The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking

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Abstract

Since 1981, executive orders have required federal agencies to submit a cost-benefit analysis to the White House before promulgating any major rule. These orders have exempted independent agencies as a matter of political expediency, but the president possesses the constitutional power to require independent agency rules to undergo cost-benefit analysis and centralized review. As the sole head of the executive branch, vested with all of "[*t*]*he* executive Power," the president rightly exercises supervisory control over independent agencies. And, as the Supreme Court recently explained, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." In addition, the Opinions Clause gives the president the specific power to demand a written analysis from federal agencies. Prohibiting presidential supervision of independent agencies would violate the Constitution's tripartite structure. The President's supervisory power over independent agencies is supported by a long line of opinions from the Department of Justice's Office of Legal Counsel. Including independent agencies in the cost-benefit executive order would promote cost-effective rulemaking and better regulatory coordination within the executive branch.

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Introduction

Since President Ronald Reagan signed his seminal order on federal regulation, Executive Order 12,291, the White House has required executive branch agencies to analyze the benefits and costs of their proposed regulations and to promulgate rules only if the benefits outweigh the costs. To enforce this requirement, several executive orders require agencies to submit their cost-benefit analyses for review by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB). The only agencies that have historically been exempted from the requirements of cost-benefit analysis and centralized review are the so-called independent agencies, whose leadership cannot be removed by the president except for cause.

The benefits of centralized review of independent agency regulations are clear. Centralized review would promote cost-effective regulation[1] and better coordination between rulemaking initiatives across the executive branch.[2] Those benefits explain why past OIRA administrators of

[1] *See* Jerry Ellig & Richard Williams, *Reforming Regulatory Analysis, Review, and Oversight: A Guide for the Perplexed* (Mercatus Ctr. at George Mason Univ., Mercatus Working Paper No. 14-23, 2014), at 44.
[2] Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 110 (2011) ("[T]he end result would be better coordinated and coherent regulatory actions, and ultimately better decisionmaking.").

both parties,[3] the American Bar Association,[4] and many other legal scholars[5] have endorsed centralized review of independent agency rules.

One might think that independent agencies would acknowledge the common-sense virtues of cost-benefit analysis and voluntarily adopt the practices that are now required of all other executive branch agencies. For the most part, they have not.[6] But the president could, by executive order, subject independent agencies to the same cost-benefit analysis requirement and centralized review process that currently govern other federal agencies.

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[3] *See, e.g.*, Letter from Susan Dudley, John D. Graham, John Spotila, Sally Katzen, Wendy Lee Gramm, Christopher C. DeMuth & James C. Miller III to Sen. Joseph I. Lieberman (Sept. 13, 2012) ("We are unanimous in our view that independent agencies should be held to the same good-government standards as executive agencies, and S. 3468 admirably advances that goal."), *available at* https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=563c60e4-3770-4329-b1aa-ff51752cd750; Robert H. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 50 U. PENN. L. REV. 1489, 1494 (2002) ("[T]he commitment to cost-benefit analysis has been far too narrow; it should be widened through efforts to incorporate independent regulatory commissions within its reach."); Katzen, *supra* note 2, at 109–110 ("I now believe that requirements for economic analysis and centralized review should be extended to the Independent Regulatory Commissions.").

[4] Letter from H. Russell Frisby, Chair, American Bar Association, Section of Administrative Law and Regulatory Practice, to Mabel Echols, OIRA (Mar. 16, 2009), at 7, 8 ("[P]residential review should apply generally to all federal rulemaking, including that by independent regulatory agencies. . . . [T]he President has a substantial argument that his need to supervise most regulation of the traditional independent agencies is no less than for the executive agencies. . . . [P]lacing policymaking responsibilities in independent agencies infringes the President's powers by undermining political accountability." (quoting ABA House of Delegates, *Recommendation: Presidential Review of Rulemaking*, 1990 ANNUAL MEETING)), *available at* https://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf.

[5] *See, e.g.*, *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Administrative Law, House Comm. on the Judiciary*, 112th Cong. 42 (Feb. 28, 2011) (statement of Peter L. Strauss, Columbia Law School, former general counsel of the Nuclear Regulatory Commission) ("[S]houldn't Congress also bring the independent regulatory commissions under these mandates [in Executive Order 12,866]? Presidents haven't done that, as I understand it, only because they fear the political costs to their relationship with you, with the Congress. Given the extraordinary range of rulemaking Dodd-Frank requires of independent commissions, Congress ought to welcome this change."); *see also id.* (statements of Susan Dudley and Jeffrey Rosen).

[6] *See* Katzen, *supra* note 2, at 110 ("IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In the 2010 OMB Report to Congress, it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits or costs." (citing OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 97–98 (2010))); *accord* OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 97–98 (2015), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf. Some independent agencies, such as the Securities and Exchange Commission, are required by statute to engage in cost-benefit analysis. *See* Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

This authority is firmly rooted in the text and structure of the Constitution, which vests all of "the executive Power" in the president,[7] requires him to "take Care that the Laws be faithfully executed,"[8] and empowers him to "require the Opinion, in writing, of the principle Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[9] The president's supervisory power over independent agencies has been confirmed by congressional legislation, executive branch legal opinions, and the courts.

Background

The Origin of Centralized Review of Agency Rulemaking

President Reagan ran for office in 1980 on a platform of comprehensive regulatory reform and relief.[10] He perceived that the federal government was "overgrown and overweight," and he demanded that the government be made "accountable to the American people" it exists to serve.[11] When he accepted the Republican nomination, Reagan pledged "a Government that will not only work well but wisely, its ability to act tempered by prudence, and its willingness to do good balanced by the knowledge that government is never more dangerous than when our desire to have it help us blinds us to its great power to harm us."[12]

To give effect to that aspiration to wise and prudent administration, President Reagan, in his first month in office, unveiled the centerpiece of his regulatory reform program, Executive Order

[7] U.S. CONST. art. II, § 1.
[8] *Id.* § 3.
[9] *Id.* § 2.
[10] *Republican Party Platform of 1980 (July 15, 1980)*, AMERICAN PRESIDENCY PROJECT (last visited May 25, 2017), http://www.presidency.ucsb.edu/ws/?pid=25844 ("Republicans realize the immediate necessity of reducing the regulatory burden to give small business a fighting chance against the federal agencies.").
[11] Ronald Reagan, Acceptance of the Republican Nomination for President (July 17, 1980), *available at* http://www.cnn.com/SPECIALS/2004/reagan/stories/speech.archive/nomination.html.
[12] *Id.*

