The Role of Congress in the Federal Regulatory Process

Thomas J. Spulak, Esq.
March 17, 2010
What is the Federal Regulatory Process?

• Rulemaking
  – issuance of rules

• Adjudicatory
  – approval of mergers and acquisitions
  – administrative enforcement actions, e.g., EPA or OSHA violations
Regulations

- The scale of administrative government is enormous.
- In 2009, the Executive Branch employed over 2.75 million civilians with a payroll of over $15.5 billion. It spent approximately $550 billion on non-defense, discretionary programs.
Executive Branch

- Each federal agency was created by Congress to ensure that specific laws were properly implemented.
- The President, as Chief Executive, supervises department and agency work through his appointed cabinet, secretaries and department heads.
Executive Branch Departments

- There are 15 major Executive Branch departments such as the Department of State, the Department of Defense and the Department of Health and Human Services.
  - Each is headed by a secretary who is appointed by the President and confirmed by the Senate. The secretary serves at the pleasure of the President and is a member of his cabinet.
Agencies Within Departments

- Some important agencies are units within the major executive departments.
  - For example, the Food and Drug Administration is in the Department of Health and Human Services, and the Occupational Safety and Health Administration is in the Department of Labor.
  - Some other agencies, while not ranked with the major executive departments, are considered to be Executive Branch agencies such as the General Services Administration or the Central Intelligence Agency.
Independent Regulatory Commissions

• Congress also created independent regulatory commissions which are part of the Executive Branch but are more independent of political control by the President than are other Executive Branch agencies.

➢ Examples of independent commissions are the Interstate Commerce Commission, the Federal Communications Commission, and the Consumer Product Safety Commission.
Hybrids

• There are also agencies that combine elements of both types of agencies.
  ➢ For example, the Environmental Protection Agency is characterized as an independent agency yet its administrator is appointed by the President with the advice and consent of the Senate and serves at the pleasure of the Senate.
Role of the White House

• The White House plays a substantial role in rulemaking.
  ➢ Much of the White House’s work on regulatory policy falls to the White House Office of Management and Budget (OMB). OMB is in a role in constructing the President’s budget and settling an administration’s priorities.
  ➢ OMB’s Office of Information and Regulatory Affairs plays the most important role in rulemaking by conducting reviews of agency regulatory policy.
The Role of Congress

• All departments and agencies obtain their rulemaking authority from Congress.
• Congress “delegates” its Article I authority “to make all laws” to departments and agencies.
  ➢ This is done by either broad grants of authority that are part of the mandate that is given to the department when it was established or through periodic “reorganizations”, or
  ➢ Specific statutes that direct departments and agencies to regulate certain areas, such as protecting the air or water, e.g., the Clean Air Act or the Clean Water Act.
Role of Congress

• Through legislation, Congress directs the agencies to carry out policies.
  ➢ Often legislation gives agencies overbroad directives and leaves the details to the agency. In other cases, Congress will set out specific procedures and objectives.
  ➢ Congress not only uses legislation to creates rules for specific policy issues but it also uses legislation to shape the rulemaking process itself.
Delegation

• Much of this delegation began during the New Deal.

  ➢ President Franklin Roosevelt greatly expanded the role of the federal government by championing the creation of a number of new agencies.

  • Congress passed a number of enabling statutes, *i.e.*, a legal mandate or grant of authority to investigate and create rules under which specific goals could be obtained.
Constitutional Challenges

• There were constitutional challenges brought to the new wave of congressional delegation to the Executive Branch.
  ➢ Could Congress cede its authority to make laws to the Executive Branch?
  ➢ Under Article II, the role of the Executive Branch is to execute or enforce laws, not make them.
Constitutional Challenges

The Supreme Court upheld most of these delegations and has continued to do so over the years.
Administrative Practices Act

• Today, the role of the Executive Branch to make rules is undisputed and Congress continues to delegate authority to the Executive Branch.
  ➢ Since April 1996, over 47,540 major and non-major rules have been reported and become effective.

• Departments and agencies make rules through a defined process outlined in the Administrative Practices Act (APA) enacted in 1946. It provides for notice, comment and the promulgation of rules.
Role of Congress

Nevertheless, Congress reserves the right to intervene in the process when it is unhappy with an action that a department or agency has taken and often acts to make its opinion known.
Role of Congress

- Congress influences agency performance—
  - by approval of presidential appointees,
  - by conducting investigations and oversight, and,
  - through the appropriations process.
Confirmation Hearings

• The Constitution gives the Senate the role of “advise and consent”. It cannot name a secretary but it has the constitutional role to approve him or her. Without it, the President’s choice is rejected.

