CRS Reports & Analysis

Legal Sidebar

Can Agencies Take Actions That They Are Not Expressly Authorized by Statute to Take?

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This installment in the Legal Sidebar series on statutory interpretation addresses the question of whether executive branch agencies are barred from taking actions that Congress has not specifically authorized them to take. This question arises with some frequency on the Hill, as drafters grapple with whether legislation is needed to address perceived policy issues and, if so, what form that legislation should take. The question does not, however, directly implicate a standard principle of statutory interpretation, like the presumption against repeals by implication noted in the last Sidebar in this series.

Broad language from the courts, suggesting that agencies "literally [have] no power to act ... unless and until Congress confers power upon [them]," sometimes conveys the impression that agencies need specific statutory authorization for any action they would take. This may be true in many cases. However, it is not true in every case. Rather, much depends upon the nature of the specific action in question. As the following examples illustrate, some agency actions could be seen as permissible without statutory authorization because Congress has been seen to have "acquiesced" to long-standing executive practices; because the Executive is said to have inherent authority to take certain actions; or for similar reasons.

Example 1: Leases and Revocable Licenses of Federal Real Property

The first example involves leases and revocable licenses of federal "real property" (a term which excludes national forest and park lands, among other things). Agencies are generally seen to need express statutory authority to lease real property, but not to grant revocable licenses to use such property. Why? The answer rests, in part, upon the difference between leases and licenses. Specifically, a *lease* generally entails the transfer of an interest in real property (i.e., a leasehold interest) that is, unless otherwise provided in the lease, irrevocable during the term of the lease. A *license* (or *permit*), in contrast, generally implies mere permission to "enter upon [a] premises and do that which if done without such permission would be a trespass." It does not transfer any interest in the property whose use is licensed.

The fact that a lease is seen to involve the disposal of an interest in real property is significant because Article IV, Section 3, Clause 2 of the U.S. Constitution—commonly known as the Property Clause—has been construed to grant Congress the sole power to dispose of federal real property. Thus, in the view of the courts and the Government Accountability Office (GAO), which provides opinions on the use of and accountability for appropriated funds, no agency or official of the executive branch may sell, lease, give away, or otherwise dispose of federal real property without being authorized by statute to do so either explicitly or by necessary implication.

The granting of a revocable license, in contrast, has not been seen to entail the disposal of federal real property for purposes of the Property Clause. As a result, agencies have been said to have authority to grant such licenses even if a statute does not authorize them to do so. A 1924 opinion by the Office of Legal Counsel (OLC) at the Department of Justice took the view that this authority arises as a corollary of agencies' roles and responsibilities in managing federal real property, and that agencies' long-standing historical practice in granting such licenses has "become a kind of common law," "regulat[ing] the rights and duties" of the parties to such agreements. More recently, in 2008, GAO suggested that the "[l]ong-continued exercise of a power of this kind ..., and the open and notorious use of ... such

licenses without legislative objection from Congress and without the adoption of any legislative rule upon the subject implies the tacit assent of Congress to the custom."

Example 2: Contracting Authority and Authority to Contract

The second example involves "contracting authority" and authority to contract. *Contracting authority* is a term of art, used to describe a type of budget authority that has generally (although not universally) been seen to permit agencies to enter into contracts in advance or in excess of appropriations. The term *authority to contract*, in contrast, refers to an agency's authority to enter into "procurement contracts," or contracts for supplies and/or services for the agencies' own direct use or benefit.

Agencies need express statutory authorization to exercise contracting authority. Article I, Section 9, Clause 7 of the Constitution—commonly known as the "Appropriations Clause"—expressly bars the drawing of money from the Treasury except in "Consequence of Appropriations made by Law." However, early on, executive agencies would frequently pressure Congress to appropriate funds for specific purposes by entering into contracts for which no funds or insufficient funds had been appropriated. Congress would then feel it had to appropriate the requisite funds to cover these "coercive deficiencies" to ensure that the federal government was seen to honor its obligations. A predecessor to today's Anti-Deficiency Act (ADA) was enacted in 1870 to put a stop to this practice. The ADA currently bars agencies from incurring obligations in advance or in excess of an appropriation unless "authorized by law." It is this "authorized by law" exception to the ADA that underlies statements by GAO and other authorities that agencies may exercise contract authority only if specifically authorized to do so by statute.

On the other hand, agencies have generally not been seen to require express statutory authorization to exercise authority to contract (although Congress has enacted statutes which grant specific agencies such authority, as well as prescribed a number of constraints upon agencies' exercise of their authority to contract). Early Supreme Court cases sometimes took the view that authority to contract is "incident to the general rights of sovereignty" or "the duties belonging to an agency." In other cases, the Court suggested that authority to contract is necessarily implied by statutory provisions creating an agency and tasking it with specific responsibilities. More recent sources simply treat this authority as a given, with little, if any, discussion for its possible basis.

In short, as shown by these examples, which are not meant to be exhaustive, agencies may—or may not—need express statutory authorization to take particular actions. It is the nature of the action that determines whether Congress must have authorized it expressly or by necessary implication, or whether agencies may take it without such statutory authorization.

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