12,291.[13] The order disciplined agency rulemaking by requiring agencies to verify that their rules were cost justified. Specifically, the order forbade rules whose "potential benefits to society" did not "outweigh the potential costs to society"[14]; it required agencies to set regulatory objectives and prioritize them "with the aim of maximizing net benefits to society"[15]; and it required an agency to select from among regulatory alternatives the option "involving the least net cost to society."[16] To allow a reasonable comparison of a rule's benefits and costs, Executive Order 12,291 required agencies to prepare a regulatory impact analysis for every major rule, which would be reviewed by the director of OMB.[17]

Although prior administrations had made a show of encouraging cost-conscious rulemaking, President Reagan's policy had teeth. Executive Order 12,291 distinguished itself from the orders of presidents Gerald Ford and Jimmy Carter by authorizing OMB to block publication of proposed and final rules that did not satisfy its review.[18] President Reagan's innovation reshaped the American regulatory system and remains in force to this day. President Bill Clinton replaced Reagan's order with Executive Order 12,866 but retained all the core features of Executive Order 12,291, including cost-benefit analysis and OMB review of executive agency rules.[19] President Barack Obama supplemented Executive Order 12,866 with Executive Order 13,563, which allowed

[13] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *available at* https://www.archives.gov/federal-register/codification/executive-order/12291.html.
[14] *Id.* § 2(b).
[15] *Id.* § 2(c), (e).
[16] *Id.* § 2(d).
[17] *Id.* § 3(a), (c).
[18] *Id.* § 3(f); *cf.* W. Andrew Jack, Note, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO. WASH. L. REV. 512, 513–14 (1986) ("[L]ike the Ford order, President Carter's proposal gave the nominal overseers no enforcement authority."), *available at* http://www.thecre.com/pdf/20120806_ExectuveOrder12291.pdf.
[19] Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993). The Clinton order specified that agencies had to assess qualitative (not just quantitative) costs and benefits of rules. *See* Hahn & Sunstein, *supra* note 3, at n.3.

agencies to consider qualitative benefits and costs "that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[20]

The Historical Exemption of Independent Agencies from Centralized Review

Executive Order 12,866 (like the Reagan order it replaced) exempts independent regulatory agencies, as defined by the Paperwork Reduction Act.[21] The exemption of independent agencies from OMB review was consistent with Congress's exemption of some independent agencies from the general requirement to submit legislative proposals and budget requests to OMB before submitting them to Congress.[22]

But neither the Reagan administration that issued Executive Order 12,291, nor the Clinton administration that issued Executive Order 12,866, nor any of the administrations that have since maintained it ever suggested that the exemption for independent agencies was legally required. To the contrary, in the early days of the Reagan administration, I spoke in my capacity as counsel to the vice president to affirm the administration's belief that President Reagan possessed the legal authority to extend the cost-benefit and centralized review requirements to independent agencies:

> The EO, by its terms, does not cover the independent agencies. This is not so much that we thought we lacked certain legal authority to do certain things, since I think we could have extended the EO and might still in the future. We chose not to do it really because of policy reasons[.] [W]e had our plate more than full with the Executive Branch Agencies which do impose by far the greatest percentage of capital cost[] burdens that we think were issued during the campaign. We just didn't want to spread ourselves too thin. If we can get the main regulatory problem under control, we'll actually focus at that point more

[20] Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011), *available at* https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.
[21] Exec. Order No. 12,866 § 2(b) (citing 44 U.S.C. § 3502(10)); Exec. Order No. 12,291 § 1(d).
[22] *See* VIVIAN S. CHU & DANIEL T. SHEDD, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 4–5 (Sept. 10, 2012) (citing 12 U.S.C. § 250; 19 U.S.C. § 2232; 47 U.S.C. § 154(k)).

> on the independents, but we'll wait and see how much progress we make with the Executive Branch.[23]

Many knowledgeable sources have confirmed my statement that President Reagan exempted independent agencies from Executive Order 12,291 for political rather than legal reasons.[24] In the intervening decades, though, the political calculus has changed: Congress continues to subject independent agencies to some degree of presidential supervision, undermining the political opposition to centralized review of independent agency rules.

And the need for centralized review has grown: today, independent agency regulations impose an enormous and growing burden on the American public, as shown in figure 1. The financial services sector has expanded dramatically since 1981 and is now regulated by a bevy of independent agencies—the Federal Reserve, the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, and the Consumer Financial

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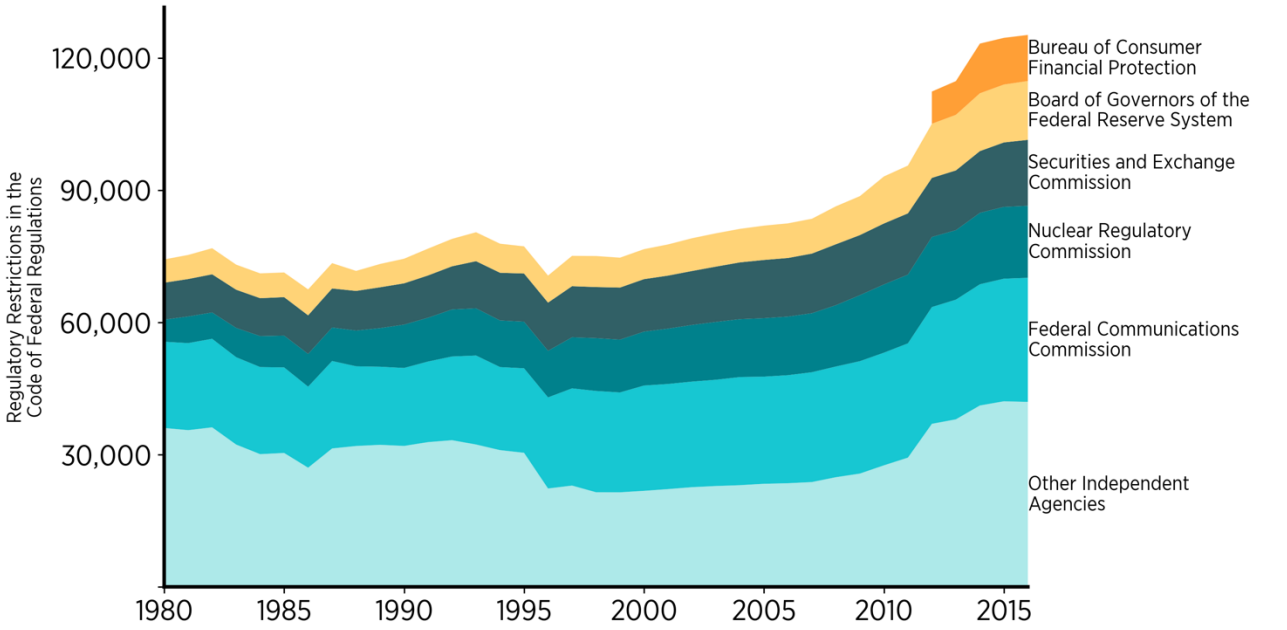
[23] C. Boyden Gray, Counsel to the Vice President, Transcription of Hall of Flags Reg. Reform Briefing (Apr. 10, 1980), reprinted in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Environment*, 97th Cong. 71, 87, 93–94 (1982) [hereinafter *Hearing on Role of OMB*]. Vice President Bush stated an additional reason for exempting independent agencies in a letter requesting that they voluntarily comply with the cost-benefit and OMB review provisions and with "the spirit of the order": "We appreciate that your organization's internal procedures may make it difficult for you to comply with every provision of Executive Order 12,291." Letter from Vice President George Bush to Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System (Mar. 25, 1981), reprinted in *Hearing on Role of OMB*, *supra*, at 177.

