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Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues

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Summary

Federal agencies regularly adopt rules, which have the force of law, to implement the statutes and programs authorized by Congress. Unless a statute directs otherwise, agencies generally must follow the requirements of the Administrative Procedure Act to promulgate rules. However, beginning with President Reagan, Presidents have maintained a centralized review process for "significant regulatory actions." Currently, Executive Order (EO) 12866, issued by President Clinton, imposes additional procedures agencies must follow before a rule can be finalized. This includes requiring agencies to submit proposed regulatory action to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for review. Although EO 12866 applies to executive agencies, independent regulatory commissions (IRC) are not required to submit their rules to OIRA for review. Debates have arisen among scholars and legislators as to whether the President has the authority to require both executive agencies and IRCs to submit their regulations for review by OIRA. In the 112th Congress, Senator Rob Portman introduced S. 3468, the Independent Regulatory Agency Analysis Act of 2012. This bill would authorize the President to issue an executive order establishing centralized review procedures for IRCs. This report discusses the constitutionality and the legal effects of extending centralized review of rulemaking to IRCs.

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Introduction

The Executive Branch has exercised control over agency rulemaking through executive orders such as Executive Order 12866.[1] This Executive Order requires executive agencies to submit significant rules to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) for review; however, it does not require the independent regulatory commissions (IRC) to comply with these requirements. This report discusses the constitutionality and the potential legal effects of extending centralized review of rulemaking to the IRCs.

Overview of Federal Rulemaking

Federal agencies adopt rules to implement statutes that Congress has enacted.[2] These rules, although established by an administrative agency, maintain the force of law.[3] In order to be able to promulgate rules, Congress must grant that agency the power to do so through statute.[4] To control the process by which agencies create these rules, Congress has enacted statutes, such as the Administrative Procedure Act (APA),[5] that dictate what procedures an agency must follow to establish a final, legally binding rule.

Unless an agency's authorizing statute provides for different procedures, the APA provides the default practice that all agencies must follow in order to promulgate rules. The APA provides for both formal and informal rulemaking procedures.[6] The formal rulemaking procedures only need to be followed when an authorizing statute requires that a rulemaking proceed "on the record" after an opportunity for a hearing.[7] These formal rulemaking procedures are rare and most agencies follow the informal, "notice and comment" rulemaking procedures outlined in the APA and discussed below.[8]

Under informal rulemaking procedures, an agency must first publish a notice of proposed rulemaking (NPRM) in the *Federal Register*.[9] The NPRM must include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[10] After providing notice through the *Federal Register*, the agency must allow "interested persons an opportunity" to comment on the proposed

[1] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[2] For more information on the rulemaking process, *see* CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd; CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Maeve P. Carey.

[3] Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

[4] *See* Brannan v. Stark, 342 U.S. 451, 462-65 (1952).

[5] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 *et seq*.).

[6] *See* 5 U.S.C. §§ 553, 556-57.

[7] 5 U.S.C. § 553.

[8] *Id.*

[9] 5 U.S.C. § 553(b). The APA provides an exception from notice or hearing if the agency has "good cause." *Id*.

[10] *Id.*

rule.[11] Typically an agency will provide at least 30 days for public comment and this time period may be extended if the agency deems necessary.[12] After the comment period has ended, the agency is required to review the public comments and may then issue a final rule. When publishing the final rule in the *Federal Register*, the agency must provide a "concise general statement" of the rule's "basis and purpose."[13] The final rule may not go into effect until at least 30 days after it is published in the *Federal Register*, with certain exceptions.[14]

In addition to the APA, Congress has enacted numerous statutes that impose obligations on agencies when they engage in rulemaking procedures. Statutes such as the National Environmental Protection Act (NEPA),[15] the Regulatory Flexibility Act (RFA),[16] the Congressional Review Act (CRA),[17] and the Paperwork Reduction Act (PRA)[18] establish additional procedures and practices that the agencies must follow prior to establishing a finalized rule. Furthermore, the President has issued executive orders and guidance documents establishing additional requirements and procedures that agencies must follow before a rule can be finalized.

Executive Control of Agency Rulemaking

Numerous presidential administrations have attempted to maintain control over the agencies by establishing a centralized review process for certain agency rules.[19] Notably, President Reagan's issuance of Executive Order (EO) 12291 required agencies to have proposed and final rules reviewed by OMB prior to publication.[20] Upon election, President Clinton revised and replaced Reagan's order with EO 12866 but maintained the centralized review process for "significant regulatory actions."[21] Clinton's EO 12866 was maintained by both the George W. Bush and Obama Administrations and remains in force today.[22] When both the Reagan and Clinton Administrations issued their respective executive orders, they exempted statutorily-designated independent regulatory commissions (IRCs) from this centralized review process. Before

[11] 5 U.S.C. § 553(c).

[12] The APA does not mandate a minimum time for comments.

[13] *Id.*

[14] 5 U.S.C. § 553(d). The APA provides an exception from the 30 day rule if the agency has "good cause." *Id.*

[15] 42 U.S.C. §§ 4321-4347 (requiring agencies to take into consideration the environmental impacts of major federal actions).

[16] 5 U.S.C. §§ 601-612 (requiring agencies to consider the impact of regulations on "small entities").

[17] 5 U.S.C. §§ 801-808 (requiring agencies to submit rules to Congress for congressional review of the proposed rules).

[18] 44 U.S.C. §§ 3501-3520 (requiring OMB approval when an agency seeks to collect information from an outside party).

[19] In 1971 President Nixon issued a "Quality of Life Review" program requiring agencies to submit certain proposed and final rules to OMB for review. *See* Angel Manual Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin L.J. Am. U. 461, 494-96 (1994).

[20] Exec. Order No. 12291, 3 C.F.R. § 127 (1981 compilation).

[21] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). The definition of "significant regulatory action" is defined *infra* in the discussion on "Executive Order 12866."

[22] President George W. Bush issued EO 13258 and EO 13422, making technical amendments to EO 12866, but otherwise maintained the centralized review requirements from EO 12866. Exec. Order No. 13258, 67 Fed. Reg. 9385 (Feb. 28, 2002); Exec. Order No. 13422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (revoked by Exec. Order No. 13497, 74 Fed. Reg. 6113 (Feb. 4, 2009). Most recently, President Obama issued EO 13563, essentially reaffirming the requirements and duties outlined in EO 12866. Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

discussing the requirements imposed by EO 12866, it is helpful to review briefly some of the features that make the IRCs generally insulated from presidential control.

What Are Independent Regulatory Commissions?

As mentioned, the centralized review portions of EO 12866 do not apply to the statutorily designated IRCs, also known as "independent regulatory agencies," identified in the PRA.[23] These IRCs share several traits that arguably insulate the agencies from the President's direct control. These characteristics include (1) "for cause" removal; (2) structural designs; (3) bypass of OMB legislative clearance; (4) bypass of OMB review of agency rulemaking; (5) bypass of OMB budget submissions; and (6) independent litigating authority.[24] For purposes of this report, we will only review the following traits—"for cause" removal, structural designs, and OMB bypass.

"For cause" Removal and Structural Design

"For cause" removal protection provides an element of insulation from presidential direction, as opposed to those officers who serve at the pleasure of the President and may be removed at will.[25] Typically, a removal provision may state that a member may be removed only "for cause" or for "inefficiency, neglect of duty, or malfeasance in office."[26]

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[23] 44 U.S.C. §§ 3501 *et seq*. The "independent regulatory agencies" identified in the PRA, which are exempt from some requirements of the act, are: the Board of Governors of the Federal Reserve System (Federal Reserve), the Commodity Futures Trading Commission (CFTC), the Consumer Product Safety Commission (CPSC), the Federal Communications Commission (FCC), the Federal Deposit Insurance Commission (FDIC), the Federal Energy Regulatory Commission (FERC), the Federal Housing Finance Authority (FHFA), the Federal Maritime Commission (FMC), the Federal Trade Commission (FTC), the Interstate Commerce Commission (ICC), the Mine Enforcement Safety and Health Review Commission (MESHRA), the National Labor Relations Board (NLRB), the Nuclear Regulatory Commission (NRC), the Occupational Safety and Health Review Commission (OSHRC), the Postal Regulatory Commission (PRC), the Securities and Exchange Commission (SEC), the Bureau of Consumer Financial Protection (CFPB), the Office of Financial Research, the Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission. *Id*. at § 3502(5). Though not listed, the U.S. International Trade Commission (USITC) is considered to be a part of this list, falling into the last category. *See* 19 U.S.C. § 1330(f) (stating that the U.S. International Trade Commission "shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44").

