

OF JUDGES AND PRESIDENTS: JUDICIAL REVIEW OF EXECUTIVE ORDERS

Wed Apr 12th, 2017 | Categories: *Environmental Law* | By *Bick Law LLP*

Although we are years away from circumscribing the legacy of President Trump, if his first 100 days are any indication, his legacy – whatever it may be – will likely be defined in part by the executive order. While Presidents throughout American history have used this tool to advance their agendas, so far President Trump has been one of the most-aggressive advocates of independent executive authority.

However, as our California environmental lawyers have also seen, the power of the executive order is not absolute. One need not look farther than the highly-publicized overturning of the White House's first two attempts at a travel ban for proof that the judicial branch can – and will – hold the nation's chief executive in check. But, beyond the headlines, understanding the judicial review process for executive orders can provide insight into what individual and corporate citizens might be able expect when it comes to enforcement of future orders from the nation's highest office.

POTUS vs. The Judiciary

As a starting point, it is worth confirming that executive orders are indeed subject to judicial review. While executive orders are not subject to the same checks and balances as Congressional legislation and **administrative regulations**, federal judges have the authority to strike down orders that violate the Constitution or statutory law.

In evaluating executive orders, the federal courts will apply one of three different standards of review depending upon the nature of the authority underlying the order:

- **Express or Implied Congressional Authorization** ☐☐☐ Executive orders that rely on powers delegated by Congress receive the highest level of deference, and have been upheld in most cases.
- **Independent Executive Authority** ☐☐☐ Orders that rely on the inherent authority of the executive branch receive an intermediate level of review. When reviewing these types of executive orders, the courts tend to take a facts-and-circumstances approach that sets little precedent for future cases.
- **Executive Orders Against the Will of Congress** ☐☐☐ Executive orders that not only lack Congressionally-delegated authority, but actually go against the will of Congress, are subject to the highest standard of review. The courts have the power to strike down such orders unless Congress lacked the authority to take the legislative action offended by the executive order.

Of course, **executive orders** are rarely self-executing. It takes agency action to carry out the will of the President, and this *can* invite another level of judicial review. We emphasize *can*, because executive orders will often include language designed to insulate agencies from legal action. For companies facing new administrative and financial burdens as a result of executive order-induced action by federal agencies such as the EPA, assessing both (i) the order's enforceability and (ii) the ability to challenge the agency's action will be critical to making informed decisions moving forward.