[24] Letter from Susan Dudley et al. to Sen. Joseph I. Lieberman, *supra* note 3 ("Legal advisors to both President Reagan and President Clinton concluded that the president has the legal power to extend these requirements to independent agencies, but both presidents chose not to do so out of deference to Congress."); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 202 (1986) ("This decision was based largely on fear of the congressional reaction to any such effort rather than on a judgment that the President lacked the necessary constitutional authority."); Katzen, *supra* note 2, at 109 ("The rules issued by the IRCs were not subject to review by OIRA under the Reagan E.O., nor under the Clinton E.O. In both cases, the legal advisors to the draftsmen concluded that the President had authority to review the rules of the IRCs, and the decision not to do so was essentially for political reasons—namely, deference to Congress, which traditionally views the IRCs as 'its' agencies, not the President's. [¶] With the benefit of hindsight, I would reach a different recommendation." (footnote omitted)); Sally Katzen, former OIRA director, Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions? (Apr. 7, 2011), 2–3 ("In both cases, it was clear that the executive orders were taking a very big step—President Reagan in establishing decisional criteria based on economic analysis and for President Clinton in retaining a centralized review process that had been strongly criticized by Democrats in Congress and opposed by significant parts of his base. In both cases, it was enough to take these steps without further antagonizing those on the Hill who saw the 'independence' of IRCs as insulating or protecting them from edicts of the president."), *available at* http://www.rff.org/files/sharepoint/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf.

Protection Bureau (CFPB).[25] The same is true of the booming high-tech industry, which was virtually nonexistent at the dawn of the Reagan era and is now regulated primarily by the independent Federal Communications Commission. There is no good reason why these independent agencies, which have come to regulate a major portion of our GDP, should not be subjected to the same cost-benefit analysis and interagency coordination as executive branch agencies.

Figure 1. Accumulation of Regulation by Independent Agencies, 1980–2016



Source: RegData 3.0

[25] *See* CURTIS W. COPELAND, ADMINISTRATIVE COUNCIL OF THE UNITED STATES, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 7 (2013) ("The volume of rulemaking expected to result from the Dodd-Frank Act has increased concerns about the quality of the rules issued by independent regulatory agencies, and has led to calls from a variety of quarters that these agencies be required to prepare cost-benefit or other types of economic analyses before issuing economically significant rules."), *available at* http://bit.ly/2lrLsMD; *see also* Patrick McLaughlin & Oliver Sherouse, *The Dodd-Frank Wall Street Reform and Consumer Protection Act May Be the Biggest Law Ever,* MERCATUS CENTER AT GEORGE MASON UNIVERSITY (Jul. 20, 2015), https://www.mercatus.org/publication/dodd-frank-wall-street-reform-and-consumer-protection-act-may-be-biggest-law-ever (Rulemakings implementing the Dodd-Frank Act are "associated with more than five times as many new restrictions as any other law passed since January 2009, for a total of nearly 28,000 new restrictions. In fact, [the Dodd-Frank Act] is associated with more new restrictions than all other laws passed during the Obama administration put together.").

Analysis

The Constitution Gives the President Supervisory Authority over All Federal Agencies

The Constitution vests all of "[t]he executive Power" in the president alone.[26] This gives the president authority to supervise all federal agencies, including so-called independent agencies.

The limitation on presidential removal of agency heads that makes such agencies "independent" is an exception to the general rule of presidential control over federal agencies. In *Humphrey's Executor v. United States*, the Supreme Court upheld for-cause removal protection of federal trade commissioners only because it deemed the Federal Trade Commission (FTC) a "quasi legislative and quasi judicial" body that "cannot in any proper sense be characterized as an arm or an eye of the executive."[27] The court reaffirmed that any "purely executive officer[]" is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[28]

If *Humphrey's Executor* implied that agencies such as the FTC are *absolutely* independent of the president, the Supreme Court has since then firmly rejected that implication. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court recently emphasized that independent agencies, although protected against at-will removal, remain constitutionally subject to presidential oversight and control.

Take Care Clause. The Take Care Clause of the Constitution is one source of the president's supervisory authority over independent agencies. As the Supreme Court explained in *Free Enterprise Fund*, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he

[26] U.S. CONST. art. II, § 1.
[27] Humphrey's Executor v. United States, 295 U.S. 602, 628, 629 (1935).
[28] *Id.* at 628, 627.

cannot oversee the faithfulness of the officers who execute them."[29] Thus, the people "look to the president to guide the 'assistants or deputies . . . subject to this superintendence.'"[30] This oversight role is a mandatory duty of the president: "[T]he President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.'"[31] The agency in that case, the Public Company Accounting Oversight Board (PCAOB), was an independent agency with two layers of removal protection: (1) its members were appointed by the SEC, also an independent agency with removal protection,[32] and (2) PCAOB members could not be removed by the president, nor by the SEC except for cause. If independent agencies were entirely free of presidential oversight and control, this arrangement would have posed no constitutional difficulty. But the Court held that it "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."[33]

Although the SEC is an independent agency, the Court recognized that the president "may hold the Commission accountable for everything . . . it does."[34] And although the opinion was concerned with removal as a means of keeping officers accountable,[35] it did not exclude other means of doing so. Quoting James Madison, the Court characterized the core executive power as that of "appointing, overseeing, and controlling those who execute the laws."[36] Removal is not the only means of overseeing and controlling an inferior officer. Thus, even in his oversight of independent agencies, the president has "the ability to ensure that the laws are faithfully

