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Presidential Control Over the Regulatory Affairs of Federal Administrative Agencies

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Abstract

This paper outlines the historical the exertion of presidential control over the regulatory affairs of federal agencies. It first examines the historical understanding of the constitutionality of exerting such control. Then, it describes the two main methods that modern Presidents use to exercise such control: presidential directives (including memoranda and executive orders) and presidential regulatory approval regimes. Finally, it discusses how this has manifested itself during the early days of the Obama administration, exploring the regulatory effects of President Obama’s executive order that directed agencies to expand funding programs for research using embryonic stem cells.
I. INTRODUCTION

This paper analyzes the effect of a new presidential administration on the regulatory activities of federal administrative agencies. It provides a broad historical and practical overview of presidential authority over administrative agencies and their regulatory activities, including a discussion of conflicting theories on the constitutionality of the President assuming absolute control over this process without express statutory permission to do so. Then, it examines how presidential control over federal agencies’ regulatory activities has occurred during the early months of the Obama administration. Specifically, it analyzes an executive order issued within the first two months of Obama’s presidency, related to stem cell funding, which represents a fundamental policy shift from the previous administration, and its practical effects on the federal agency that is responsible for regulating in this area.

II. PRESIDENTIAL AUTHORITY OVER ADMINISTRATIVE AGENCIES AND THEIR REGULATORY ACTIVITIES

All federal administrative agencies are considered to be part of the executive branch of the federal government. The President, as the head of the executive branch, can lawfully exert a fair amount of control over these agencies. However, the Constitution authorizes Congress to limit this control to some degree. This section outlines the various ways that a President can exert control over administrative agencies and their regulatory activities.

a. Structural Designation of Agencies and Related Presidential Powers

Federal administrative agencies generally fall under one of two structural types. Some agencies, such as the Department of Health and Human Services, are Cabinet-level departments, headed by a Secretary who is a member of the President’s cabinet. These are known as “executive branch agencies.” Other agencies, however, are independent regulatory commissions,
such as the Securities and Exchange Commission. These have a greater degree of independence from the President, and are generally headed by a multi-member commission, which is often required to have a mixture of members from each political party (Fox, 2000).

An agency’s designation (either executive branch or independent regulatory commission) is determined by Congress and indicated in the statute that originally creates a new agency or reorganizes an existing agency. Decisions regarding agency designations often involve political considerations and do not adhere to strict guidelines. In other words, just because an agency regulates in a certain area does not mean it will automatically have one designation or the other (Fox, 2000).

According to the U.S. Constitution, the President, as the head of the executive branch, may appoint, “with the Advice and Consent of the Senate,…public Ministers and Consuls, … and all other Officers of the United States[.]” The Constitution specifies that the Senate may vest this appointment power in the President alone for “inferior Officers[.]”

When it comes to appointing the leadership of federal administrative agencies, however, the President’s appointment power varies by agency type. The Constitution clearly empowers the President to appoint people of his choice to head Cabinet-level departments, since these people will serve as members of the Presidential Cabinet. However, this does not mean that the President has all the say, and Congress has none, in these appointments. The President’s appointments of Cabinet officials are subject to the advice and consent of the Senate. In addition, since the Constitution clearly vests in Congress the ultimate power to create agencies in the first place, some Congressional limits on who may be appointed to head these agencies have historically been viewed as acceptable. For example, the Judiciary Act of 1789 required the
Attorney General, head of the Department of Justice, to be “learned in the law,” although this is no longer an express requirement for this officer.

Congress has historically placed even stronger limits on the President’s power to appoint the leaders of independent commissions. One type of limit is restrictions on party membership of appointees. For example, Congress can require that some of the commissioners on a multi-member panel not be members of the President’s political party. Congress can also stagger commissioners’ terms, ensuring not only that a President cannot stack a commission, but also that a President is not stuck with an entire panel of commissioners appointed by a previous President with no opportunity to change them out (Fox, 2000).

While the Constitution is fairly clear on the President’s appointment powers, there is less constitutional clarity on how much control the President may exert over the agencies’ day-to-day operations, including its administrative rulemaking activities (Strauss, 2007).

