



(Un)Precedented Times

What the President Can and Can't Do,
and What That Means for Tribes

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Outline

1. Role of Executive in Context
 1. Three Branches of Government
 2. President & Agencies
 3. Executive Orders
2. President and Courts
3. Current Executive Orders and Tribes

Three Branches



Legislative: Makes laws, appropriates funds

Actual power to set regulations
Sets broad restrictions



Executive: Applies laws, uses funds

“Enforces” the law
Translates law into usable rules



Judicial: Interprets whether other branches were wrong

Responsive; not proactive
Limited enforcement power

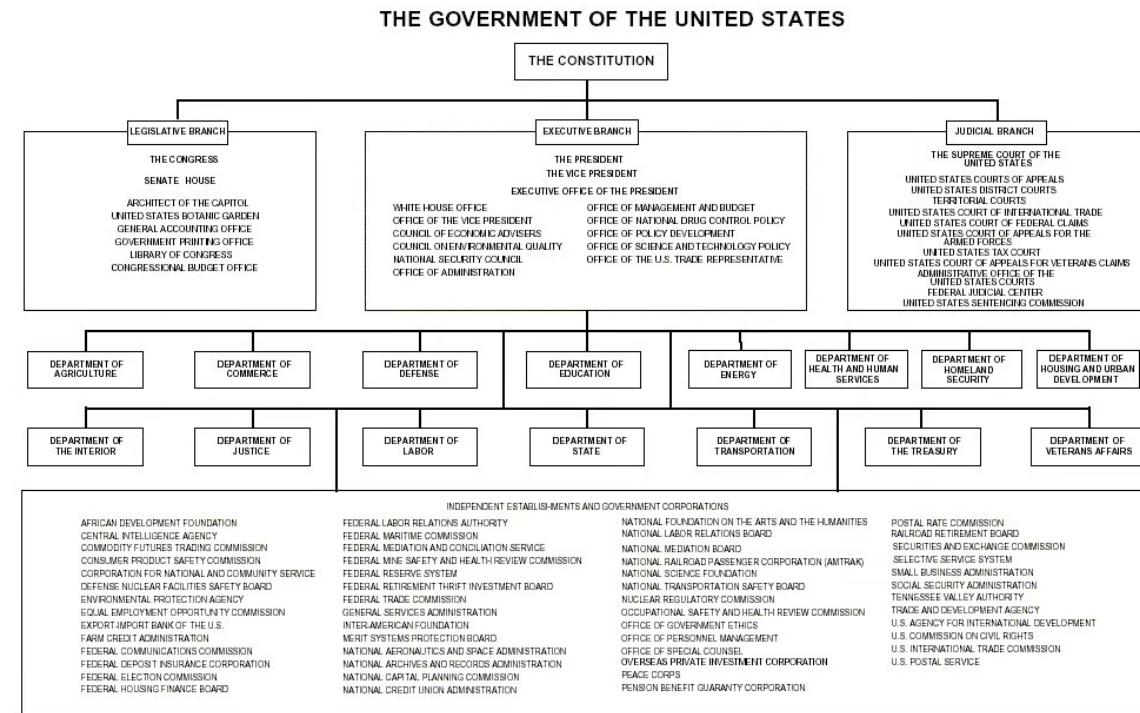
President & Agencies

Agencies use executive power

- Enforce laws created by Congress
- Agencies promulgate rules
 - Filling in details of Congressional laws
 - Cannot exceed authority given by Congress

Administrative Procedures Act

- Passing, amending, repealing reg. must follow APA rules
 - Notice-Comment rulemaking
 - Cannot be arbitrary/capricious decision



Executive Orders

- “Policy Statements”
 - How executive branch should act
 - Inform agency actions
 - “each agency shall . . .”
 - “as consistent with appropriate law . . .”
 - Not covered by APA; not a “law” in itself
- Executive Orders only affect *how* agencies do what Congress told them to



President & Courts



Theory:

Lawsuit or criminal trial brings question to court

Court declares action unconstitutional

Court orders other branches to listen



Practice:

Contempt orders

Writ of mandamus (rare)

Orders enforced by Federal Marshalls (under Dept. of Justice)

Past Compliance

- Eisenhower forces governors to comply; *Brown v. Board of Educ.*
 - “The Supreme Court has spoken and I am sworn to uphold the constitutional process in this country, and I will obey.”
- Andrew Jackson ignores noncompliance; *Worcester v. Georgia*
 - “John Marshall has made his decision; now let him enforce it.”