[29] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010).
[30] *Id.* at 498; *see also id.* at 499 ("The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.").
[31] *Id.* at 496.
[32] *Id.* at 487.
[33] *Id.* at 498.
[34] *Id.* at 496.
[35] *Id.* at 483.
[36] *Id.* at 492 (quoting 1 ANNALS OF CONG. 463 (1789)).

executed."[37] The Court's objection to the PCAOB's double removal protection grew out of its concern about presidential oversight: "The result is a Board that is not accountable to the President, and a President who is not responsible for the Board."[38]

And the president's oversight of independent agencies is active, not passive, under *Free Enterprise Fund*. To exercise real supervisory authority, the president must be able to exert some "structural protections against abuse of power."[39] Oversight without enforcement would "reduce the Chief Magistrate to a cajoler-in-chief."[40] It would not allow the president to fulfill his constitutional duty to take care that the laws be faithfully executed.

Requiring independent agencies to analyze the benefits and costs of their major rules and to submit them to OIRA would be a prudent and rather minimalist exercise of that constitutional duty. If the president is to exercise any control at all over independent agencies, as the Supreme Court says he must, at the very least he must be able to require independent agencies to follow general principles of good governance. Requiring that regulations do more good than harm is common sense, and it allows some executive branch input without sacrificing the agencies' independent judgment as to the merits of any given rule. Officers who fail to abide by such general principles embodied in executive orders give the president good cause to remove them from office, even when they enjoy for-cause removal protection. "The refusal of the [independent regulatory] commission to obey the President's executive order would constitute neglect of duty or misconduct, which would justify the removal of the commissioners from office."[41]

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[37] *Id.* at 498.
[38] *Id.* at 495.
[39] *Id.* at 501.
[40] *Id.* at 502.
[41] *See* OFFICE OF LEGAL COUNSEL, APPLICABILITY OF EXECUTIVE PRIVILEGE TO INDEPENDENT REGULATORY AGENCIES 190 (Nov. 5, 1957) [hereinafter 1957 OLC Opinion], *available at* https://www.justice.gov/sites/default/files/olc/opinions/1957/11/31/op-olc-supp-v001-p0170_0.pdf; *see infra* note 56 and accompanying text.

Opinions Clause. Under the Opinions Clause of the Constitution, the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[42] Along with the general power implied by the Take Care Clause, the Opinions Clause offers an express grant of the specific power to demand a written analysis from federal agencies.

The scope of the Opinions Clause—"any Subject relating to the Duties" of an agency—is certainly broad enough to embrace an opinion about the anticipated costs and benefits of proposed agency action. Although the Supreme Court reserved the question whether the SEC is an "'executive Departmen[t]' under the Opinions Clause,"[43] the court's holding that the SEC is a "'Departmen[t]' for the purposes of the Appointments Clause" strongly implies an affirmative answer.[44]

Constitutional structure. In addition to the specific provisions of Article II that support the president's authority to supervise independent agencies, the structure of the U.S. constitutional system as a whole demands that all federal agencies operate within the control of the chief executive. Again quoting Madison, the Supreme Court noted the framers' view that a functioning executive branch requires presidential oversight of federal agencies: "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to *the requisite responsibility and harmony in the Executive Department*,' was that the executive power included a power to oversee executive officers through removal."[45] And at-will removal is but one tool of presidential oversight. Where Congress withholds that tool, the need for other forms of enforceable presidential oversight is even greater.

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[42] U.S. CONST. art. II, § 2, cl. 1.
[43] *Free Enterprise Fund,* 561 U.S. at 511 n.11.
[44] *Id.* at 511.
[45] *Id.* at 492 (quoting Letter from James Madison to Thomas Jefferson (Jun. 30, 1789)).

As the U.S. Court of Appeals for the D.C. Circuit put it, "[t]he authority of the President to control and supervise executive policymaking is derived from the Constitution. . . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."[46] Although this statement appeared in a case concerning an executive branch agency, the principle applies no less to independent agencies, which play an increasingly important role in the administration of government.

The court's argument "from the practical realities of administrative rulemaking"[47] sounds in structural constitutional interpretation, a field that draws on "inference from the structures and relationships created by the constitution in all its parts or in some principal part."[48] A constitutional interpretation must be rejected if it would result in an unworkable system of government or one ungovernable by the three branches that the framers designed. Thus, any rational interpretation of the president's constitutional authority must be consistent with preserving a functional government that adheres to the tripartite structure of the Constitution. If the president were powerless to influence the cost and coherence of independent agency rulemakings, the result would be an unaccountable, self-contradicting, many-headed fourth branch of government found nowhere in the Constitution and unanswerable to the people who established it.

[46] Sierra Club v. Costle, 657 F.2d 298, 405–06 (D.C. Cir. 1981) (affirming the president's right to consult in private with his EPA administrator concerning a proposed rule), *quoted in Hearing on Role of OMB*, *supra* note 23, at 47 (statement of James C. Miller III, Administrator for OIRA).
[47] *Sierra Club*, 657 F.2d at 406.
[48] CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

The Executive Branch Has Affirmed the President's Authority to Supervise Independent Agencies

My early statements on the president's authority to supervise independent agencies were consistent with a long line of executive branch authorities supporting the president's right to impose centralized review on independent agencies.[49]

1957 Office of Legal Counsel (OLC) opinion. Long before President Reagan's order, the executive branch had occasion to affirm the president's supervisory role over independent agencies. In 1957, the Department of Justice's Office of Legal Counsel opined that the executive privilege extends to independent regulatory agencies, such as the SEC, because "their functions and operations are subject to executive control."[50] *Humphrey's Executor*,[51] which upheld the for-cause removal protection of the FTC, "cannot be invoked as a complete charter of independence of the regulatory commissions from executive control."[52] To the contrary, OLC found that "[t]he President's power to remove commission members for inefficiency, neglect of duty, or malfeasance . . . implies that he may exercise a certain amount of managerial authority over the commission."[53] Thus, "the President under penalty of removal 'may exact reasonable efficiency and absolute integrity.'"[54]

Even more broadly, OLC endorsed the view of Professor Robert Cushman that the president "can force an independent regulatory commission to comply with executive orders of general application unless Congress clearly indicates that such orders should not apply. These executive orders relate to a multitude of matters which affect the general efficiency of the government."[55]

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[49] Many independent agencies voluntarily agreed to comply with the processes of the executive order despite their exemption. *Hearing on Role of OMB*, *supra* note 23, at 101 (statement of Patrick M. McLain, Subcommittee Counsel).
[50] 1957 OLC Opinion, *supra* note 41, at 172.
[51] 295 U.S. 602 (1935).
[52] 1957 OLC Opinion, *supra* note 41, at 171–72.
[53] *Id.* at 172. The 1957 OLC Opinion also noted other legislation that brought independent agencies within the president's supervisory power. *See id.* at 190 (Reorganization Act of 1949, 5 U.S.C. § 133z); *see infra* p. 8.
[54] 1957 OLC Opinion, *supra* note 41, at 190.
[55] *Id.* (quoting ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 464 (1941)).