A federal administrative agency is authorized to promulgate regulations through the passage of federal statutes, which are also known as enabling acts. The creation of a federal statute requires bicameral passage (an identical form of the bill must be passed in both the House of Representatives and the Senate) and presentment to the President. If the President signs the bill, then it becomes federal law. Through this process, the President maintains some control over what the agencies are permitted to do, because the President can veto the bill if he or she disagrees with the amount or type of authority it grants the agency. However, according to the 1998 case of *Clinton v. City of New York*, the President is only constitutionally permitted to veto an entire bill, and may not veto (or “cancel”) only individual parts of it, or “line items,” with which he or she disagrees.
Therefore, a presidential veto, used in this way, can only ensure that the agency is not granted the power to regulate. However, when this happens, nothing gets done, which may also conflict with the President’s desired objectives. What if the President wants the agency to regulate in a certain area and, at the same time, wants to ensure that he or she has an authoritative say in the content and scope of the regulations? Can the President, as head of the executive branch, direct a federal agency to only promulgate those regulations that he or she wants to be promulgated?

b. Legal Views on the President’s Control Over Federal Agencies’ Regulatory Activities

The United States Constitution does not expressly grant the President the power to dictate the exact content of the regulations promulgated by federal agencies. Instead, the closest the Constitution comes to authorizing any presidential action in this area appears in section 2 of Article II, under which the President is permitted to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices.” This, of course, does not grant the President the permission to direct the agencies on what the exact content of the regulations should be. Therefore, the President’s power in this area is open to interpretation.

The Attorney General, who is the head of the federal Department of Justice and is appointed by the President and confirmed by the Senate, is authorized under the Judiciary Act of 1789 to issue opinions on this matter. According to the statute, the Attorney General has a “duty…to give his [or her] advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matters that may concern their departments[.]” Administrative agencies take opinions issued by
the Attorney General very seriously, and consider them to be binding, unless a federal court later invalidates them.

A number of Attorneys General throughout history have weighed in on the President’s lawful control over promulgation of regulations by federal agencies. One of the earliest opinions on this matter was issued by Attorney General William Wirt, who served during the administration of James Madison. Attorney General Wirt analyzed this issue under the U.S. Constitution’s “Take Care” clause, located in section 3 of Article II, which requires the President to “take Care that the Laws be faithfully executed[.]”

In Attorney General Wirt’s opinion on this issue, published on October 20, 1823 under the title *The President and Accounting Officers*, he expressed his belief that, although the President could validly exercise supervisory authority over the agency’s head officers, the language of the enabling act itself dictated the President’s discretionary power over the regulatory process. According to Attorney General Wirt, if the statute expressly granted regulatory authority to the agency’s officers, rather than to the President, then the President would violate the Take Care clause and fail to execute the law faithfully if he or she insisted on having final approval of the regulations promulgated. Therefore, Attorney General Wirt believed that this was an issue of statutory interpretation, and the President could only exercise such authority of the statute granted him or her express permission to do so (Stack, 2006; Wirt, 1823).

This express grant of presidential authority is not an uncommon occurrence. For example, Congress passed the Agricultural Adjustment Act in 1933, in which it authorized the “Secretary of Agriculture…with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title[.]”
Other Attorneys General, however, have issued opinions reflecting a more expansive view of the President’s discretionary power over an agency’s regulatory affairs. For example, Attorney General Caleb Cushing, in his 1855 opinion entitled *Relation of the President to Executive Departments*, expressed his belief that any grant of authority to an executive officer of an agency is impliedly granted to the President, because the Constitution grants the President control over these officers (Cushing, 1855; Stack, 2006).

The Supreme Court has also weighed in on this issue. For example, in the 1803 case of *Marbury v. Madison*, the Court established classifications for two types of activities carried out by an administrative agency at the direction of the agency’s head. The first type of activities are those respecting the nation, carried out at the President’s will and in accordance with the President’s constitutional powers. The second type of activities are those that fulfill an agency’s ministerial duties and impact one or more person’s individual rights, carried out by (and not subject to the discretion of) agency heads at the direction of Congress.

The Court held that the first type of activities are to be carried out entirely at the President’s discretion, and that they cannot be examined by the judicial branch or otherwise subject to anyone else’s discretion or limitations, because they represent the exercise of the President’s constitutional powers. The other type of activities, however, are not subject to the discretion of the President or the agency head, and may be examined by a court if it is claimed that they infringed on an individual’s rights.