[24] *See, e.g.*, Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000), and Paul R. Verkuil, *Symposium: The Independence of Independent Agencies: The Purposes and Limits of Independent Agencies*, 37 Duke L.J. 257, 262-63 (1988). *See also* Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. __; 130 S. Ct. 3138 (2010) [hereinafter PCAOB]. These traits have been used to identify other agencies, like the Social Security Administration, that are considered independent from the President, but that have not been designated as an IRC under 42 U.S.C. § 3502(5).

[25] *See* Brett M. Kavanaugh, Article: Separation of Powers During the Forty Fourth Presidency and Beyond, 93 Minn. L. Rev. 1454, 1471-72 (2009).

[26] 12 U.S.C. § 242 (Federal Reserve) ("for cause" removal); 46 U.S.C. § 301(b)(3) (FMC) (removal for "inefficiency, neglect of duty, malfeasance in office"). For further discussion on the grounds for removal, *see infra* "President's Recourse."

Structural design also provides insulation from presidential control.[27] Congress has established numerous commissions with several members that serve "set terms expiring at staggered intervals, [and] who could be removed by the President only upon a showing of sufficient cause."[28] Other structural features may include an odd number of members of the commission, with no more than a simple majority appointed from one political party, who serve terms that tend to exceed the president's four-year term.[29] A bipartisan composition of a board and fixed terms set at staggered intervals attempt to create a collegial body that is insulated from outside political pressure.[30]

OMB Bypass (Legislative/ Rules/ Budget)

OMB acts as a coordination center for a variety of agency activities, which include reviewing legislative proposals and testimony to Congress;[31] overseeing agency rulemaking;[32] and approving budget requests.[33] The primary purpose of these OMB clearance procedures is to ensure that any legislative proposals, rules issued, or budgetary requests are consistent with the President's policies and programs.[34]

Despite OMB's coordinative and supervisory role, the IRCs may be exempted by statute or executive order from OMB clearance procedures, thereby providing these agencies with greater independence from the President. For instance, Congress exempts many of the financial regulatory agencies from submitting their legislative recommendations to any other agency prior to their submission to Congress "if such recommendation, [or] testimony ... include[s] a statement indicating that the views expressed ... are those of the agency ... and do not necessarily represent the views of the President."[35] As mentioned earlier, the IRCs are exempt from submitting their regulatory actions for OIRA review under EO 12866. Additionally, some of the IRCs, like the

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[27] *See* James M. Graham, *Study on Federal Regulation: Vol. 1, The Regulatory Appointments Process*, S. Doc. No. 95-25, at 16 (1st sess. 1977) (noting that the creation of independent agencies dates back to 1887 when Congress established the Interstate Commerce Commission and observing that "[t]he commission form, as it has been created and developed by Congress over the past ninety years, is a determined attempt to isolate the agencies both from precipitous change and from control by the Executive Branch.").

[28] S. Doc. No. 95-25 (Vol. 1), *supra* note 27, at 16.

[29] Breger and Edles, *supra* note 24, at 1137.

[30] While most IRCs are multimember boards, Congress has listed some single headed agencies whose head serves a fixed term and have a for cause removal limitation as an IRC under 42 U.S.C. § 3502(5). *See, e.g.*, Consumer Financial Protection Bureau, 12 U.S.C. § 5491(c).

[31] Mem. from OMB to Heads of Executive Departments and Establishments on Revision of Circular A-19, Revised, Dated July 31, 1972: Legislative Coordination and Clearance (Sept. 20, 1979), http://www.whitehouse.gov/omb/circulars_a019/.

[32] *See, e.g.*, Exec. Order No. 12866, § 6.

[33] 31 U.S.C. § 1108(b)(1); *see also* OMB Circular A-11 (Aug. 2012), http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2012.pdf.

[34] *See, e.g.*, Mem. from Peter R. Orszag, Director of OMB, to the Heads of Departments and Agencies on Legislative Coordination and Clearance (Jan. 27, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-09.pdf; Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (subjecting agency action to OMB review); OMB, Circular A-11 (Aug. 2012), http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2012.pdf.

[35] 12 U.S.C. § 250. The financial regulatory agencies include the SEC, Federal Reserve, FDIC, Comptroller of the Currency, the FHFA, and the National Credit Union Administration.

U.S. International Trade Commission (USITC) and Federal Communications Commission (FCC), are statutorily shielded from having their annual budget requests revised by OMB.[36]

Executive Order 12866

Executive Order 12866 (Executive Order or EO 12866) has numerous components,[37] one of which includes the establishment of "Centralized Review of Regulations" by OIRA within OMB.[38] Only executive agencies are subject to the centralized review of agency rulemaking provisions, while the IRCs have been exempt from this process.[39] The Executive Order defines an "agency" as "any authority of the United States that is an 'agency' under 44 U.S.C. § 3502(1), other than those considered to be independent regulatory agencies, as defined in [44 U.S.C. § 3502(5).]"[40] For purposes of this report, agencies to which centralized review applies shall be referred to as "executive agencies."

Section 6 of EO 12866, which establishes the centralized review process, requires an executive agency to submit to OIRA a list of its planned regulations and to identify all planned regulatory actions that the agency "believes are significant regulatory actions within the meaning of this Executive order."[41] The Executive Order defines "significant regulatory action" to be

> any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.[42]

OIRA, not the promulgating agency, makes the ultimate determination of whether a rule should be considered a "significant" rule.[43] Executive agencies must submit all planned regulations, whether they determine them to be significant or not, and OIRA will make its own determination

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[36] 19 U.S.C. § 2232 ("... estimated expenditures and proposed appropriations [for the USITC] shall be transmitted to the President ... and shall be included by him in the Budget without revision, and the Commission shall not be considered to be department or establishment for purposes of such chapter."); *see also* 47 U.S.C. § 154(k).

[37] For instance, § 1 of EO 12866 sets forth a "Statement of Regulatory Philosophy and Principles," which requires agencies to critically examine their existing regulations, and § 4 commands each agency to submit an annual "Regulatory Plan" to OIRA.

[38] OIRA was established by the PRA, 44 U.S.C. §§ 3501-3520, to review agency information collection requests, but was not statutorily authorized to conduct centralized review of agency rulemaking as required under Exec. Order No. 12866.

[39] Some other portions of the Executive Order apply to IRCs. *See, e.g.*, Exec. Order No. 12866 at § 4(b)-(c).

[40] Exec. Order. No. 12866 § 3(b). In turn, 44 U.S.C. § 3502(5) defines "independent regulatory agency" by establishing a non-exhaustive list of IRCs that are agencies "designated by statute as a Federal independent regulatory agency or commission." *See supra* note 23.

[41] Exec. Order No. 12866 at § 6(a)(3).

[42] *Id.* at § 3(f).

[43] *Id.* at § 6(a)(3)(A).

within ten days of receiving the information on the proposed action.[44] All "significant regulatory actions" are subject to review by OIRA prior to their promulgation.

For any rulemaking that is deemed "significant," executive agencies must provide to OIRA the text of the regulation, a statement explaining the need for the regulation, an explanation of how the proposal will satisfy the need, and "an assessment of the potential costs and benefits of the regulatory action."[45] Additionally, executive agencies must also submit a statement establishing that the regulatory action is consistent with established law and the President's priorities without unduly interfering with state and local governments.[46]

Any rule that is determined to be "economically significant"[47] must meet further requirements. For these rules, executive agencies must provide a detailed cost-benefit analysis (CBA) of the proposed rule and must attempt to quantify those costs and benefits to the best of their ability.[48] They must also perform a CBA for any reasonable alternatives and provide "an explanation why the planned regulatory action is preferable to the identified potential alternatives."[49]

OIRA generally has 90 days to complete its review of the proposed agency action to ensure it comports with the principles of EO 12866.[50] An executive agency, to the extent permitted by law, is not allowed to finalize a rule by publishing it in the *Federal Register* until OIRA completes the review process.[51]

OIRA may return a proposed regulatory action to the executive agency "for further consideration" with an explanation detailing why OIRA believes the action fails to meet the requirements of EO 12866.[52] This may be because the executive agency failed to provide an adequate CBA or, in the case of an economically significant action, failed to adequately consider reasonable alternatives to the proposed action. Additionally, OIRA could return the regulation for further consideration if it feels that the proposed action may conflict with the President's priorities or an action already taken or planned by another agency. Upon return, the executive agency must then reconsider the rule and address OIRA's concerns before publishing the rule.[53] Any conflicts between OIRA and the executive agency are to be resolved by the President of the United States.[54]

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[44] *Id*.

