health Directors

##### Lawyers in specialized areas without private practice, like public health.

#### What are the problems with the system if you are managing a department?

#### How high should it go?

## Buckley v. Valeo, 424 U.S. 1 (1976)

### The Role of the FEC

#### What does the FEC do?

#### Why would congress want to have its own people on the agency board?

### Original process for selecting members of the Federal Election Commission (FEC)

#### Two members appointed by the President pro tempore of the Senate,

#### two by the Speaker of the House, and

#### two by the President (all subject to confirmation by both Houses of Congress), and

#### the Secretary of the Senate and the Clerk of the House as ex officio nonvoting members

### Does FEC do something that requires that it be in the executive branch, and thus under the Appointments Clause?

#### (This is the defining action for an executive branch agency)

### Does the original selection process violate the Appointments Clause?

## The Congressional Budget Office (CBO)

### The “primary function” of the CBO is to give the House and Senate Committees on the Budget information that “will assist such committees in the discharge of all matters within their jurisdiction.” The CBO also has additional duties, all of which relate to giving Congress information on budget matters.

### The Director is appointed for a four-year term by the Speaker of the House of Representatives and the President pro tempore of the Senate.

### Does this appointment scheme violate the Appointments Clause?

## Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. 501 U.S. 252 (1991) (“MWAA”)

### The federal statute authorized the airport to be run by a state Airport Authority

### Major decisions of the Airport Authority were subject to the veto of a “Board of Review composed exclusively of Members of Congress.

### What is the Appointments Clause issue?

## Incompatibility or Ineligibility Clauses

### Prohibit any Member of Congress, while serving in Congress, from being appointed ‘‘to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been [i]ncreased during such time,’’ and they provide that ‘‘no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.’’ U.S. Const. art. I, §6, cl. 2.

### Can you think of a common violation in the form a congressperson holding an office in an branch executive agency?

## The Library of Congress

### The Librarian is appointed by the President.

### Its operation is overseen, by the Joint Committee of Congress on the Library.

### The Joint Committee consists of the chairman and four members of the Committee on Rules and Administration of the Senate and the chairman and four members of the Committee on House Oversight of the House of Representatives.

## Does the Library Oversight Violate the Constitution?

### Is congressional oversight a violation of separation of powers?

#### What do we need to know about this oversight to answer the question?

### Does it need to be an executive agency at all, i.e., could congress run The Library of Congress and appoint the director?

#### What do we need to know about the library to decide?

#### Is there a part of the Library does make rules and get involved in enforcement?

## Legislative Veto

### Background information

#### What is the source of congressional power over aliens?

##### Congress' Art. I power "To establish an uniform Rule of Naturalization," combined with the Necessary and Proper Clause, grants it unreviewable authority over the regulation of aliens.

##### Does Congress treat all persons who come to the US the same?

###### For example, are Haitians subject to the same immigration rules are Cubans?

##### Based on the Constitutional grant of authority, why isn’t this an equal protection problem?

#### Basic Rights of Aliens

##### Aliens in the US, even illegals, get constitutional protections in criminal law proceedings.

##### Illegal aliens have limited rights to a hearing before an administrative judge on detention and deportation issues.

#### Agency Changes since this case

##### The INS is now ICE - http://www.ice.gov/

###### What is the significance of the shift?

### Legislative Veto

#### What is the role of the House of Representatives in the law challenged by Chadha?

#### If they had not acted, would Chadha have been able to stay in the country?

#### Did they specifically vote against Chadha, i.e., did they make any factual determination to refute what the ALJ had found in the individual deportation cases?

### At the Supreme Court

#### Standing question – remember the Defense of Marriage standing question when the DOJ would not defend?

##### Why did the court invite Congress to submit briefs?

##### Why would Congress have standing?

#### Analyzing a long used procedure

##### What did the Court tell us about the tradition of using the legislative veto?

###### Does history make the legislative veto constitutional?

###### Does it matter if the procedure is useful?

#### The constitutional requirements for passing a law

##### Bicameralism

###### What was the Great Compromise?

Why was it critical to the ratification of the constitution?

###### How is the senate different from the house?

How were senators originally chosen?

Senate rules are not from the constitution, they are a latter add-on by the Senate

###### Why was bicameralism key to making the Great Compromise work?

###### How does the Great Compromise still affect the functioning of congress?

##### Checks and Balances

###### How does bicameralism it fit into the checks and balances of the US Constitution?

###### How has the evolution of the Senate's rules changed from the intent behind the compromise?

Did the founders contemplate modern political parties?

###### How does the House legislative veto violate bicameralism?

##### Presentment Clause

###### What is the president’s role once legislation has passed the house and senate?

###### What if he does not sign it?

The Constitution grants the President 10 days to review a measure passed by the Congress. If the President has not signed the bill after 10 days, it becomes law without his signature.