Obviously, *Marbury v. Madison* was not the last judicial word on this issue. For example, in 1838, the Supreme Court further expanded on the President’s control over the second type of activities. In *Kendall v. United States* (37 U.S. 524), the Court held that an
agency was legally bound to perform the second type of activities, and that it was unconstitutional for the President to direct the agency to do otherwise.

However, as the country’s regulatory structure has grown in sophistication, many regulatory activities fall outside the boundaries established by the Court in *Marbury v. Madison*. Furthermore, while Attorneys General may issue opinions that expand presidential power to direct agencies’ regulatory activities, modern Presidents have developed the use of certain tools to provide more exact directions of how they want the agencies to regulate.

c. Historical Development of Presidential Rulemaking Controls

Historically, Presidents have employed two main methods for exerting control over agencies’ regulatory affairs: (1) directing agencies to take a certain course of action, and (2) mandating presidential approval for regulatory actions.

1. Presidential Directives

A President can issue written and verbal directives to inform federal agencies of his or her regulatory preferences. These directives manifest themselves in various formats, including executive orders, signing statements, and memoranda to agency officials.

The first presidential proclamation, which is considered to be the predecessor of the executive order in its modern format, was issued by George Washington in 1789. It directed Confederation government officers to report which officer handled which general action related to the affairs of the government. Since that time, Presidents (and, in earlier times, their Secretaries of State) have continued to issue declarations, executive orders, and other written and verbal statements, both to dictate presidential policy decisions and to direct administrative agencies to act in accordance with those decisions (Relyea, H.C., 2008).
The issuance of the executive orders by more recent Presidents has had a significant impact on all federal agencies, but not because they contained substantive regulatory directives for individual agencies. Instead, they established and revised various federal regulatory approval regimes that would be managed by organizations directly under the control of the President. These are described in greater detail in the next section.

Since 1862, each executive order has been assigned a unique identifying number. The Federal Register Act of 1935 required executive orders to be published in the Federal Register and compiled in Title 3 of the Code of Federal Regulations (CFR)¹ (Congressional Research Service, 2003). Executive orders and other presidential communications are also published in the Compilation of Presidential Documents.²

A substantive regulatory directive from the President to a particular agency can be problematic if the statute that enables regulatory action does not expressly grant regulatory power to the President. As dictated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* (467 U.S. 837 (1984)), courts are required to defer to an agency’s interpretation of a statute if the statute empowers the agency to regulate. However, if the agency acts at the direction of the President, based on the President’s interpretation of a


² Since 1965, the Government Printing Office has published the Weekly Compilation of Presidential Documents, which includes transcripts of speeches and remarks, presidential statements, communications to Congress and agencies, executive orders, and other presidential communications. Issues of this publication, dated from 2001 to January 2009, are available through GPO Access at [http://www.gpoaccess.gov/wcomp/browse.html](http://www.gpoaccess.gov/wcomp/browse.html). Older issues are available through Hein Online. Beginning with the Obama administration, the publication schedule of this document changed from weekly to daily. Every issue of the Daily Compilation of Presidential Documents, which began publication on January 29, 2009, is also available through GPO Access, at [http://www.gpoaccess.gov/presdocs/index.html](http://www.gpoaccess.gov/presdocs/index.html).
statute that does not grant the President any regulatory power, a court is more free to invalidate the regulatory action (Stack, 2006).

2. Presidential Regulatory Approval

In the past, Presidents have found themselves frustrated by the lack of real control that they could exert over the regulatory activities of federal agencies. In 1937, President Franklin Roosevelt established a committee to explore the possibility of reforming the federal regulatory process in such a way as to give the President more control over regulatory affairs. The recommendation of this committee, which was accepted by Congress, was to create the Executive Office of the President (EOP), which would be placed within the Bureau of the Budget and would actively oversee the agencies’ regulatory affairs (Kagan, 2001).