[45] *Id.* at § 6(a)(3)(B).

[46] Id.

[47] Regulatory actions that fall within the first category of "significant regulatory action" are "economically significant" rules.

[48] OMB Circular A-4 provides agencies with guidance on how to conduct an adequate cost-benefit analysis and what specifically needs to be considered by the agency and submitted to OIRA. OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003), http://www.whitehouse.gov/omb/circulars_a004_a-4.

[49] Exec. Order No. 12866 at § 6(a)(3)(C).

[50] *Id.* at § 6(b)(2). This review period may be extended once for an additional 30 days or indefinitely if requested by the head of the agency. *Id.*

[51] *Id.* at § 8. *See* Envtl. Def. Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986) (holding that agency may publish final rule if waiting for OIRA review will cause issuing agency to miss a statutory deadline).

[52] *Id.* at § 6(b)(3).

[53] For analysis of how OIRA conducts this centralized review, *see* CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Maeve P. Carey.

[54] Exec. Order No. 12866, § 8.

Authority to Subject Agency Rulemakings to Centralized Review

Two factors have caused questions to arise when evaluating the President's authority to unilaterally require executive agencies to submit their rules to OIRA for review. First, Congress has delegated to the various executive agencies, not the President himself, the authority to implement federal programs through the creation of rules. Second, Congress has not by statute authorized the President to establish a centralized review of the rules agencies are statutorily authorized to promulgate. Given this, could the President be exceeding his constitutional authority by taking such action without direct approval from the legislative branch? Under what authority is the President taking such action?

One argument in support of the President's authority to require centralized review of agency rulemaking is the unitary executive theory.[55] This theory is based on the argument that the Founders vested all executive power in the President of the United States alone and gave him the power to "take Care that the Laws be faithfully executed."[56] Proponents of the unitary executive theory generally maintain that the President should thus have full control over the executive branch and should be able to direct officers in fulfilling their statutory obligations.[57] One proponent argues that "even if a statute grants discretion to the Secretary of State and explicitly prohibits presidential intervention in the decisionmaking process, the President retains the constitutional authority to substitute his own judgment for the Secretary's determination."[58] Proponents of a strong unitary executive theory, therefore, have little difficulty in justifying the constitutionality of a centralized review process. The Department of Justice (DOJ) Office of Legal Counsel (OLC) issued an opinion in support of the Reagan Administration's EO 12291 that draws from some of the same principles of the unitary executive theory while acknowledging certain limits to the President's authority over executive officers.[59]

The crux of OLC's argument rests on the President's constitutional power to "take Care that the Laws be faithfully executed."[60] The OLC opinion argues that the President's responsibility to ensure that all legislation is "faithfully executed" requires him to coordinate among the executive agencies as they implement a vast array of legislation through the rulemaking process.[61] The Supreme Court, in *Myers v. United States*, interpreted the Take Care Clause to mean that the President shall have the authority to "supervise and guide" the executive officers in the administration of the statutes to ensure "unitary and uniform execution of the laws."[62] By requiring the executive agencies to submit rules and CBAs for review,[63] OLC concludes that the

[55] A thorough summary of the unitary executive theory can be found in Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992).

[56] U.S. Const., Art. II, §§ 1, 3.

[57] *See, e.g.,* Saikrishna Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 Yale L.J. 991, 991 (1993) ("Historical evidence ... indicates that the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration.").

[58] *Id.* at 992.

[59] Proposed Executive Order Entitled "Federal Regulation, 5 Op. Off. Legal Counsel 59, 60 (1981) [hereinafter 1981 OLC Opinion].

[60] U.S. Const., Art. II, § 3.

[61] 1981 OLC Opinion, *supra* note 59 at 60-61.

[62] Myers v. United States, 272 U.S. 52, 135 (1926).

[63] The memorandum also notes that requesting information on the costs and benefits of proposed regulation is within his constitutional powers under the Opinions Clause of Article II. *See* 1981 OLC Opinion, *supra* note 59, at 62.

President is only acting in a supervisory capacity to "take Care" that the laws are being faithfully executed. The opinion argues that EO 12291 does not exceed the President's Article II powers because he is not divesting the executive agencies of their statutory authority to exercise their congressionally delegated powers; he is merely ensuring that the executive agencies under his control are implementing their statutes in a uniform manner, consistent with the President's priorities. Moreover, when adhering to EO 12291 would conflict with statutory obligations, OLC notes that agencies are only required to comply with the Executive Order "to the extent permitted by law."

Another argument offered to support the President's authority to require centralized review of agency rulemaking is based on statutory interpretation, rather than a clear constitutional authority to take such action. An article by now Supreme Court Justice Elena Kagan, writing as a legal scholar, argues that Congress, when it delegates rulemaking authority to an executive agency in lieu of an IRC, has implicitly permitted the President to direct executive agency officials to reach certain conclusions.[64] Though Kagan contemplates a scenario in which the President orders an executive agency to reach a certain conclusion on an issue delegated to that agency, this authority to direct an agency official could likely justify the authority to subject those agency rules to centralized review.

Kagan's argument recognizes that Congress has the authority to limit the President's control over agency officials and their discretion to implement certain regulations. For instance, when Congress delegates decision-making authority to an IRC, the President may not interfere with the discretion given to that officer.[65] However, she argues that when Congress has delegated authority to an executive branch agency, and has not specifically limited the President's authority to control that agency decision, these statutes reflect congressional intent to permit the President to exercise control over that decision.[66] This is because Congress is well aware that executive officers are subordinate to the President, appointed by the President, removable by the President, and are otherwise subject to presidential oversight.[67] Furthermore, Congress knows how to isolate a specific decision from the President's influence – by delegating that decision to an IRC.[68] Therefore, she argues when Congress is silent, it is implicitly giving the President ultimate control over that legal authority. This control over agency decision making is likely sufficient to enable the President to require OIRA review of executive agency rules and to resolve any disputes between OIRA and the agency.

Another approach to examine the President's authority over executive agencies is by evaluating these executive orders under the tripartite framework from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[69] Justice Jackson's concurring opinion set forth three types of circumstances in which presidential authority may be asserted and established a scheme

[64] Elena Kagan, *Article: Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

[65] *Id.* at 2327.

[66] *Id.* at 2327-28.

[67] *Id.* at 2327.

[68] *See id.*

[69] 343 U.S. 579 (1952) (holding President Truman's executive order directing the seizure of steel mills to be unconstitutional because Congress had not delegated the power to do so to the President and the action was essentially a legislative act) [hereinafter *Youngstown*]. Although Justice Black wrote the majority opinion, Justice Jackson's concurring opinion establishing a tripartite framework of presidential power has proven to be the most influential opinion of the Supreme Court decision.

for analyzing the validity of presidential actions in relation to constitutional and congressional authority.[70] First, if the President has acted according to an express or implied grant of congressional authority, presidential "authority is at its maximum."[71] Second, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[72] Third, in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum.[73] In such a circumstance, presidential action must rest upon an exclusive Article II power.[74]

An argument could be made that the issuance of executive orders requiring OIRA review of executive agency rules is an action that falls within Jackson's second prong – the "zone of twilight." Congress has never given the President express authority to require centralized review of agency rules.[75] Additionally, Congress has never expressly denied the President the authority to establish such requirements. Therefore, under this argument, the President's authority to act by executive order would be placed in category two's "zone of twilight." Justice Jackson's opinion declared there are no specific rules to determine whether an action in this category is constitutional, but notes that the validity of the action will likely "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[76] Justice Jackson's opinion seems to suggest that practical considerations should be evaluated when determining the scope of presidential authority to act in the "zone of twilight." It could be argued that evaluating the orders based on these practical considerations would lend support for the President's authority to issue such orders, given the seemingly general support for centralized review,[77] the complex nature of the administrative state that must be coordinated,[78] and Congress's apparent acquiescence on the issue.[79]

In contrast, others have argued that the President's imposition of centralized review without congressional authorization runs afoul of the separation of powers under the tripartite framework.[80] This argument notes that Congress has not delegated by statute, impliedly or expressly, the authority to require a centralized review of agency rules. In fact, the argument posits that Congress has impliedly *denied* the President the authority to assume this type of

[70] *Id.* at 635-38. (Jackson, J. concurring).