Existing Executive Orders

Executive Order on Consultation & Coordination

“Each agency shall . . .”

- Guideline, not law
- How executive branch chooses to function

Preservation of Sacred Sites

Each agency administering federal land shall accommodate access to, and prevent affecting sacred sites

However, Antiquities Act & National Historic Preservation Act provide similar things

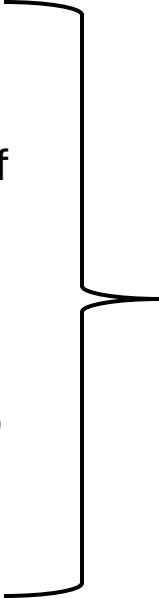
New Executive Orders

- “Unleashing Alaska’s Extraordinary Resource Potential”
 - The heads of all executive departments and agencies . . . shall exercise all lawful authority and discretion available to them and take all necessary steps to:”
 - Permit all necessary pipelines
 - Restart leases on Arctic Wildlife Refuge
 - Rescind environmental impact statements
 - Rescind any guidance issued by BLM for protection of subsistence resource values in special areas
 - Immediately review all Department of the Interior guidance regarding the taking of Alaska Native lands into trust
 - Direct all bureaus of the Department of the Interior to consider the Alaskan cultural significance of hunting and fishing and the statutory priority of subsistence management required by the ANILCA



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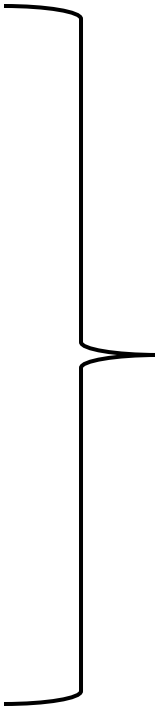


All as separate
agency actions

New Executive Orders

- DOGE (Creation, Workforce, Deregulation, Cost Efficiency)

- Hiring freeze
- Quitting pressure
- Contract cancellations
- “identify the following classes of regulations . . .” and rescind or modify
- “Subject to their paramount obligation to discharge their legal obligations” . . . “agencies shall” deprioritize regulations that go beyond “best reading of statute”
- “where appropriate and consistent with applicable law, terminate” contracts



Mostly discretionary
agency actions

New Executive Orders

- “Unleashing American Energy”
 - Revokes previous order shaping NEPA
 - No longer agency regulations on NEPA
 - Statutory requirements remain
 - Each agency establishes own NEPA guidelines
 - Still needs *some* Environmental Impact Statement
 - NEPA significantly weakened, standardless
 - Halts funding from Inflation Reduction Act & Infrastructure Investment and Jobs Act
 - Discretionary funds only disbursed if consistent with order
 - All relevant agencies should rescind any regulation that is an “undue burden” on mineral development
 - Requires APA notice-comment procedure



Courtesy: The Onion

New Executive Orders

- Anti-Diversity, Equity, & Inclusion Orders
 - Legally, “Indian” is political term, not racial
 - Orders do not directly affect obligations to Tribes
- Deregulation Orders
 - Focused on drilling, mining, extraction
 - Starts notice-and-comment process for rescinding rules
 - Each regulation must have own basis

What Tribes Can Do

- Lawsuits
 - Unique legal protections (Constitution, treaties, trust responsibility)
 - Specific Congressional statutes
 - Agencies must act within Congressional lines
 - Administrative Procedures Act
 - Must follow proper procedures
- Government-to-Government Talks
- Comment on Agency Actions
 - Actions cannot be arbitrary/capricious

Conclusion

- Executive action has limits
 - Cannot exceed Congress
 - Can exercise discretion allowed by Congress
 - Courts can review, and sanction
- Consultation policy is based on executive order
- Trust obligation, Constitutional relation, treaties, Congressional laws remain
- Until elections, negotiation & courts are primary remedies