• Confirmation hearings for presidential nominees to high agency positions often are the occasion for debate about agencies policies and programs. If a nominee is identified with a certain position or issue, Senators scrutinize the nominee on that issue and use the hearing as a means to express their own opinions.
  • Senators also use confirmation hearings to be sure nominees understand the intentions of Congress regarding agency activities.
Oversight

- Oversight by congressional committees is one of the most effective tools Congress has to hold the Executive Branch accountable.

  Oversight enables Congress to examine how agencies are implementing laws. This process is important because, as the late Chief Justice Charles Evan Hughes observed:

  “Legislators have little time to follow the trails of expert inquiry and so we turn the whole business over to a few with broad authority to make actual rules which control our conduct. The exigency is inescapable but the guardians of liberty will ever be watchful lest they are rushed from legislative incapacity into official caprice.”
Oversight

• If an agency has been lax in enforcing a statute, Congress may prod the agency into beginning or committing to begin a rulemaking.

• If an agency is implicated in wrong doing, Congress may uncover more details of the situation which may result in a formal reprimand or dismissal.

➤ At the very least, oversight and investigation raises the visibility of a given issue by spurring media attention and public debate.
Oversight

• Congress can investigate misconduct in the Executive Branch.
  ➢ This is especially evident when one party controls Congress and the other the White House.
Hearings

• Congress can call a hearing to discuss a pending rule or the need for a rule.
  ➢ It can summon department and agency heads, as well as public witnesses.
  ➢ Through this process, it seeks to communicate its interests.
    ➢ Members of Congress will also send letters, perhaps with multiple signatories, to department and agency heads expressing their views.
Congressional Jurisdiction

- Health and Human Services.
- Environmental Protection Agency,
- Federal Aviation Administration,
- Department of State,
- United States Trade Representative,
- House Committee on Energy and Commerce; Senate Committee on Health, Education, Labor and Pensions,
- Committee on Energy and Commerce; Senate Committee on Environment and Natural Resources,
- House Committee on Transportation and Infrastructure; Senate Commerce Committee,
- House Committee on Foreign Affairs; Senate Foreign Relations Committee,
- House Committee on Ways and Means; Senate Committee on Finance
Checks on Congressional Authority

• The Pillsbury Doctrine is the result of a judicial decision which serves as a check on Congress overextending itself into an administrative adjudicatory proceeding.
Checks on Congressional Authority

• Prior to 1983, Congress would often reserve the opportunity to overturn a department or agency rule through the use of legislative vetoes. These were struck down in the 1983 case, *INS vs. Chadha*.
  – After *Chadha* the only way Congress could weigh-in on a final rule was by a joint resolution of disapproval which must pass both houses of Congress in the same form and be signed by the President.
Legislation

- Congress may use its general powers to overturn agency rules by regular legislation; however, for various reasons, Congress may find it difficult to do so.
  - This is especially true when the Congress and the President are of different parties.
Resolution of Disapproval

• Congress typically reserves the right to “disapprove” a rule before it becomes effective.
• “Expedited procedures” provide an opportunity to stop a rulemaking from taking effect.
Examples of Resolutions of Disapproval

IN THE SENATE OF THE UNITED STATES
JANUARY 21, 2009

Mr. Merkley (for himself, Mrs. Landrieu, Mr. Frank, Mr. Nelson, Mr. Leahy, Mr. Kennedy, Ms. Landrieu, Mr. Voino, Mr. Sessions, Mr. Murkowski, Mr. Graham, Mr. Coons, Mr. Tester, Mr. Stevens, Mr. Brown, Mr. Thune, Mr. Johnson, Mr. Inhofe, Mr. Barrasso, Mr. Udall, Mr. Enzi, Mr. Inhofe, Mr. Blackburn, Mr. Moran, Mr. Kyl, Mr. Bennett, Mr. Baucus, Mr. Johnson, Mr. Johnson, Mr. Blumenthal, and Mr. Shelby) introduced the following joint resolution which was read twice and referred to the Committee on Environment and Public Works:

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Endangerment finding and the cause or contribute findings
2. For greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 68498 (December 15, 2009)), and such rule shall have no force or effect.
Examples of Resolutions of Disapproval (cont’d)

