



Insight

Analyzing DOJ's OIRA Opinion Memorandum

DAN BOSCH | JANUARY 7, 2021

EXECUTIVE SUMMARY

- A recently released opinion from the Department of Justice finds that the president legally can direct independent agencies to submit regulations to the White House for review.
- The main argument supporting this position is that regulatory review is a consultative process rather than a determinative one, and, accordingly, covered agencies still get to make the final call on agency actions.
- The curious timing of the opinion's release – just weeks before a new administration – means the opinion could have a large impact moving forward, or none at all.

INTRODUCTION

On the final day of 2020, the Department of Justice (DOJ) released an [opinion](#) memorandum regarding whether the regulations of independent agencies can be reviewed by the White House's Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB). The opinion concludes that the president may direct independent agencies to comply with the same review process described in Executive Order (EO) 12,866.

This analysis explains EO 12,866, DOJ's reasoning behind its opinion, and its possible ramifications.

EO 12,866 EXPLAINED

Requiring agencies to submit regulations for some type of regulatory review is not new and helps ensure that agencies' regulations are based on sound principles. President Nixon first implemented the idea on the federal level. In the five decades since, each administration has utilized regulatory review to ensure that regulations are aligned with policy priorities and analyzed for their economic impact. President Reagan is widely considered to have centralized the process in [EO 12,291](#), which required that executive agencies analyze major rules to determine if benefits outweigh costs and submit rules and analyses to OIRA for review.

President Clinton replaced Reagan's order with [EO 12,866](#), which remains in effect and forms the basis of OIRA regulatory review as it is known today. EO 12,866 contains two directives relevant for DOJ's opinion.

The first directive is regulatory planning, which requires that all agencies – independent and executive – submit to OIRA twice annually a list of rules the agency is working on. OIRA then publishes this information in the Unified Agenda of Regulatory and Deregulatory Actions.

The second directive is centralized regulatory review. Executive agencies must submit all proposed and final “significant” regulatory actions – those with economic effects of \$100 million or more annually or raise novel policy questions – to OIRA for review before the action goes to the Federal Register for publication.

Independent agencies were exempted from this requirement, begging the question of whether they were left out for policy reasons or because the president lacked the legal authority to have such influence over independent agencies. Sally Katzen, who helped write EO 12,866 as OIRA administrator during the Clinton Administration, has maintained it was a policy choice.^[1] The rationale for this position is that if independent agencies can be included under the EO for purposes of the regulatory agenda, then it follows that they could be subject to EO's regulatory review provision if the president desired. No president has yet chosen to do so.

DOJ's OPINION

President Trump's OMB asked DOJ to examine the question of whether the president has the authority to direct independent agencies to submit their significant regulations to OIRA for review under EO 12,866. DOJ issued its opinion on October 8, 2019, but it was only released to the public on December 31, 2020.

DOJ concluded that the president does have the authority to require independent agencies to comply with EO 12,866. A primary reason for this conclusion is that OIRA review, while compulsory, is consultative rather than determinative. In other words, EO 12,866 requires agencies to submit regulations for review and address concerns raised by OIRA before publication, but OIRA does not ultimately determine whether a rule goes forward. Therefore, the president – through OIRA – is not approving or denying regulations *per se*, but rather ensuring that regulations are based on sound reasoning and analysis for the purposes of executing the laws of the United States.

The DOJ memorandum also cites a previously issued DOJ memorandum from 1981 responding to a question by the Reagan Administration about whether independent agencies could be included in the review requirements of EO 12,291. According to the new DOJ memorandum, the Reagan Administration DOJ similarly concluded that:

Even if Congress sought to limit “[p]residential supervision” of independent agencies “on matters of substantive policy,” we advised that subjecting them to the proposed regulatory review process would be consistent with their independent status, because the order would preserve the agencies’ “substantive discretion to decide particular . . . rulemaking matters.”

Responding to arguments that Congress created independent agencies to shield them from a president's political discretion, the DOJ memorandum again cites the 1981 memo. It says that while Congress has the authority to determine the structure of the executive branch (subject to some limits), the executive has the authority to determine how the functions of its branch are carried out, as long as it does not conflict with a statute. EO 12,866 does not conflict with any statute, according to DOJ, and specifically directs covered agencies to meet all applicable laws. The new memorandum concludes that “[t]here is nothing in the statutory composition of independent agencies or in their other generally shared attributes that would preclude the full application of EO 12,866 to them.”

POSSIBLE RAMIFICATIONS

The timing discrepancy of the date the memorandum was issued (October 8, 2019) and its release (December 31, 2020) raises the question of how the Trump Administration intended to use the opinion. One possible explanation is that the administration intended to bring independent agencies under OIRA regulatory review for its second term. With that opportunity now erased, there are a couple possible explanations for releasing the memo in the administration's waning days.

The first is that President Trump intends to issue an EO bringing independent agencies under OIRA review anyway, forcing incoming President Biden to embrace a good-government measure or denounce it. This scenario seems unlikely, however, as it could be revoked in short order by the Biden Administration, along with the [probable](#) repeal of several EOs that formed the Trump Administration's deregulatory posture.

The second, more likely explanation is that the Trump Administration simply wanted the opinion made public to bolster the argument that the regulations of independent agencies can be subject to OIRA review. It would help a future administration that supports regulatory review of independent agencies to have a ready-made legal opinion on the shelf upon entering office.

One scenario that simultaneously makes sense yet seems like a long shot is that the Biden Administration embraces the opinion and directs independent agencies to comply fully with EO 12,866. This scenario makes sense because the policy makes sense. Any administration, regardless of party, has an incentive to review the regulations of independent agencies. Indeed, two former OIRA administrators, including Katzen, have [endorsed](#) the idea. Why it could be a long shot is that the Biden Administration is likely to reverse virtually all of the Trump Administration's regulatory reforms, regardless of their merits.

CONCLUSION

DOJ's opinion memorandum supports the prevailing legal theory that a president could direct independent agencies to submit their regulations to OIRA for review at the executive's discretion. Because such review is not technically decisive on the regulations in question, independent agencies would maintain their independence while the president would get more control over all executive agencies. What happens with the memorandum as the Biden Administration begins its first term remains to be seen, but it could have a significant impact on independent agencies going forward.

[1] Katzen, Sally. "OIRA AT THIRTY: REFLECTIONS AND RECOMMENDATIONS." *Administrative Law Review*, vol. 63, 2011, pp. 103–112.