

## RESEARCH SUMMARY

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

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Since President Reagan came to office in 1981, executive orders have required federal agencies to conduct a cost-benefit analysis for any major rule and to submit that analysis for review by the White House's Office of Management and Budget along with the proposed rule. These executive orders have exempted "independent" agencies, whose heads the president cannot remove except for cause.

In "[The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking](#)," former White House Counsel and legal scholar C. Boyden Gray reviews the legal and constitutional history of the president's power over independent agencies and their work, concluding that the president has the authority to require independent regulatory agencies to conduct formal cost-benefit analysis and submit their regulatory proposals for centralized review by the executive branch.

### KEY POINTS

First, independent regulatory agencies are vastly different today than when the Supreme Court first considered the President's power to supervise them.

- The Supreme Court held, in the 1935 case of *Humphrey's Executor v. United States*, that Congress could lawfully insulate the Federal Trade Commission from at-will removal by the president because the agency performed "quasi legislative and quasi judicial" functions. However, this removal protection does not imply total independence from the president.
- Moreover, the decision to exempt independent agencies from cost-benefit analysis and centralized review was political, not legal. It was made at a time when independent agencies played a much smaller role in the administrative state and the national economy than they do today.

Second, the president has constitutional authority to supervise federal regulatory agencies. As the sole head of the executive branch, the president rightly exercises supervisory control even over "independent" agencies.

- As the Supreme Court explained in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." Thus, the president must have the capacity to exert some "structural protections against abuse of power," even by independent agencies.
- Additionally, the Opinions Clause of the Constitution gives the president the specific power to demand a written analysis from federal agencies. Exempting independent agencies from presidential supervision would violate the Constitution's structure.

This constitutional argument is supported by a long line of opinions from the Department of Justice's Office of Legal Counsel (OLC).

- A 1957 OLC opinion about executive privilege affirmed that, despite *Humphrey's Executor*, the president "can force an independent regulatory commission to comply with executive orders" concerning "the general efficiency of the government" unless "Congress clearly indicates that such orders should not apply."
- Subsequent OLC opinions issued between 1970 and 1981 reaffirmed that the president has responsibility over all government agencies, that the president can require independent agencies to take into account the economic impact of their decisions, and that cost-benefit analysis requirements can be imposed on independent agencies as a fulfillment of the president's duty to ensure faithful execution of the laws.

Finally, Congress itself has demonstrated that for-cause removal protection should not completely insulate "independent" agencies from presidential control. Various reorganization acts and the Paperwork Reduction Act have required presidential supervision of independent agencies.

## CONCLUSION

As he has with other executive orders, President Trump could include independent agencies in an order requiring cost-benefit analysis and centralized review of regulations. This would promote cost-effective rulemaking and improved regulatory coordination within the executive branch. Given the breadth and depth of the effects of independent agency rulemaking on the US economy, the president should no longer exempt these agencies from the accountability of cost-benefit analysis and centralized review.