OLC agreed with Cushman that the president could remove independent agency heads for failure to comply with a generally applicable executive order, notwithstanding their for-cause removal protection: "The refusal of the commission to obey the president's executive order would constitute neglect of duty or misconduct, which would justify the removal of the commissioners from office."[56] Thus, "[f]rom a managerial standpoint [independent regulatory agencies] may also be amenable to executive direction."[57]

Although the 1957 OLC opinion was concerned with executive privilege, not centralized regulatory review, the question of presidential supervision of independent agencies was relevant to the executive privilege question. OLC's conclusion about the president's power to force independent agencies to comply with generally applicable executive orders in support of efficient government supported the application of the privilege.[58] The president's power to direct independent agencies through generally applicable executive orders also supports extending cost-benefit analysis and centralized review to independent agencies by executive order.

1977 OLC opinion. In 1977, President Carter's White House inquired whether it could include independent agencies in an executive order designed to "improve procedure, set up work schedules and plans for more efficient discharge of the agencies' duties, and improve the proficiency of personnel by appropriate training programs directed to the drafting of regulations."[59] OLC responded that the president did have this power based on his constitutional duty to "take care that

[56] *Id.* (quoting CUSHMAN, *supra* note 55, at 465).
[57] *Id.* at 191.
[58] *Id.* at 190 ("Where the President is vested with general managerial powers over a regulatory commission it would seem proper to regard the doctrine of executive privilege as extending to the disclosure of communications between the commission and the President or his staff concerning managerial matters.").
[59] Mem. from John Harmon, Ass't. Att'y. Gen., Off. of Legal Counsel, to Simon Lazarus, Assoc. Dir., Domestic Council, 3 (Jul. 22, 1977) [hereinafter 1977 OLC Opinion], *available at* http://thecre.com/pdf/Carter_DOJOpinion072277.PDF.

the laws be faithfully executed."[60] Article II implied a duty to "make certain that the agencies, although independent with respect to their quasi-legislative and judicial functions, perform those functions efficiently and without undue delay" and to "guide their fiscal and personnel policies."[61]

The 1977 opinion cited a 1970 OLC opinion, not publicly available, that held that the president "has the ultimate responsibility, under the Constitution and various statutes, to assure efficient operation of *all* government agencies."[62] The 1970 Opinion concluded that "in appropriate cases," the president's supervisory responsibility allows him to "undertake management studies, be concerned with agency budgets, etc."[63]

OLC in 1977 found that Congress had "recognized" this constitutional supervisory power in the removal statutes that authorize the president to remove heads of independent agencies "for inefficiency, neglect of duty, or malfeasance."[64]

Most importantly, President Carter's OLC affirmed that the president could force independent agencies to calculate and report benefits and costs: "it . . . appears appropriate for [the president] to require that the agencies *take into account the economic impact of their decisions*."[65] Thus, before President Reagan took office, OLC had already established the legal framework for a cost-benefit requirement for independent agencies.

It may have been on the basis of this 1977 OLC opinion that James McIntyre, President Carter's OMB director, stated the following year in a memorandum to the president that "[t]he

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[60] *Id.* at 2 (quoting U.S. CONST. art. II, § 3).
[61] *Id.*
[62] *Id.* at 2 (emphasis added) (quoting Mem. from Off. of Legal Counsel to Flanigan, Presidential Assistant (Jan. 15, 1970)).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 3, emphasis added. The 1977 OLC Opinion goes on to say that the president "probably cannot dictate the precise effect the agencies are to give to [the cost-benefit] impact" of a proposed rule. *Id.* But Reagan's OLC held to a more muscular vision of the president's power to supervise independent agencies "as necessary to ensure that they are faithfully executing the laws." *See infra* note 98 and accompanying text.

Department of Justice is of the opinion that the President has the constitutional and statutory authority to require independent agencies to comply with the procedural reforms in this Executive Order."[66] McIntyre was referring to what would become Executive Order 12,044, which required agencies to consider and analyze "meaningful alternatives,"[67] to select "the least burdensome of the acceptable alternatives,"[68] and to prepare regulatory analyses for all major rules.[69]

February 13, 1981 OLC opinion. Four days before President Reagan issued Executive Order 12,291, OLC issued an opinion affirming the president's constitutional prerogative to require federal agencies to engage in cost-benefit analysis and to submit their rules to OMB for review.[70] Although the opinion did not distinguish between executive branch agencies and independent agencies, most of the arguments in support of centralized review apply equally to both.

The February 13, 1981 OLC opinion's principal argument in support of centralized review of agency rulemaking is that the president is the head of the executive branch and has a duty to "take Care that the Laws be faithfully executed."[71] In *Myers v. United States*, the Supreme Court recognized that the duty to "take Care" includes the power to "supervise and guide" agencies in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[72]

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[66] Mem. from James T. McIntyre to President Carter, concerning Executive Order on Improving Government Regulation (Mar. 1978), *available at* http://www.thecre.com/pdf/Carter_OMBMemoMarch1978.PDF.
[67] Exec. Order No. 12,044 § 1(d).
[68] *Id.* § 2(d)(3).
[69] *Id.* § 3.
[70] OFFICE OF LEGAL COUNSEL, PROPOSED EXECUTIVE ORDER ENTITLED "FEDERAL REGULATION" (Feb. 13, 1981) [hereinafter February 13, 1981 OLC Opinion], *available at* https://www.justice.gov/sites/default/files/olc /opinions/1981/02/31/op-olc-v005-p0059_0.pdf.
[71] U.S. CONST., art. II, § 3, *quoted in* February 13, 1981 OLC Opinion, *supra* note 70, at 60.
[72] Myers v. United States, 272 U.S. 52, 135 (1926), *quoted in* February 13, 1981 OLC Opinion, *supra* note 70, at 60.