[71] *Id*. at 635, 637.

[72] *Id.* at 637.

[73] *Id.*

[74] *Id.* at 637-38. For example, his authority to act as Commander-in-Chief would be an exclusive Article II power. U.S. Const., Art. II, § 2, cl. 1.

[75] However, Kagan's argument that Congress has implicitly granted the President power over executive agency decisions could be viewed as an argument that would place the action in Justice Jackson's first category, thus giving the President maximum power to act in this area. *See* Kagan, *supra* note 64.

[76] *Youngstown*, 343 U.S. at 637.

[77] *See, e.g.*, Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 30 (4th ed. 2006) (noting the "fairly broad agreement that [OIRA review] is not only legal, but that if properly administered, it is essential to effective executive branch management").

[78] *See* 1981 OLC Opinion, *supra* note 59, at 60-61.

[79] Congress has not taken any legislative action against the President for implementing centralized review.

[80] Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981).

control over the rulemaking process. Congress's expansive use of the legislative veto,[81] early congressional responses to President Nixon's attempts to make policy through the OMB budget process, and congressional rejection of legislative proposals to create a central office to evaluate agency performance all may be viewed as actions taken by Congress to limit the President's authority in the sphere of agency policymaking.[82] Following this approach, the President is viewed as acting in the third category under Justice Jackson's opinion from *Youngstown.* Under this argument, in order for the President's centralized review requirements to be constitutional, the President must be able to rely solely on his own Article II powers.

Although unitary executive proponents, discussed above, argue that the President has the requisite authority to impose centralized review based solely on his Article II powers, some scholars argue that the Vesting Clause and Take Care Clause, discussed above, do not grant the President a broad power, but rather show that the President is intended to be an "agent of Congress," carrying out the legislative will.[83] Opponents of the unitary executive theory note that the authority to "take Care" that the laws be executed does not imply the authority to execute them himself.[84] Rather, when Congress delegates to a subordinate official, the subordinate official has ultimate control over the decision and the President must "take Care" that only that official exercises the delegated authority. If it were true that the President is acting within Justice Jackson's third category with his powers at a minimum, these powers could arguably not be enough to sustain the constitutionality of the executive orders. These executive orders requiring agencies to submit their regulations for presidential review, it may be argued, impermissibly interfere with Congress's delegation of authority to the specific agency and could be potentially struck down for unconstitutionally breaching Congress's powers.[85]

Debates about the constitutionality of these executive orders have mostly receded since their initial issuance. Most scholars and organizations now seem to agree that the President has the authority to conduct centralized review of the executive agency rulemaking process.[86] One author notes that "the once rather vibrant legal and policy debate over the pros and cons of presidential review has gradually evolved into a fairly broad agreement that it is not only legal, but that if properly administered, it is essential to effective executive branch management."[87] Presidential review of agency rulemaking has existed in some form since 1971 and the authority has been exercised under EO 12866 for nearly twenty years without any action from Congress to restrain the process. The implicit acquiescence of both Congress and the courts regarding the constitutionality of these orders appears to provide practical support for the proposition that the President has the authority to exercise centralized control over the executive agencies.

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[81] Legislative vetoes have since been determined unconstitutional by the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983).

[82] Rosenberg, *supra* note 80, at 221-34.

[83] Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 128 (1994).

[84] *See* Rosenberg, *supra* note 80, at 197 ("The wording may thus suggest oversight of execution by others rather than direct execution by the President.").

[85] *See id.* at 233-34.

[86] *See, e.g.,* Kagan, *supra* note 64, at 2384 (noting that centralized review "within broad but certain limits, both satisfies legal requirements and promotes the values of administrative accountability and effectiveness."); Administrative Conference of the United States, Recommendation 88-9, Presidential Review of Agency Rulemaking (1988), http://www.acus.gov/wp-content/uploads/2011/10/88-9.pdf; American Bar Association, Recommendation and Report 302 (1991), http://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302.pdf.

[87] Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 30 (4th ed. 2006).

Furthermore, although no courts have directly decided the constitutional validity of these executive orders,[88] cases dealing with the President's authority to consult and advise his executive officers could arguably be viewed as offering support for the constitutional validity of centralized review. The U.S. Court of Appeals for the D.C. Circuit (DC Circuit), when determining whether the President could consult nonpublicly with his EPA Administrator regarding a proposed rule, stated

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. 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.[89]

This statement from the DC Circuit could be viewed as lending support to the principles outlined in the 1981 OLC opinion. The court notes that the President may "control and supervise executive policymaking,"[90] and appears to indicate that, in the complex realm of administrative law, effective coordination between the executive agencies and the President is arguably necessary if not desirable.

Further questions, however, could arise regarding whether the President could extend this review to cover the IRCs. The following sections discuss whether the President has the constitutional authority to require centralized review of the IRCs' rulemakings or whether these IRCs must remain free from this type of executive influence.

Independent Regulatory Commissions and OIRA Review

Although many groups and scholars have called for the extension of centralized review to the IRCs, this extension has not yet occurred.[91] The following section addresses whether the President has sufficient legal authority to extend such requirements to the IRCs, assuming there are adequate legal grounds for general OIRA review of agency rulemaking (described above).

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[88] Although no courts have reached the constitutional questions raised by these executive orders, at least one court has acknowledged the constitutional issues raised by the OIRA review process. Pub. Citizen Health Res. Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (reversing agency's decision based on the administrative record and avoiding the separation of powers issue presented, but noting that OIRA participation in rulemaking "presents difficult constitutional questions concerning the executive's proper role in administrative proceedings"); *see also* New York v. Reilly, 969 F.2d 1147, 1152 (D.C. Cir. 1992) (holding that although the EPA "reevaluated its conclusions" regarding the issuance of a rule due to determinations from OMB that the rule failed to "meet the benefit/cost requirements... laid out in Executive Order 12291," the EPA still based its decisions on its own expertise and the refusal to issue the rule remained valid).

[89] Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

[90] *Id.* at 406.

[91] *See, e.g.*, American Bar Association, Section of Administrative Law and Regulatory Practice, Letter to OIRA (Mar. 16, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf.

President's Authority for Extending OIRA Review to the IRCs

Although bypassing OMB review is a hallmark trait of agency independence, prior presidential administrations have considered subjecting the IRCs to OIRA review.[92] Both Presidents Reagan and Clinton obtained legal opinions from OLC, which concluded there is sufficient legal basis to apply the centralized review requirements to the IRCs.[93] Determinations not to extend the CBA requirements to the IRCs were apparently due to political rather than legal impediments. Yet, S. 3468, introduced by Senator Rob Portman in the 112th Congress, would grant the President authority to extend centralized review requirements by executive order to the IRCs. This demonstrates there may be lingering questions as to whether the President has the legal authority to extend requirements of the executive order to the IRCs without such congressional action.