Pocket veto - However, if Congress adjourns during the 10-day period, the bill does not become law.

##### Presidential Veto

###### Why does the constitution give the president a veto?

###### What can Congress do if the president vetoes a bill?

###### How have bills changed since the founding that makes it very difficult to veto a bill?

### When may the House of Representatives Act Unilaterally?

#### (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;

#### (b) The House elects the president if no candidate gets a majority in the Electoral College.

### When may the Senate Act Unilaterally?

#### (a) conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;

#### (b) elects the vice-president if no one receives a majority of votes in the Electoral College.

#### (c) final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;

#### (d) unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

### What is the Only Congressional Joint Resolution with Legal Effect?

#### Congress declares war by joint resolution

#### Does the Constitution provide a specific mechanism to end wars?

##### Why?

### What is the significance of these narrow exceptions?

#### Why did the court find the legislative veto a major constitutional issue?

#### What did the court rule?

#### Has this crippled government function?

#### Does it strengthen agency powers?

### Report and Wait Law - 5 U.S.C. §§801-808

#### New rules must be reported to Congress.

#### The rule is put on hold for 60 days.

#### Congress can pass a joint resolution blocking the rule, which must be signed by the president or, if he refuses, Congress must overrule his veto.

#### Is this constitutional?

##### Why or why not?

### In the States

#### Some state legislatures have asserted the right of legislative veto.

#### This will be allowable based on the state constitutions, not the US Constitution.

#### In general, state constitutions, as construed by state courts, allow more direct legislative control over agencies than does the US Constitution.

## Congressional Removal of Executive and Judicial Branch Officers

### Impeachment

#### Brought by the house

#### Senate as jury

#### Only for “Treason, Bribery, or other high Crimes and Misdemeanors.”

### Why is this of limited effectiveness for agency oversight?

### Why is this a problem for dealing with bad judges?

#### Thomas Porteous is the eighth federal judge to be convicted and removed from office by the Senate

## Formal Legislative Review and Oversight of Executive Branch Agencies

### (1) an appropriations committee, which oversees how the agency spends its budget;

### (2) a “substantive” committee, which oversees the substance of the agency’s work; and

### (3) “government operations” committee, which is concerned with the agency’s efficiency and its coordination with other parts of the government.

### One of each of these three types of committees will exist in both the Senate and the House.

### Why did they all miss the financial agency failures?

## Informal Legislative Review and Oversight

### Members of Congress ask agencies about some grievance of their own or their constituents.

#### This includes all types of contacts (telephone calls, e-mails, and so on) between individual Members of Congress, or the Member’s staffs, or a committee’s staff, and agency officials.

#### Many of these informal contacts relate to discrete agency actions affecting specific constituents.

### Do you think Congressmen get better service?

### Is this fundamentally undemocratic?

### How do lobbyists take advantage of this system?

### We will discuss Charlie Wilson's War in class as an example of the power of formal and informal oversight

## What is an Earmark?

### Congress enacts a statute that appropriates a lump sum of $10 million for the Indian Health Service (“IHS”)

### The appropriations statute is accompanied by a report from the appropriations committee saying that IHS should use part of the $10 million to continue operating an existing medical clinic.

#### Is this consistent with the founders intent?

#### Who did they intend to direct the spending of government money?

### The appropriations bill itself, however, does not refer to the funding for the clinic.

### The organic statute (establishing the Indian Health Service) broadly authorizes IHS to spend its appropriation “for the benefit, care, and assistance of the Indians.”

## Enforcing Earmarks

### What if the agency ignores the report and closes the health center?

### Can this be challenged in court?

# Evaluation Questions

## (Later modules will refer back to some of this information.)

## What is the congressional power over agencies, i.e., how are agencies formed, where do they get their legal powers, and how are they financed?

## What is the key factor that determines whether an agency must be in the executive branch?

### What is an example of an agency that is controlled by Congress?

### What powers can a Congressional agency exercise?

## The Structure of Congress

### What was the Great Compromise between the large and small states that lead to the organization of the Congress?

### How was this compromise intended to affect the politics of the two bodies?

#### How were Senate members initially chosen?

#### How did changing to direct election of Senators change the interests Senators represent?

### What are bicameralism and presentment?

### Why is bicameralism critical to the Great Compromise?

### What are the president's options on vetoing legislation and how may congress override a veto?

### What are the exclusive powers of the House of Representatives?

### What are the exclusive powers of the Senate?

### What is the only joint power?

## Earmarks

### What is an earmark?

### How does an earmark different from an approbation bill?

### Can an earmark be enforced in court if the agency does not follow it?

#### Why not?

#### Who legally directs the spending of an earmark?