The opinion did recognize "the power of Congress to confine presidential supervision by appropriate legislation"[73] and the "comparative insulation given to the independent regulatory agencies."[74] But this should not be understood to exempt independent agencies from the president's "take Care" duty altogether. Rather, the opinion insists on the president's power "to guide and limit[] discretion which Congress has allocated to a particular subordinate official."[75] Thus, even where Congress has "peculiarly and specifically committed [certain duties] to the discretion of a particular officer," the president retains the authority "to consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority."[76]

In *Humphrey's Executor*, the Supreme Court held that Congress's grant of for-cause removal protection to the Federal Trade Commission exempted it from the president's general power of removal, on the theory that "the commission acts in part quasi legislatively and in part quasi judicially."[77] But nothing in *Humphrey's Executor* absolves the president of his constitutional duty to supervise all agencies to the extent that they exercise executive power. And as argued in a contemporaneous OLC opinion, discussed later in this article,[78] the procedural matters of cost-benefit analysis and related centralized review fall within the executive power and outside the independent agencies' quasi-legislative policymaking power.[79]

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[73] February 13, 1981 OLC Opinion, *supra* note 70, at 60 (quoting Buckley v. Valeo, 424 U.S. 1, 140–41 (1976)); *see id.* at 61 ("[T]he President's exercise of supervisory powers must conform to legislation enacted by Congress.").
[74] *Id.* at 61.
[75] *Id.*
[76] *Id.* at 62.
[77] 295 U.S. 602, 628 (1935).
[78] *See infra* p. 8.
[79] Mem. from Larry L. Simms, Acting Ass't. Att'y. Gen., Off. of Legal Counsel, to the Hon. David Stockman, Director of OMB, 12 (Feb. 12, 1981) [hereinafter February 12, 1981 OLC Opinion], *reprinted in Hearing on Role of OMB*, *supra* note 23, at 163.

The February 13 opinion makes clear that "design[ing] and execut[ing] a uniform method for undertaking regulatory initiatives" is an executive function that the president "is uniquely situated" to perform.[80] The opinion places the "requirement that the agencies perform a cost-benefit analysis" squarely in this category.[81] The requirement does not exceed the president's supervisory power, OLC wrote, because it "leaves a considerable amount of decisionmaking discretion to the agency," which "retain[s] considerable latitude in determining whether regulatory action is justified and what form such action should take."[82]

In addition to the Take Care Clause, the opinion finds support for requiring cost-benefit analysis in the president's duty to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient,"[83] and in his constitutional right to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[84]

February 12, 1981 OLC opinion. Although the public OLC opinion supporting Executive Order 12,291 had no need to directly consider independent agencies, a different OLC opinion, dated February 12, 1981, did address the legality of a more expansive executive order that was never issued. That more expansive order would have extended the cost-benefit analysis and centralized review obligations to independent agencies.[85]

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[80] February 13, 1981 OLC Opinion, *supra* note 70, at 60, 61.
[81] *Id.* at 62.
[82] *Id.* at 63 ("The order does not empower [OMB] to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions.").
[83] U.S. CONST., art. II, § 3, *cited in* February 13, 1981 OLC Opinion, *supra* note 70, at 62.
[84] *Id.* § 2, *cited in* February 13, 1981 OLC Opinion, *supra* note 70, at 62 n.7.
[85] February 12, 1981 OLC Opinion, *supra* note 79, at 7, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 152.

OLC concluded that "under the best view of the law, these and some other requirements of the order can be imposed on the independent agencies."[86] The opinion qualified this conclusion with the statement that "an attempt to exercise supervision of these agencies through techniques such as those in the proposed order would be lawful only if the Supreme Court is prepared to repudiate certain expansive dicta in the leading case on the subject"—in particular the court's characterization of the FTC as "independent of executive authority except in its selection."[87]

Although this statement could have been clearer, it should not be understood to require a change in Supreme Court precedent *before* the president may act to supervise independent agencies. Dicta that go beyond the holding of the court do not bind the president any more than such dicta bind the Supreme Court itself.[88] No less an authority than *Humphrey's Executor* itself stated that "dicta . . . may be followed if sufficiently persuasive but [is] not controlling."[89]

And, as the February 12 OLC opinion continued, "there are several reasons to conclude that the Supreme Court would today retreat from . . . dicta" in *Humphrey's Executor* that seems to limit the president's power over independent agencies to the power of appointment: (1) the *Humphrey's Executor* court had been focused primarily on agency adjudication, not on presidential supervision of rulemaking; (2) rulemaking by independent agencies is now functionally indistinguishable from rulemaking by executive branch agencies; (3) the Court's assumption about the apolitical nature of regulation is "outmoded"; and (4) since the time of *Humphrey's Executor*, Congress has delegated

[86] *Id.* at 9, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 160.
[87] *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 625–26); *see also id.* (quoting 295 U.S. at 624 (characterizing the FTC as "neither political nor executive")).
[88] *See* Cohens v. Virginia, 19 U.S. 264, 399 (1821) (Marshall, C.J.) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").
[89] 295 U.S at 399.

to the president an increasing array of statutory powers over independent agencies.[90] Indeed, since 1981, *Humphrey's Executor* has become an even more dubious precedent, as the GDP share of industry subject to independent regulatory agencies has grown dramatically.[91]

Statutes requiring presidential supervision of independent agencies confirm that Congress's intent is not to exclude such agencies from the president's influence altogether.[92] In particular, OLC pointed to the Regulatory Flexibility Act, which requires independent agencies to prepare "agendas and analyses somewhat similar to those of the Proposed Order,"[93] and the Paperwork Reduction Act of 1980, which "give[s] OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public."[94] OLC reasoned that "these statutes recognize the legitimacy of some presidential influence in the activities of independent agencies, especially when it consists of a coordinating role with only an indirect effect on substantive policymaking."[95]

Accepting the premise that Congress intended for-cause removal to insulate independent agencies from presidential control of "substantive policy,"[96] the February 12 opinion concluded that the president retains a supervisory role with regard to an independent agency's procedures by virtue of his constitutional duty to "take Care that the Laws be faithfully executed."[97] Thus, the president may supervise independent agencies "as necessary to ensure that they are faithfully executing the laws."[98]

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[90] February 12, 1981 OLC Opinion, *supra* note 79, at 9–10, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 160–61.
[91] *See supra* note 25 and accompanying text.
[92] February 12, 1981 OLC Opinion, *supra* note 79, at 11, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 162 ("reorganization authority, OMB's budgetary and legislative request processes, the deferral or rescission of appropriations, and the selection of agency chairmen" (citing Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 491–95 (1978))).
[93] *Id.* at 12 n.16 (citing Pub. L. No. 96-354, 94 Stat. 1164), *reprinted in Hearing on Role of OMB*, *supra* note 23, at 163.
[94] *Id.* (citing Pub. L. No. 96-511, 94 Stat. 2812).
[95] *Id.* at 11–12, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 162–63.
[96] *Id.* at 10, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 161.
[97] *Id.* at 11, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 162 (quoting U.S. CONST., art. II, § 3).
[98] *Id.* (citing JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 33 (1960)).