When President Reagan issued EO 12291 in 1981, both support and concern over the constitutionality of OMB's role in the administrative process had been expressed.[94] The same arguments made in the 1981 OLC opinion in support of the constitutionality to conduct centralized review of regulations via executive order, discussed above, could also apply in extending the review requirements of EO 12866 to the IRCs. Relying on the *Myers* decision to reach its conclusion, [95] OLC states it is "unclear to what extent Congress may insulate [non-independent] executive agencies from presidential supervision," given that the Court in *Myers* held that the President had an illimitable power of removal over "purely executive officers."[96] While OLC applies *Myers* to explain the President's supervisory role over agencies whose heads are removable by the President at will,[97] the Supreme Court's decision in *Humphrey's Executor v. United States* would likely provide guidance over whether the President may perform the same supervisory role with respect to agencies whose heads are restricted to removal "for cause."[98]

In *Humphrey's Executor*, the Court unanimously upheld the Federal Trade Commission (FTC) Act, which restricted the President's ability to remove an agency official.[99] Specifically, the

[92] The first draft of President Carter's executive order, which imposed a number of procedural requirements on agency rulemaking, was ambiguous so that it might have applied to independent agencies. Exec. Order No. 12044, 43 Fed. Reg. 12,661 (1978) (entitled "Improving Government Regulations"). *See also* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 466 n.72 (1979).

[93] *See* Sally Katzen, Conference Summary: Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions?, at 2-3 (Apr. 2011), http://www.rff.org/Documents/Events/Workshops%20and%20Conferences. *See also* Peter L. Strauss and Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 202 (1986) (In describing why IRCs were excepted from the executive order, the authors remarked: "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 power." *Id*.).

[94] *See* Moreno, *supra* note 19, at 461, 494-96 (1994).

[95] 1981 OLC Opinion, *supra* note 59, at 60.

[96] *Id*. at 60. (citing *Myers v. United States*, 272 U.S. 52 (1926) (noting that while Congress can imbue cabinet officers with the power to appoint inferior officers and place incidental regulations and restrictions on when such department heads can exercise their power of removal, Congress may not involve itself directly in the removal process. *Id*. at 161.)).

[97] OLC observed: "It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Article II, subject to removal when their performance in exercising their statutory duties displeases the President." 1981 OLC Opinion, *supra* note 59, at 61.

[98] 295 U.S. 602 (1935) [hereinafter *Humphrey's Executor*].

[99] *Id*. The Court distinguished its holding in from *Myers* by stating that *Myers* was limited to "purely executive officers," as "such an officer [i.e., the postmaster] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid (continued...)

President could remove an FTC commissioner only on the basis of "inefficiency, neglect of duty, or malfeasance in office."[100] Notably, the Court also pronounced in dicta that the congressional intent in creating the FTC was to create a body "independent of executive authority *except in its selection* [of commissioners]."[101] A separate OLC opinion, which discussed the application of EO 12291 to the IRCs, wrestles with this characterization of the FTC, as it serves as a model for many of the IRCs.[102] OLC lists several reasons why the dicta would not control whether the President has authority to supervise the IRCs in rulemaking. Among these reasons, OLC contends that insulation from the President for purposes of agency adjudication was not "pertinent to supervision of rulemaking,"[103] and the Court had not considered that "Executive Branch and independent agencies engage in rulemaking in a functionally indistinguishable fashion."[104] It also underscores the President's other statutory powers over the IRCs, which "recognize the legitimacy of some presidential influence in the activities of independent agencies ... "[105] Although *Humphrey's Executor* affirmed congressional intent to minimize presidential supervision of the IRCs, OLC ultimately concludes this does not prevent the President from "supervis[ing] [the IRCs] as necessary to ensure that they are faithfully executing the laws, although [the President] may not displace their substantive discretion to decide particular adjudicative or rulemaking matters."[106]

The OLC argument in favor of presidential supervision over the administrative process appears to draw from the principles which are at the root of the unitary executive doctrine.[107] Under this view, despite the intent to have an agency insulated from presidential control, the "Constitution makes no provision for a category of agencies existing 'outside' the executive, legislative, and judicial branches. The President is the constitutionally specified agency of the Congress in

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he is." *Id*. at 627.

[100] *Id*. at 619-20.

[101] *Id*. at 628-29 (emphasis in the original). The Supreme Court ruled that the legislative and judicial functions envisioned by the statute necessarily placed the FTC outside the scope of complete presidential control. *Id.*

[102] Mem. for the Hon. David Stockman, Director of OMB, from Larry L. Simms, Acting Ass't Atty. Gen., Off. of Legal Counsel 7 (Feb. 12, 1981), *reprinted in* Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158 (1981) [hereinafter Second 1981 OLC Opinion]. OLC cautioned: "If the dicta of [the decision] are taken at face value, the President's constitutional power to supervise the independent agencies is limited to his power of appointment, and none of the proposed Executive Order's requirement may legally be applied to the independent agencies." *Id*. at 160.

[103] Second 1981 OLC Opinion, *supra* note 102, at 160. Other scholars have also proposed treating insulation from presidential control or oversight differently for purposes of administrative adjudications compared to policy decisions, rulemakings and enforcement actions. *See, e.g.*, Kavanaugh, *supra* note 25, at 1474.

[104] Second 1981 OLC Opinion, *supra* note 102, at 160-61. Where the IRCs and executive agencies overlap in enforcement, the policies adopted by an IRC can affect those of executive agencies. *See* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 591 (1988-1989).

[105] Second 1981 OLC Opinion, *supra* note 102, at 167-68.

[106] *Id*. at 162. *See also* Mem. for Simon Lazarus, Assoc. Dir. Domestic Council, from John Harmon, Ass't Atty. Gen., Off. of Legal Counsel (Jul. 22, 1977) (concluding President Carter has authority to extend to IRCs an executive order designed to improve the administrative process within the executive branch) (citing James M. Landis, *Report on Regulatory Agencies to the President Elect*, reprinted in S. Doc. 91-49, *Separation of Powers and Independent Agencies*, at 1339 (1960) ("The congestion of the dockets of the agencies ... the failure to evolve policies ... are all part of the President's constitutional concern to see that the laws are faithfully executed. The outcome of any particular adjudicatory matter is, however, as much beyond his concern, except where he has a statutory responsibility to intervene ... ")).

[107] *See supra* notes 55 to 58 and accompanying text.

implementation of federal law." [108] Put another way, the "law that delegates authority to an independent regulatory commission, like the law that places final decision in the hands of cabinet officials, is constitutional and thus part of the body of law to the faithful execution of which the President is obliged to see."[109]

A statutory approach could also be taken in examining whether the President has authority to include the IRCs within EO 12866. The terms of removal of executive officers may assist in analyzing if Congress has granted authority to the President to supervise the IRCs, which informs whether these agencies may be subject to review requirements via executive order.[110] Although there are no definitions for these removal terms, see discussion *infra*, a narrow interpretation of removal would mean the President is limited to firing the IRC heads for reasons unrelated to policy—that is, "the President may discharge people for corruption ('malfeasance in office'), for refusing to do their jobs ('neglect of duty'), or for more general dereliction in the sense of gross incompetence ... ('inefficiency')."[111] This interpretation would likely preclude the President from supervising an IRC's policy choices, such that he would have little authority to extend the Executive Order.[112] A broad interpretation of the terms, on the other hand, would mean the President could remove an agency member "for any number of actual or perceived transgressions" of presidential will.[113] Under this interpretation, the President could have a "high degree of authority over the policy choices of independent agencies," in which case "inclusion of [the IRCs] within the executive order is plainly lawful, simply as a statutory matter."[114]

Alternatively, at least one scholar suggests that the Court's latest removal decision in *Morrison v. Olson*,[115] potentially offers new guidance on the scope of the President's supervisory powers.[116] After *Morrison*, the modified test on the constitutionality of a statutory removal restriction is whether the law "impedes the President's ability to perform his constitutional duty."[117] This shift demonstrates the Court "moving away from loose conceptions that whole agencies have a special constitutional status outside the executive branch, and toward a more focused inquiry whether the President has been denied a supervisory role that is appropriate to the particular function involved."[118] Accordingly, rather than examining whether the President could extend executive order requirements to the IRCs as whole, the new inquiry would be "whether the executive's accountability can be trusted" and "whether political accountability would interfere with

[108] Strauss and Sunstein, *supra* note 93, at 204.

[109] *Id*. at 203.

[110] Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1534 (2002).

[111] *Id*. at 1534.

[112] *Id*.

[113] *Id*. at 1536. To support their argument for a broad interpretation, Hahn and Sunstein observe that the Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), held that the terms of removal applicable to a legislative branch officer were "very broad ... [and] could sustain removal ... for any number of actual or perceived transgressions of the legislative will." *Id*. at 729.