111TH CONGRESS 2ND SESSION
H. J. RES. 77

Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

IN THE HOUSE OF REPRESENTATIVES
January 7, 2010
Mr. Barton of Texas (for himself, Mr. Sessions, Mrs. Bachmann, Mr. Bachus, Mr. Barfield of South Carolina, Mr. Bartlett, Mr. Blumenauer, Mr. Blunt, Mr. Broun, Mr. Brown, Mr. Boustany, Mr. Boucher of Texas, Mr. Broun of Georgia, Mr. Brown of Indiana, Mr. Burton, Mr. Califf, Mr. Cantor, Mr. Carper, Mr. Casey, Mr. Casten, Mr. Castle, Mr. Coulter, Mr. Cole, Mr. Collins, Mr. Lowey of Kentucky, Mr. Filner, Mr. Flaherty, Mr. Fleming, Mr. Gallegly, Mr. Gary of Georgia, Mr. Geithner, Mr. Gingrey, Mr. Gottheimer, Mr. Hanlon, Mr. Himes, Mr. Johnson of Ohio, Mr. King of Iowa, Mr. Klein of Minnesota, Mr. LaMalfa, Mr. Lewis of California, Mr. Lucas, Mr. Luetkemeyer, Mr. Manzullo, Mr. McCaul of California, Mr. McMillen, Mr. Mcnerney, Mr. McNerney, Mr. Mcmorris Rodgers, Mr. Miller of Missouri, Mr. G. Miller of California, Mr. Tim Murphy of Pennsylvania, Mr. Napolitano, Mr. Nebenzu, Mr. O'Halleran, Mr. Perlmutter, Mr. Pocan of Wisconsin, Mr. Boren of Oklahoma, Mr. Bonamici of Oregon, Mr. Bogden of Alabama, Mr. Beatty of Kentucky, Mr. Boren of Oklahoma, Mr. Bonamici of Oregon, Mr. Bost of Pennsylvania, Mr. Boustany, Mr. Broun, Mr. Brus蛮, Mr. Schweikert, Mr. Starker, Mr. Stark, Mr. Stemerman, Mr. Steuber, Mr. Steube, Mr. Smith of Maryland, Mr. Smith of Texas, Mr. Spanberger, Mr. Scott, Mr. Thompson of Pennsylvania, Mr. Thune, Mr. Toomey, Mr. Westmoreland, Mr. Whitmer, Mr. Wiseman, Mr. Womack of South Carolina, Mr. Young of Alaska, Mr. Boren of Oklahoma, Mr. Bonamici of Oregon, Mr. Boustany, Mr. Broun, Mr. Bost of Pennsylvania, and Mr. Broun of Tennessee) introduced the following joint resolution which was referred to the Committee on Energy and Commerce.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.

JOINT RESOLUTION
Disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act (published at 74 Fed. Reg. 64496 (December 15, 2009)), and such rule shall have no force or effect.
Appropriations

• Congress has the “power of the purse” and uses it to influence agency and department action.
• Article 1, §9 of the constitution states that “no money shall be drawn from the Treasury but in consequence of appropriations made by law.”

 Every department and agency must receive funding from Congress annually. This provides effective leverage for Congress to make its opinions known.
Appropriations

Congress does this in several ways:

1. Questioning department and agency heads when they appear before Congress to request their annual appropriations.

2. “Riders” and other provisions in funding bills.
Riders

Appropriations provisions include:

1. Prohibitions on the finalization of particular proposed rules;
2. Prohibitions on the development of regulations with regard to particular statutes or issues;
3. Restrictions on implementation or enforcement; and
Prohibiting the finalization of particular purposed rules

• “None of the funds made available by this act may be used to issue a final rule in furtherance of or otherwise implement the proposed rule on cost sharing for animal and plant health emergency programs or the animal or plant health inspections service published on July 8, 2003.”
Restricting implementation of enforcement

• “None of the funds made available in effect may be used to pay the salaries or expenses of personnel to (1) inspect horses under §3 of the federal Meat and Inspection Act; (2) inspect horses under §903 of the federal Agriculture Improvement and Reform Act of 1996, or (3) implement or enforce §352.19 of Title 9, Code of Federal Regulations.”
Conditional Restrictions

• “None of the funds made available to the Indian Health Services in this Act shall be used to implement the final rule published in the Federal Register on September 16, 1987, by the Department of Health and Human Services, relating to the eligibility for the health care services of the Indian Health Services until the Indian Health Services has submitted a budget request reflecting the increased costs associated with the proposed final rule and such request has been included in an appropriations act and enacted into law.”
Congressional Review Act

• The Congressional Review Act (Act), enacted in March 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or fast track legislative procedures for this purpose primarily in the Senate.
Congressional Review Act

• In essence the Act requires all final rules, including rules issued by independent boards and commissions to be submitted to both houses of Congress and to GAO before they can take effect. Members of Congress have 60-days of continuance session to introduce a joint resolution of disapproval after a rule has been submitted to Congress. The Senate has 60 session days.
Conclusion

• Questions.