Applying this standard to the proposed executive order, OLC found that the cost-benefit and centralized review provisions fit comfortably within the procedural realm that is appropriate for presidential supervision:

> The principal requirement . . . that independent agencies prepare [regulatory impact analyses] would have only an indirect effect on substantive discretion, since the identification of costs and benefits and the particular balance struck would be for the agency to make. It should also be possible for OMB to prescribe criteria for independent agencies to follow in preparing their RIA's, to consult with them in the process, and to disagree with an independent agency's analysis on the administrative record. None of these actions would directly displace the agencies' ultimate discretion to decide what rule best fulfills their statutory responsibilities.[99]

The opinion went on to cite a "frequent formulation of the President's power over the independent agencies"—the idea that the president "may supervise them as necessary to ensure that they are faithfully executing the laws, although he may not displace their substantive discretion to decide particular adjudicative or rulemaking matters."[100] But the opinion did not expressly endorse that limitation on the president's power as a constitutional matter. It was consistent with President Reagan's executive order, which merely allowed the OMB director to request that an agency "refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking" until OMB's "review is concluded."[101] The successor executive order requires that irreconcilable disputes between an agency and OIRA be resolved by the president.[102] The Supreme Court's subsequent emphasis on the president's critical role in holding independent agencies "fully accountable" suggests that independent agencies should be held to the same standard and subject to the same OIRA review procedures as other agencies.[103]

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[99] *Id.* at 12, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 163.
[100] *Id.* at 11, *reprinted in Hearing on Role of OMB*, *supra* note 23, at 162.
[101] Exec. Order No. 12,291 § 3(h)(i), 46 Fed. Reg. 13,193 (Feb. 17, 1981).
[102] Exec. Order No. 12,866 § 7 (Oct. 4, 1993).
[103] *Free Enterprise Fund*, 561 U.S. at 479.

A draft report for the Administrative Council of the United States (ACUS) suggests that the February 12 memorandum "may not be a formally issued OLC opinion."[104] That distinction may be irrelevant because the memorandum was cited before Congress by OMB Director James Miller as "[a]n opinion by the Office of Legal Counsel of the Department of Justice" and "the legal basis on which [the Reagan administration] would rely should [it] have chosen to apply [Executive Order 12,291] to independent agencies."[105] I objected to the opinion's release on the basis of its relevance, not its authoritative status, and I suggested that it be withheld only "until such time as we extend the Executive order to the independent agencies, since the Executive order does not apply to the independent agencies."[106] In my view, the February 12 memorandum represents the considered view of the executive branch concerning the president's power to supervise independent agencies.

Executive Branch Practice

Although the White House has not yet required independent agencies to submit to cost-benefit analysis and centralized review, presidents since Reagan have asked independent agencies to do so voluntarily.[107]

And presidents have exercised their supervisory authority over independent agencies in even more directive ways. The FCC, for example, has followed directions from presidents of both parties in its rulemaking. Following a closed-door meeting with the chairman of the FCC, President

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[104] COPELAND, *supra* note 25.
[105] *Hearing on Role of OMB*, *supra* note 23, at 100. Mr. Miller later said that his answer "was predicated on a citation of the wrong opinion. The opinion I had in mind was the one that went with the Executive order." *Id.* at 101. But the February 12, 1981 OLC Opinion is the only one directly addressing the legality of extending Exec. Order No. 12,291 to independent agencies.
[106] *Id.* at 100.
[107] *See, e.g.*, Letter from Vice President George Bush to Paul A. Volcker, Chairman, Board of Governors of Federal Reserve System (Mar. 25, 1981), *reprinted in Hearing on Role of OMB*, *supra* note 23, at 177; Exec. Order No. 13,579 § 1(b), 76 Fed. Reg. 41,587 (July 14, 2011) (encouraging independent regulatory agencies to comply with the cost-benefit requirements of Exec. Order No. 13,563).

Reagan declared a two-year moratorium on any action by the FCC that would threaten its financial interest and syndication rules, even though the chairman favored repeal of those rules.[108] The combined pressure from President Reagan and Congress held the FCC in check for years.[109] Likewise, President Obama's public statements in support of reclassifying broadband as a telecommunications service led the FCC to change its approach to Internet regulation. Three months after the president's statement, the FCC's chairman endorsed President Obama's proposal and issued a proposal adopting the president's approach.[110] Requiring independent agencies to undergo cost-benefit analysis and centralized review is a light touch compared with these overt presidential directives on specific independent agency policies.

Congress Has Confirmed the President's Supervisory Power over Independent Agencies

Congress has never opposed the president's asserted authority to subject agency rulemaking to centralized review. The House of Representatives voted to block OIRA from spending federal funds on President George W. Bush's Executive Order 13,422, which governed "guidance documents" as well as rules.[111] But the Senate did not endorse the measure, and no house of Congress has opposed centralized review for agency *rules*.

As for independent agencies, Congress has repeatedly subjected them to a degree of presidential control. First, it has made heads of independent agencies removable by the president

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[108] *See* Christopher J. Pepe, *The Rise and Fall of the FCC's Financial Interest and Syndication Rules*, 1 VILL. SPORTS & ENT. L.F. 67, 74 n.46 (1994).
[109] *Id.* at 75.
[110] See Rebecca Curwin, *Unlimited Data, but a Limited Net: How Zero-Rated Partnerships Between Mobile Service Providers and Music-Streaming Apps Violate Net Neutrality*, 17 COLUM. SCI. & TECH. L. REV. 204, 217 (2015).
[111] H.R. 2829, 110th Cong. § 901 (2008). President Obama rescinded Exec. Order No. 13,422 soon after taking office. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

for "inefficiency, neglect of duty, or malfeasance in office."[112] Although this for-cause removal provides some level of independence and limits the president's power to direct an agency's policy choices,[113] even the limited removal power makes an agency accountable to the president—not to Congress—for efficient and lawful operation, objectives that are served by cost-benefit analysis and centralized review.