[114] Hahn and Sunstein, *supra* note 110, at 1536.

[115] 487 U.S. 654 (1988) [hereinafter *Morrison*].

[116] *See* Bruff, *supra* note 104, at 590-593.

[117] *Morrison*, 487 U.S. at 691.

[118] Bruff, *supra* note 104, at 591.

successful performance of the function."[119] This would involve identifying rulemaking programs on a case-by-case basis to determine whether the President may supervise agency rulemaking.

The legal arguments against application of EO 12866 to executive agencies, discussed above, would also apply to the IRCs. However, while an analysis under Justice Jackson's concurrence from *Youngstown* could lead to the conclusion that coordinating regulatory review of executive agencies by executive order would not violate separation of powers principles,[120] the outcome could be different when applying the tripartite framework to the IRCs. The third prong of the framework states that where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum.[121] There is no express congressional prohibition on the President conducting centralized review on executive agencies or the IRCs. However, the question with respect to the IRCs is whether an inference may be drawn that it is the "implied will of Congress" the President refrain from a supervisory role over the IRCs, based on congressional intent to insulate the IRCs, as well as statutory provisions that secure OMB bypass or presidential bypass for some IRCs.[122] If such were the case, the presidential action must rest upon an exclusive power.[123] This would likely call into question whether it would be sufficient for the President take such action by relying solely on the general authority vested to him as head of the executive branch, and his authority to "take Care" the laws be executed faithfully.[124] Notably, if S. 3468 were to become law, the first prong under *Youngstown* would likely be satisfied. As the President would be extending the Executive Order pursuant to an express grant of congressional authority, it is likely there would be little question that such action was valid.

Recourse for IRC Noncompliance

If the President were to amend EO 12866 to include the IRCs, this raises the question of what types of action may be taken to enforce agency compliance. If an agency disregarded the Executive Order, could the President fire a member of an IRC, who has "for cause" removal protection? Or, could action be taken through the courts to enforce compliance? Alternatively, Congress could codify the provisions of EO 12866, which has been previously considered.[125] A statute mandating compliance with the OIRA review process could affect the recourse available to the President and the availability of judicial review.

[119] *Id*. at 592.

[120] *See supra* notes 69 to 74 and accompanying text.

[121] *Youngstown*, 343 U.S. at 637-38 (Jackson, J. *concurring*).

[122] *See* Moreno, *supra* note 19, at 510 n.318.

[123] *Youngstown*, 343 U.S. at 637.

[124] Vesting Clause, U.S. Const., Art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); Take Care Clause, U.S. Const., Art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed.").

[125] *See, e.g.*, S. 981, The Regulatory Improvement Act of 1997, 105th Cong., 1st sess. (1997).

President's Recourse

Through OMB, the President arguably plays a purely supervisory role over the administrative process, with no authority to determine the outcomes of the agency's final judgment.[126] It is therefore plausible that an agency could disregard an OIRA request to defer rulemaking or to reassess a proposed rule for lack of adequate CBA. In this situation, the only recourse within the President's control for agency noncompliance would be to remove the head of the agency, as he or she serves at the pleasure of the President.[127] However, if an IRC were to disregard the OMB process, the question arises as to whether the President has grounds to remove the members of the agency if they have "for cause" removal protection. This, in turn, depends on what it means to be removed "for cause." Before proceeding to discuss the potential meaning of "for cause" removal, we must first discuss whether "for cause" removal applies to members of an IRC where the establishing statute is silent on removal.

Does "for cause" removal protection apply to members of the IRCs if the statute is silent?

In the context of removal under the Appointments Clause,[128] the Supreme Court has declared as a general matter: "[i]n the absence of a specific provision to the contrary, the power of removal is incident to the power of appointment."[129] Under this principle, the presumption is if a statute is silent on removal, the appointing authority has the power to remove, unless prevented by law. Although a majority of the IRCs have explicit provisions in their statutes providing that members may be removed only "for cause"[130] or "for inefficiency, neglect of duty, or malfeasance in office,"[131] some are silent on removal. These include, among others, the Securities and Exchange Commission (SEC), the National Credit Union Administration (NCUA), and the Federal Election Commission (FEC).[132] Statutory silence on removal may raise the issue of whether members of these agencies may be removed only "for cause." For at these three agencies—the SEC, NCUA, and FEC—lower courts have inferred the application of a "for cause" removal restriction.

In *Wiener v. United States*, the Supreme Court addressed whether President Eisenhower could remove a member of the War Claims Commission (WCC) despite the statute's silence on removal.[133] Reviewing the legislative history of the War Claims Act of 1948[134] as well as the

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[126] 1981 OLC Opinion, *supra* note 59, at 64 (stating the President has no authority to "reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh the costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation.").

[127] 1981 OLC Opinion, *supra* note 59, at 62. Other options for the President to take enforcement against the agency would be to modify its budget request amount or to request Congress to overturn the rule by legislation. However, the effectiveness of the President's reprimand against the agency would be dependent on congressional action.

[128] U.S. Const., Art. II § 2, cl. 2.

[129] Keim v. United States, 177 U.S. 290, 293-94 (1900) (citing *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) ("In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.")).

[130] *See, e.g.*, 12 U.S.C. § 242 (Federal Reserve).

[131] *See, e.g.*, 5 U.S.C. § 7104 (Federal Labor Relations Authority); 28 U.S.C. § 991 (U.S. Sentencing Commission).

[132] *See PCAOB,* 130 S. Ct. at 3215 (Breyer, J., dissenting) (Appendix D to Justice Breyer's dissent listed 29 departments and other agencies the heads of which are not subject to any statutory for cause removal protection and which have some of the traits which suggest independence).

[133] 357 U.S. 349 (1958) [hereinafter *Wiener*]. The Commission was composed of three persons appointed by the (continued...)

distinctive adjudicatory functions of the WCC,[135] the Court concluded the President could not remove the member at will.[136] It found many similarities between the WCC and the FTC, whose restriction on removal had been upheld in *Humphrey's Executor*. After likening the structure, functions, and purpose of the WCC to the FTC—that is, the quasi-judicial functions of the WCC, and the congressional intent the WCC to be "free from control or coercive influence"[137]—the Court was "compelled to conclude that no such power [of at will removal] ... is impliedly conferred upon by statute simply because Congress said nothing about it."[138]

Subsequent courts that have also read into an otherwise silent statute a "for cause" removal restriction have generally followed the Court's approach in *Wiener*.[139] In *Swan v. Clinton*, the DC Circuit reviewed the NCUA's "function, statutory language and legislative history" to determine whether its Board members enjoy removal protection during their appointed terms.[140] The DC Circuit held that it would assume that Board members have removal protection during their appointed terms, because the legislative background was not so "ambiguous as not to permit us to discount the possibility that Congress did intend at least [removal protection during the] term."[141] Similarly, in *SEC v. Blinder*, the federal court of appeals reviewed the structural design, as well as the nature of the SEC's functions (quasi-legislative/judicial), and found that it could assume, without deciding, that SEC commissioners, like the FTC commissioners in *Humphrey's Executor*, may be removed only for "inefficiency, neglect of duty, or malfeasance in office."[142] The DC

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President with the advice and consent of the Senate. The Commission was to expire after a set number of years, and it is this time limit that acted as "the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal ... " *Id*. at 350.

[134] 62 Stat. 1240 (1948).

[135] *Wiener*, 357 U.S. at 354. ("The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court by mandamus or otherwise.'" *Id*.).

[136] "If ... the War Claims Act precluded the President from influencing the Commission in passing on a particular claim ... it must be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." *Id*. at 356.

[137] *Wiener*, 357 U.S. at 355 (citing *Humphrey's Executor*, 295 U.S. at 629).

[138] *Id*. at 356. As part of its conclusion, the Court also stated that "no such power of [at will] removal is given to the President directly by the Constitution." *Id*. While it has been long held that "the power of removal is incident to the power of appointment" absent a provision to the contrary, this statement from *Wiener* could be interpreted as indicating that, within the context of IRCs, there is some inherent constitutional limitation on the President's power to remove members at will.