The Bureau of the Budget was eventually transformed, by President Richard Nixon, into the Office of Management and Budget (OMB). At first, the OMB merely facilitated the inter-agency environmental and life-quality review of proposed regulations. However, all of this changed when President Reagan issued Executive Order 12291 in 1981. This executive order created, within the OMB, the Office of Information and Regulatory Affairs (OIRA), which would be responsible for reviewing all major rules proposed by federal executive agencies to determine whether they met appropriate cost-benefit and economic impact standards. Under the review procedure, OIRA could delay the publication of any regulation that did not meet its standards. Four years later, President Reagan issued Executive Order 12498, which expanded OIRA’s control over the regulatory process by mandating that each agency submit, for OIRA approval, a yearly plan outlining the agency’s proposed regulatory activities (Kagan, 2001).

In 1993, President Clinton issued Executive Order 12866, which refined the federal regulatory review system created by President Reagan. President Clinton’s regulatory review
system still required OIRA approval of regulations, and that agencies submit yearly regulatory plans. However, it also introduced changes intended to improve the regulatory review process. It required each agency to establish a Regulatory Planning Officer (RPO) to oversee the agency’s regulatory planning activities. In addition, the regulatory planning process was revised to encourage more communication between the agencies and the OMB at earlier stages of regulatory planning, for the purpose of heading off future conflicts between the OMB and the agency that would jeopardize the promulgation of regulations. The executive order also implemented new requirements for documenting and disclosing communications related to regulatory affairs between non-government interest groups and executive branch officials (Kagan, 2001, Strauss, 2007).

With the arrival of the George W. Bush administration came new changes to the regulatory approval process. President Bush issued Executive Order 13422 in 2007, which “sufficiently increased White House controls over agency rulemaking” (Strauss, 2007). Under this executive order, each agency would continue to have an RPO that was responsible for approving the agency’s regulatory plan. However, agency heads no longer had the power to appoint or manage RPOs. Instead, all RPOs were to be “presidential appointees,” presumably loyal to the President, through whom the President could exercise significant control over an agency’s regulatory process (Strauss, 2007).

Some administrative law scholars are alarmed by this development. Indeed, one critic of President Bush’s changes to this regulatory approval system expressed the concern that “the President has been able to create a divided administration within each agency, with real power vested in a shadow officer who essentially answers only to [the President]” (Straus, 2007).
Of course, President Obama will still want to maintain some control over federal regulatory affairs, but time will tell whether he will retain the power to appoint and control agency RPOs established by President Bush. President Obama has not yet invalidated Executive Order 13,422. The Obama administration recently passed its 100-day mark, however, and may still be determining how to handle this issue.

A new presidential administration does not halt the necessity for continued regulatory action by the federal government. Although President Obama announced a temporary moratorium on the promulgation and publication of new federal regulations at the beginning of his presidency, he has issued executive orders that dictate the federal government’s new policies in areas that are subject to federal regulation. One of these areas is embryonic stem cell research, which is regulated by the Department of Health and Human Services. The next section discusses President Obama’s executive order related to this topic, and related actions taken by this agency in response to this executive order.

III. PRESIDENT OBAMA’S EARLY EXERTION OF PRESIDENTIAL POWER OVER FEDERAL AGENCIES: STEM CELL RESEARCH

On January 20, 2009, the Chief of Staff of recently-inaugurated President Barack Obama, Rahm Emanuel, issued a memorandum to the heads of all federal agencies, effectively directing them to cease and desist from all further substantive regulatory activities until they could be reviewed by President Obama’s new appointees.

However, this did not mean that all federal agency officials could take an immediate, indefinite vacation. President Obama has an ambitious agenda for his administration, and will call on the agency officials currently in place to help him put it into motion. This final section
outlines the regulatory work that the National Institutes of Health (NIH) was required to do to fulfill President Obama’s newly-introduced policy on federal funding for stem cell research.

a. The Executive Order

President Barack Obama only issued two executive orders in March 2009. Executive Order 13,506, which established a Council on Women and Girls within the EOP, got little attention from the press or the public, although its stated mission (“to ensure that Federal programs and polices address and take into account the distinctive concerns of women and girls”) is a noble one, and the membership of this Council includes Cabinet-level officials and other executive officers (Exec. Order 13506).

