



Can a President Amend Regulations by Executive Order?

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An executive order signed by President Trump on July 10, 2018, raises the question of whether a President—with the stroke of a pen—can amend federal rules codified in the [Code of Federal Regulations](#) (CFR). In [Executive Order 13843](#), the President changed the hiring process for administrative law judges (ALJs), “excepting” them from the competitive service. Somewhat unusually, the order directly amends three provisions in the CFR, rather than directing an agency to amend the regulations. Generally, rules may only be amended through special procedures governed by the [Administrative Procedure Act](#) (APA). This process, known as notice-and-comment rulemaking, usually requires advance notice and a period for public comment on proposed rule amendments. As a result, Executive Order 13843 raises the question of whether the President, if otherwise vested with the authority to make rules, could bypass this normal process and directly amend the rule by executive order. Supreme Court precedent suggests that presidential actions, such as executive orders, are not reviewable under the APA. But the APA’s procedural requirements still apply to agencies when they act to implement any presidential directives, raising the question of when presidential action ends and when agency implementation begins. This Sidebar explores the scope of the presidential exception to the normal rulemaking process.

When an agency engages in “[rule making](#),” defined as formulating, amending, or repealing a “[rule](#),” the APA generally requires the agency to follow certain procedures. Unless a rule falls within one of the [statutory exceptions](#), the agency is required to undertake notice-and-comment rulemaking. (For an overview of notice-and-comment rulemaking procedures, see [these two](#) CRS Reports.) An agency has to comply with the APA not only when it initially promulgates a rule, but also when its actions constitute a [substantive amendment](#) to a rule falling within the APA rulemaking requirements.

These rulemaking procedures apply only to an “[agency process](#).” The APA defines “[agency](#)” to include “each authority of the Government of the United States,” but excludes Congress and the courts. In effect, the APA applies only to the executive branch. The text of the statute does not explicitly mention the President, who is the head of the executive branch and seemingly an “authority of the Government of the United States.” However, in 1992, the Supreme Court held in [Franklin v. Massachusetts](#) that the President’s “actions are not subject to [the APA’s] requirements.” In that case, the State of Massachusetts challenged the decision of the President and the Secretary of Commerce to use a certain method for counting federal employees serving overseas in the 1990 Census, arguing, in part, that this decision was [arbitrary and capricious](#) and therefore unlawful under the APA. The Court concluded that the relevant

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final action incorporating this method was that of the President, rather than the Secretary, and went on to consider whether the President was an “agency” subject to the APA. The Court acknowledged that the APA definition of “agency” does not expressly exclude the President, but [noted](#) that the President is not “explicitly included, either.” Citing “respect for the separation of powers and the unique constitutional position of the President,” the Court [held](#) that “textual silence” was “not enough to subject the President to the provisions of the APA.” But the Court was careful to [clarify](#) that it was only holding that the President’s actions may not be reviewed “for abuse of discretion under the APA,” and those actions “may still be reviewed for constitutionality.”

The Supreme Court confirmed this ruling two years later, in *Dalton v. Spencer*, where the Court relied on *Franklin*’s reasoning to reject an APA challenge to the President’s decision to approve the closure of a naval shipyard. Otherwise, however, the Court has not further elaborated on the scope of the presidential exception to the APA. Lower courts have explored the ramifications of this case to a greater extent. *Franklin* is often invoked as a justification to bar judicial review when a court is asked to review agency action that is not yet “final” and may only become final through presidential action. If the critical step to finalize an act must be taken by the President, [courts may reject](#) procedural challenges to interim agency actions. Thus, the D.C. Circuit has [held](#) that “*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.”

Critically, although the APA’s procedural limitations may not apply to presidential action, other laws may govern the President’s rulemaking authority. As the Supreme Court has [said](#), the President only has the power to issue an executive order if authorized by “an act of Congress or . . . the Constitution itself.” Courts may review claims that the President’s action was unauthorized. In issuing [Executive Order 13843](#), exempting ALJs from the competitive service and amending [Civil Service Rule VI](#), President Trump invoked [5 U.S.C. § 3302](#), which states that “the President may prescribe rules governing the competitive service.” There is precedent for this direct amendment of the civil service rules: prior Presidents from [Harry Truman](#) to [Barack Obama](#) have similarly amended the civil service rules by executive order, and the civil service rules as a whole were [initially promulgated](#) in the late 1800s by executive order.

Apart from [5 U.S.C. § 3302](#), a [wide variety of statutes](#) expressly vest the President with the authority to make rules and regulations. Many of the statutes authorizing the President to make rules also place [substantive](#) or [procedural](#) constraints on that authority. The D.C. Circuit has [suggested](#) that *Franklin* may be distinguishable “where the authorizing statute or another statute places discernible limits on the President’s discretion.” [5 U.S.C. § 3302](#), the statute invoked in Executive Order 13843, provides that the President may create “necessary exceptions of positions from the competitive service,” as “conditions of good administration” may warrant. This language places substantive limitations on the President’s authority: he may only create exceptions so long as they are “necessary” and warranted by “conditions of good administration.” Other statutes create procedural limitations—some even require the President to undertake “[notice and comment](#).” (Whether these substantive and procedural limitations could be enforced in court is a separate question and would likely depend on the nature of the suit and the particular statutory provision invoked.)

Additionally, the APA will [likely still govern](#) the actions of executive branch agencies *implementing* a presidential directive. [Lower courts](#) have suggested that this presidential exception will not “[insulate . . . from judicial review](#)” any agency action implementing a presidential directive. In 1996, the D.C. Circuit, quoting Justice Scalia’s concurring opinion in *Franklin*, announced that, “it is now well established that ‘[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.’” The APA generally applies to any executive branch authority that is not the President. Even where a statute does vest the President with rulemaking

authority, if the President delegates that regulatory power to an agency, the agency will likely [have to follow APA rulemaking procedures](#) when it exercises that power.

In the context of [Executive Order 13843](#), it appears that the U.S. Office of Personnel Management (OPM) will primarily be implementing the directive—the executive order directs OPM to adopt regulations and provide guidance as necessary to implement the order, and OPM has already issued a [guidance memo](#) “to address several issues that may arise as agencies” begin to implement the order. In the memo, OPM announced that it will promulgate regulations to “address any provisions” in current regulations that are “inconsistent” with the executive order. OPM’s memo also implicitly acknowledges that the presidential order itself already effected some amendments to the civil service rules and seemingly advises agencies to act accordingly. If OPM does act to amend existing rules, [federal law](#) expressly requires the agency to follow APA’s rulemaking procedures.

Consequently, to determine when the APA’s procedural requirements apply, it becomes important to distinguish presidential action from agency action, ascertaining the precise effect of the executive order itself, as distinguished from the agency action that implements the order. Under *Franklin v. Massachusetts*, it appears that the President’s issuance of the executive order was not itself subject to the procedural requirements of the APA, even though the President did exercise statutory authority to engage in rulemaking. But when OPM acts to implement the President’s order, it will presumably be subject to the APA, and if OPM (or any other executive agency) acts to create, amend, or repeal any rules, it will likely have to follow notice-and-comment rulemaking procedures.

Author Information

Valerie C. Brannon
Legislative Attorney

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