[139] It is important to note that the Supreme Court decision in *Morrison v. Olson*, 487 U.S. 654 (1988), has modified the analysis on whether a restriction on removal is constitutional. After *Morrison*, the structure and characterization of an agency are no longer the controlling factors in determining who is removable at will, rather the "real question is whether the removal restrictions ... impede the President's ability to perform his constitutional duty." *Id*. at 691. The new test on removal is likely applicable where it is clear there exists a restriction on removal, as was the case in *Morrison*. According to Breger and Edles, *supra* note 24, the "threshold question remains whether Congress intended to confer some form of statutory protection on government officials," in which case the Court's approach in *Wiener* may serve as a more appropriate guide in determining whether a for cause removal limitation may be inferred. *See id*. at 1144 n.163.

[140] Swan v. Clinton, 100 F.3d 973, 981-83 (D.C. Cir. 1996).

[141] *Id*. at 983. The D.C. Circuit first reached this conclusion to address the contention that Board members serving in a holdover capacity could not be removed unless there was cause.

[142] SEC v. Blinder, 855 F.2d 677 (10th Cir. 1988) (accepting appellants' assertion in their brief, that it is commonly understood that the President may remove a commissioner only for "inefficiency, neglect of duty or malfeasance in

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Circuit likewise found the FEC to be "patterned on the classic independent regulatory agency sanctioned ... in *Humphrey's Executor*" in which case it held that it could "safely assume that the President would at minimum have authority to discharge a commissioner for good cause—if for no other."[143]

Although the holding in *Wiener* could apply broadly to the IRCs whose statutes are silent on removal, it is likely a court would act like the DC Circuit in *Swan* and review each of these commissions on a case-by-case basis to determine whether a "for cause" limitation on removal can be read into the establishing statute.[144] However, it may be likely that the IRCs without an explicit removal provision and that are exempt from EO 12866[145] may be more similar to the FTC and WCC, such that a reviewing court would apply the rationale in *Wiener*, and a "for cause" removal restriction could be read into their statutes. As "for cause" removal protection applies to many of the IRCs by statute, and assuming that a "for cause" provision can be read into the statute of other IRCs, the next issue raised is whether noncompliance with the requirements of EO 12866 would be grounds upon which agency members may be removed "for cause."

Does noncompliance with an executive order give rise to "for cause" removal?

There does not appear to have been an occasion where the President has successfully removed, on an involuntary basis, an individual with "for cause" removal protection.[146] Moreover, it remains unclear as to the type of conduct that could give rise to removal under such circumstances, as these terms have not been defined by statute or the courts.[147] For example, in *Humphrey's Executor*, President Franklin Roosevelt had asked a Commissioner of the FTC for his resignation stating, "I do not feel that your mind and my mind go along together on either the policies or the

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office." *Id*. at 681.). *See also* SEC v. Bilzerian, 750 F. Supp. 14 (D.D.C. 1990) (also reviewing the creation, structure and purpose of the SEC and finding that "it is generally accepted that the President may remove a commissioner for inefficiency, neglect of duty, or malfeasance in office." *Id*. at 16.).

[143] FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).

[144] Other agencies without a "for cause" removal provision, which are not listed IRCs but that share traits of independence, may not have a removal provision read into their statutes because they are not analogous to the FTC and WCC. Notably, OLC has opined that it would "resist any further application of the *Wiener* rationale ... except with respect to officers whose only functions are adjudicatory." The Constitutional Separation of Powers between President and Congress, 20 Op. Off. Legal Counsel 124, 170 (1996). For example, OLC opined that the President may remove at will the members of the Advisory Council on Historical Preservation, despite the Council being listed in statute as an "independent agency." OLC followed the approach in *Wiener* and examined the legislative history of the Council and its functions, which were primarily executive in nature and not akin to other quasi-legislative/judicial independent agencies. 6 Op. Off. Legal Counsel 180 (1982). *See also* President's Power to Remove Members of the Federal Council on the Aging, 5 Op. Off. Legal Counsel 337 (1981).

[145] For example, the FCC, FDIC, and USITC are IRCs whose establishing statutes do not have a removal provision.

[146] Some confirmed appointees to statutorily protected positions may choose to voluntarily resign or leave quietly under threat of removal. For example, S. John Byington was a confirmed member of the CPSC who served a term set to expire in October 1978. The CPSC statute provides the President with the authority to remove a member only for "neglect of duty or malfeasance" in office. 15 U.S.C. § 2053. During his term in office, Mr. Byington's conduct came under investigation by the DOJ. While articles indicate that he was under considerable political pressure, there does not seem to be any direct evidence that the White House pressured him to resign. Nonetheless, Mr. Byington resigned in June 1978, prior to the expiration of his term in office. *See* Bailey Morris, *Byington Out But Agency's Ills Continue*, Washington Star at A2 (Feb. 9, 1978).

[147] Breger and Edles, *supra* note 24, at 1145. *See, e.g.*, *Morrison*, 487 U.S. at 692 (stating "we need not decide in this case exactly what is encompassed within the term 'good cause' under the [Ethics in Government] Act").

administering of the Federal Trade Commission."[148] The Commissioner declined to resign, and the President notified him that he was removed from office. The Court stated that "the intent of the [FTC] act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here."[149] This case provides a sense of the type of conduct that would not provide grounds for removal within a "for cause" standard. Although the Court refrained from defining the removal terms, its conclusion appears to indicate that merely holding political views that differ from the President does not constitute grounds upon which the President may remove an individual "for cause." Notably, both Congress and DOJ also have opined on the meaning of "good cause" in the context of the Independent Counsel position, at issue in *Morrison v. Olson*. From DOJ's point of view, removal for "good cause" could exist if an independent counsel "refused to obey a presidential order to grant immunity to the target of an investigation."[150] The Senate rejected this interpretation, stating the removal protection was for the purpose of preventing the firing of an official "unless he or she engages in some type of misconduct [such as] taking a bribe or committing an impropriety."[151] This coupled with the Court's decisions in *Humphrey's Executor* and *Wiener* where the Court indicated that removal had to involve the "rectitude" of the government official could signify a more limited ability of the President to fire agency heads with "for cause" removal protection.[152]

On the other hand, the Court in *Bowsher v. Synar* noted that the applicable statute conferred "very broad" removal power upon Congress, whereby the Comptroller General could be removed for "any number of actual or perceived transgressions of legislative will."[153] Legal scholars have suggested that "for cause" provisions could be interpreted broadly so the President may remove an IRC member "under a broad array of circumstances, including a commissioner's frequent or important failure to follow the President's wishes with respect to what is required by sound policy."[154] In addition, this could include removal of an IRC head for refusing to follow certain presidential directives, such as an order to conduct CBA of a proposed regulation.[155]

The parameters for the conduct which give rise to removal "for cause" will remain less than clear, absent guidance by the courts or Congress. Were an IRC to disregard a presidential directive to follow OIRA review on proposed regulation, it appears uncertain whether this would constitute

[148] *Humphrey's Executor*, 295 U.S. at 618-19 (1935). President Roosevelt's initial request for Mr. Humphrey's resignation was on the grounds "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection." *Id*.

[149] *Id*. at 626. The FTC Act provides that a Commissioner may only be removed for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41.

[150] Independent Counsel Reauthorization Act of 1987, S. Rep. No. 100-123 at 12 (1987).

[151] S. Rep. No. 100-123 at 12 (stating that DOJ's interpretation of the statute "completely misconstrues Congressional intent.").

[152] *Wiener*, 357 U.S. at 356.

[153] Bowsher v. Synar, 478 U.S. 714, 729 (1986) (holding that Congress could not assign executive branch functions to the Comptroller General, a legislative branch officer). The statute provided the Comptroller General could be removed by Congress for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) felony or conduct involving moral turpitude." 31 U.S.C. § 703.

[154] Breger and Edles, *supra* note 24, at 1145 (referring to the argument of Lawrence Lessig and Cass R. Sunstein in *The President and the Administration*, 94 Colum. L. Rev. 1, 110 (1994)).