However, the other executive order received a lot of attention because it fundamentally changed a controversial federal policy championed by the previous administration. On March 9, 2009, President Obama issued Executive Order 13505, entitled “Removing Barriers to Responsible Scientific Research Involving Human Stem Cells.” The stated purpose of this order is to eliminate federal funding restrictions, which were put into place by President Bush, on scientific research that involves embryonic stem cells. Among other things, it directs the Secretary of the Department of Health and Human Services (DHHS) and the Director of the NIH to “review existing NIH guidance and other widely recognized guidelines on human stem cell research, … and issue new NIH guidance on which research that is consistent” with the executive order. The order requires that this work be done within 120 days, and does not leave to the discretion of the NIH whether or not new guidelines are to be promulgated (Exec. Order No. 13505).

This executive order revokes two items: a statement, issued by President Bush on August 9, 2001, and Executive Order 13435, issued on President Bush on June 20, 2007, which, taken
together, prohibited federal funding for any stem cell research conducted using new embryos after August 9, 2001 (Exec. Order 13505).

b. The Required Agency Action

Obviously, this executive order would create some immediate work for certain federal agencies. Although agency funding guidelines are not necessarily the same as regulations, the NIH, as the organization within the DHHS that is responsible for medical research, will publish the guidelines and open them to public comment before implementing them, just as any agency would be required to do for federal regulations in accordance with the procedure for federal notice-and-comment rulemaking.

On April 17, 2009, the Acting Director of the NIH, Raynard S. Kington, issued a document entitled “Draft National Institutes of Health Guidelines for Human Stem Cell Research.” This document, which was published in the Federal Register on April 23, 2009, served notice of the opening of the public comment period for draft stem cell guidelines created by the NIH in compliance with President Obama’s executive order. According to the draft guidelines, research involving human embryonic stem cells would be eligible for NIH funding, but only if “the cells were derived from human embryos that were created for reproductive purposes, were no longer needed for this purpose, [and] were donated for research purposes[.]” This, of course, directly contradicts the funding restrictions established by President Bush for the same type of research.

c. Effect of Agency Official Appointments

Dr. Kington was appointed to serve as the acting head of the NIH in October 2008, while President Bush was still in office, and has not yet been replaced in that position by anyone in the Obama administration. However, in Dr. Kington’s brief time as the head of the NIH, he appears
to have acquired a sense of the disconnect between NIH scientists and the policies of the Bush administration, and he has acknowledged this disconnect publicly. On January 21, 2009, Dr. Kington was quoted in the New York Times as saying, “In the area of stem cell policy, there was a fair degree of discussion and one might even say tension between the views of the agency and the Bush administration” (Harris, G. & Broad, W.J., 2009). Therefore, perhaps the Obama administration will not be so quick to find someone else to replace him at this post.

At the time of the publication of the NIH guidelines, the DHHS was also not headed by an Obama appointee. President Obama’s choice for the Secretary of Health and Human Services, Kathleen Sebelius, was not confirmed by the Senate until April 29, 2009, which is twelve days after the NIH guidelines were released (Department of HHS, 2009).

What this shows is that, even in the early days of a new presidential administration, agencies can and do conduct regulatory affairs in accordance with the new President’s stated policies, even if the agency’s leadership was appointed by the previous President. While regulatory changes cannot occur immediately, the wheels can be set in motion to implement those changes very early in a new president’s term, before he or she has even had the chance to change out agency heads or Cabinet officials.

**IV. CONCLUSION**

This paper has provided a brief historical overview on presidential control of the regulatory affairs of federal administrative agencies. It has also outlined the effect of a new presidential administration on regulatory affairs, using as an illustrative example the recent executive order issued by President Obama related to stem cell research and the early work done in fulfillment of it by the NIH.
A new president, and his or her advisors, must have a clear understanding of the constitutional limits on presidential authority over administrative agencies, and how previous presidents have managed to stretch the acceptable boundaries of that control. Thus equipped, new presidents can attempt to implement their desired policy changes early in their new terms.

Of course, time will tell if the stem cell executive order and the NIH guidelines produced in response will stand up as constitutionally valid. This issue may arise if they are ever judicially challenged. However, President Obama used the same method to change the policy as President Bush used to create it: the executive order. This appears to have been an acceptable means of doing this in the past, and there is no indication that these means will not continue to be acceptable.
REFERENCES

Note: The 2009 Executive Orders have not been codified in the CFR yet, so I have provided Federal Register citations in the alternative.

Agricultural Adjustment Act of 1933, ch. 25 § 10, 48 Stat. 31 (1933) (codified at 7 U.S.C. § 610(c)).


U.S. Constitution.