In a series of acts passed from 1932 to 1977, Congress gave the president varying degrees of authority to reorganize or even abolish federal agencies, including independent agencies.[114] This would have been a strange grant of authority if Congress had believed that the "independence" of such agencies was absolute and that the president's executive power did not extend to organizing such agencies.

The president's congressionally authorized power over "independent" agencies reached its high-water mark when Congress passed the Economy Act of 1933. Title IV of that Act defined "executive agency" to include independent agencies.[115] The president had the authority to "[a]bolish" independent agencies under this statute, seemingly without limitation.[116] Surely Congress would not have done this if presidential control of independent agencies were incompatible with the exercise of executive power.

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[112] *See, e.g.*, 15 U.S.C. § 41 (Federal Trade Commission); 42 U.S.C. § 1802 (Atomic Energy Commission); 49 U.S.C. § 11 (Interstate Commerce Commission); 49 U.S.C. § 421 (Civil Aeronautics Board).
[113] *See Humphrey's Executor*, 295 U.S. at 625.
[114] *See* Economy Act of 1932, Pub. L. No. 72-212, 47 Stat. 413; Economy Act Amendments of 1933, § 406, Pub. L. No. 73-2, 47 Stat. 1519; Reorganization Act of 1939, Pub. L. 76-19, 53 Stat. 561; Reorganization Act of 1945, Pub. L. No. 70-263 § 5, 59 Stat. 613, 615–16; Reorganization Act of 1949, §§ 5, 7, Pub. L. No. 81-109, 63 Stat. 203, 205 (imposing no limit on the reorganization of independent agencies); Reorganization Act of 1977, § 905(a)(1), Pub. L. No. 95-17, 91 Stat. 32.
[115] Economy Act Amendments of 1933, § 402, 47 Stat. 1517 ("When used in this title, the term 'executive agency' means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government and, except as provided in section 403, includes the executive departments.").
[116] Economy Act Amendments of 1933, § 403(c), Pub. L. No. 73-2, 47 Stat. 1518.

Even after *Humphrey's Executor* established the theory of "quasi legislative and quasi judicial" agencies, Congress again gave the president broad managerial responsibility over independent agencies in the Reorganization Act of 1949, subject only to a veto by either house of Congress.[117] With the exception of "executive department[s]," which he could not abolish outright,[118] the president could "abolish," "consolidat[e]," or "coordinat[e]" any agency, part of an agency, or function of an agency,[119] as long as any new functions transferred to an agency had been authorized by Congress to be performed by some agency.[120] This managerial responsibility included the power to establish new offices, transfer appropriations, and terminate the affairs of abolished agencies.[121]

The February 12, 1981 OLC opinion cited the Paperwork Reduction Act as evidence that presidential supervision of independent agencies is consistent with congressional intent. Since that time, the Paperwork Reduction Act has been amended to give OMB even more procedural control over all independent agencies, which are expressly included in the Act's definition of "agency."[122] Independent agencies must now certify to OMB that each collection of information required by the agency satisfies the requirements of the Act,[123] and they must provide other information as OMB directs[124]—requirements that did not appear in the 1980 Act. Although a multimember independent

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[117] *See* Reorganization Act of 1949, § 7, Pub. L. 81-109, 63 Stat. 205 (defining "agency" to include "any executive department, commission, council, independent establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government," and excluding only "the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government"); *id.* § 6 (single house veto).
[118] *Id.* § 5(a)(1), 63 Stat. 205.
[119] *Id.* § 3, 63 Stat. 203–04.
[120] *Id.* § 5(a)(4), 63 Stat. 205.
[121] *Id.* § 4, 63 Stat. 204.
[122] 44 U.S.C. § 3502(1).
[123] *Id.* § 3507(a)(1)(C) (quoting *id.* § 3506(c)(3)).
[124] *Id.* § 3507(a)(1)(C). Independent agencies must also submit for OMB review proposed rules requiring collections of information, *id.* § 3507(d)(1)(A), and OMB may direct an independent agency to share with other agencies the information it collects, *id.* § 3510(a).

agency may void any OMB disapproval of a proposed collection of information or instruction to make a material change,[125] this veto power does not apply to independent agencies headed by a single director, such as the CFPB, the Office of Special Counsel, the Social Security Administration, and the Federal Housing Finance Agency. More importantly, it requires the independent agency to publicly acknowledge that OMB has disapproved of its information collection. Congress would not have granted this managerial role to the White House if it believed that the executive power did not extend to independent agencies.

Conclusion

President Trump has already hinted at an inclination to exercise his supervisory role over independent agencies to reduce burdensome regulation. On January 30, 2017, he issued an executive order requiring each agency to offset the costs of new rules "by the elimination of existing costs associated with at least two prior regulations"[126] and limiting the "total incremental cost" of new and repealed regulations.[127] By its own terms, the order is addressed to "the heads of all agencies," without exempting independent regulatory agencies.[128] In March 2017, Trump even more clearly included independent agencies in an executive order on executive branch

[125] *Id.* § 3507(f)(1); *see also id.* § 3515 (exempting multimember independent agencies from the requirement to make "services, personnel, and facilities available" to OMB).
[126] Exec. Order No. 13,771, Reducing Regulation and Controlling Regulatory Costs § 2(c), 82 Fed. Reg. 9339 (Feb. 3, 2017).
[127] *Id.* §§ 2(b), 3(d).
[128] *Id.* The acting administrator of OIRA, a career staffer, quickly issued interim guidance excluding independent agencies from the order's effect. Mem. from Dominic J. Mancini, Acting Administrator, OIRA, to Regulatory Policy Officers, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs (Feb. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017; Mem.: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs," M-17-21, at Q1 (Apr. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation. But a future OMB director could revert to the inclusive language of the order itself.

reorganization. The order was addressed to "the head of each agency,"[129] and it cited the Administrative Procedure Act's definition of "agency," which includes independent agencies.[130] Each agency head is required to submit "a proposed plan to reorganize the agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of the agency."[131]

President Trump could expand the course of regulatory reform he has set for his administration by extending to independent agencies the long-standing policy of centralized review of major rules. Independent agencies, no less than other executive branch agencies, should work not only well but wisely.[132]

[129] Exec. Order No. 13,781 § 2, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13,959 (Mar. 16, 2017).
[130] *Id.* § 1 (citing 5 U.S.C. § 551(1) (defining "agency" broadly)).
[131] *Id.* § 2.
[132] *See supra* note 12 and accompanying text.