[155] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 667 n.402 (1984). This proposition could be further supported by the argument, discussed *supra*, that extending the centralized review requirements to the IRCs by executive order is constitutional because a broad interpretation of the for cause removal terms could indicate that Congress granted the President supervisory powers over the policy decisions of agencies.

grounds by which the President could remove a member of an IRC "for cause." Thus, the President may have little or limited recourse to enforce an IRC's compliance with the Executive Order. Notably, S. 3468, as discussed above, would not require the IRCs to comply with EO 12866 by statute; rather, the bill would authorize the President to require such conduct by executive order. The bill does not address whether noncompliance could constitute grounds for removal. It only requires the head of the agency, who does not comply with the executive order, to submit explanations of noncompliance with the proposed and final significant rule.[156] Thus, even if S. 3468 became law and the President chose to extend to centralized review requirements to the IRCs, the President would face the same limits on enforcing IRC compliance, given the uncertainties of what constitutes "for cause" removal.

Were Congress to codify the statutory provisions of EO 12866 such that the IRCs are mandated to comply with the centralized review procedures, it may still remain unclear whether noncompliance with a statute would give the President "cause" to fire an agency head. As discussed, it is uncertain what conduct permits the President to remove an official "for cause." Although it is less clear whether noncompliance with an executive order would be grounds for removal under a "for cause" standard, a persuasive argument could be made that noncompliance with a statute rises to the level of removal "for cause." A reviewing court may find that failing to comply with a statutory directive more clearly constitutes "neglect of duty" or "malfeasance of office."

Judicial Recourse

In addition to the recourse available to the President, discussed above, individuals could challenge the validity of an agency rule if the agency fails to comply with the requirements of centralized review. However, due to restrictions on judicial review contained in EO 12866, judicial review would only be available if Congress, through statute, permitted the courts to hear cases regarding compliance with centralized review requirements. The following sections discuss the limitations on judicial review contained in EO 12866 and the potential for judicial review if Congress authorizes the courts to hear challenges.

Executive Order 12866 Restricts Judicial Review

Although compliance with rulemaking procedure requirements that are established by statute are often subject to judicial review,[157] the final section of EO 12866 provides that there shall be no judicial review for agency compliance with the order. Section 10 of Executive Order 12866 declares:

[156] S. 3468, § 3(c). The agency is to submit "(A) a determination that the rule complies with the requirements and an explanation of that determination; (B) if applicable, an explanation why the independent regulatory agency did not comply with one or more of the requirements, based on the statutory provision authorizing the rule; and (C) a clear statement of the issues on which the agency agrees or disagrees with the [OIRA] Administrator's assessment of the rule." *Id*.

[157] The Supreme Court has held that there is a "strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). Under the APA, judicial review is presumed to be available unless another statute precludes such review of where "agency action is committed to agency discretion by law." 5 U.S.C. § 702.

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Therefore, no individual may question the validity of an agency action for noncompliance with the centralized review procedures set forth by EO 12866. If the President were to extend the centralized review of rulemaking to the IRCs, it seems clear that the preclusion of judicial review would also extend to these IRCs.

Courts have ruled that EO 12866 and its predecessor orders have effectively removed questions regarding compliance with the order from judicial scrutiny. In 2009, the United States Tax Court held that EO 12866 precluded a challenge to whether a regulation was actually a "significant regulatory action" requiring review by OIRA.[158] In that case, the petitioner argued that the IRS violated EO 12866 when the agency failed to identify the challenged temporary income tax regulation as a "significant regulatory action" and submit it to OIRA for review.[159] However, the court quoted § 10 of EO 12866 and dismissed the argument swiftly by stating "petitioner has no right to challenge compliance with Executive Order 12866."[160]

Similarly, in an earlier case that involved Reagan's EO 12291, the U.S. Court of Appeals for the Sixth Circuit ruled that the order's provisions precluding judicial review established that no challenge could be made against an agency for noncompliance.[161] From these decisions, it seems to be well established that § 10 of EO 12866 effectively precludes judicial review of compliance with the order.[162]

Judicial Recourse for Noncompliance with Statute

Although EO 12866 precludes judicial review, Congress could enact a statute that would require agencies, both executive agencies and the IRCs, to comport with centralized review and subject their compliance to judicial scrutiny. If compliance with the centralized review process were to be subject to judicial review, what effect would this have on the IRCs and executive agencies?

Review of agency actions for compliance with the centralized review process, such as performing an adequate CBA, would provide courts with another avenue to set aside or vacate a rule for failure to comply with rulemaking procedures. If an agency failed to follow the statutorily imposed review requirements, claims could be brought under the APA challenging agency actions

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[158] BLAK Investments v. Commissioner of Internal Revenue, 133 T.C. 431, 447 (2009).

[159] *Id*.

[160] *Id*.

[161] State of Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986) ("Given this clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review, we hold that the Order provides no basis for rejecting the EPA's final action.").

[162] The 1981 OLC Opinion also notes that even without the provision specifically precluding judicial review, courts would likely determine compliance with the order to be non-reviewable because the "Executive Order has not been promulgated pursuant to a specific grant of authority from Congress to the President and thus lacks the 'force and effect of law' concerning private parties." 1981 OLC Opinion, *supra* note 59, at 68 (citing *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975) (holding that the executive order could not be judicially enforced because it had not been issued pursuant to delegation from Congress)).

as arbitrary or capricious or otherwise not in compliance with the law.[163] Existing decisions can provide an illustration for how agencies might be held to comply with CBA requirements. The remainder of this section discusses cases brought against the SEC for failure to consider the costs and benefits of their regulatory actions.

Although the IRCs are not subject to the OIRA review process, many of them are required to consider the costs and benefits of their rules. However, such obligations are not imposed by executive order, but rather by statute. For example, the Investment Company Act (ICA) obligates the SEC to consider the economic effects of a new rule.[164] If the SEC promulgates a rule without adequately assessing the economic impacts, a court can vacate the rule as an arbitrary or capricious action under the APA.[165] Thus, when courts are permitted to review the economic analyses of an agency, the imposition of the agency's rules may be delayed by possible court action.

The DC Circuit has vacated SEC rules and remanded rules back to the Commission for further consideration. The court has taken such action for the agency's failure to adequately consider the costs imposed by a rule, failure to consider possible alternatives to a rule, and for relying on insufficient data or unpersuasive studies. In 2005, the DC Circuit remanded to the SEC for further consideration a rule that required mutual funds to have independent directors represent at least 75% of the board of directors in order to qualify for certain exemptions.[166] The court held that, in promulgating the rule, the SEC did not adequately consider the costs that would be imposed on mutual funds. The SEC argued that there was no "reliable basis for determining" how mutual funds would seek to comply with the requirement, and therefore it could not easily determine the potential costs.[167] The court noted that this did not relieve the SEC from its obligation to estimate, as best it could, the economic impact of the new requirement. The court held that the lack of an economic impact analysis violated the SEC's obligations under the ICA and APA.[168] Furthermore, the court determined that the SEC had also failed to adequately consider alternatives to their promulgated rule, in violation of the APA. Although the SEC is not required to consider every possible alternative, the court noted that two dissenting Commissioners from the SEC raised the possible alternative and that it warranted adequate consideration.[169]

In 2011, in *Business Roundtable v. SEC*,[170] the DC Circuit vacated another SEC rule, which would have required public companies to disclose information to shareholders regarding shareholder-nominated candidates for board of director positions. The court again noted that, pursuant to the ICA, the SEC had an obligation to "determine as best it can the economic

[163] 5 U.S.C. § 706(2). NEPA claims are made on this basis. NEPA does not provide a private right of action so suits are brought against agencies under the APA arguing that the agency action is arbitrary or capricious for failure to consider the environmental impacts of the federal action. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 345-46 (1989) ("[R]espondents brought this action under the Administrative Procedure Act to obtain judicial review of the Forest Service's decision. Their principal claim was that the Early Winters Study did not satisfy the requirements of NEPA.")

[164] When the Commission engages in rulemaking, the Commission "shall ... consider ... whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 80a-2(c).

[165] 5 U.S.C. § 706(2)(A).

[166] Chamber of Commerce of the United States of America v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

[167] *Id.* at 143.

[168] *Id.* at 144.

[169] *Id.* at 144–45.

[170] 647 F.3d 1144 (D.C. Cir. 2011).

implications of the rule."[171] The court found numerous problems with the SEC's justifications for the rule and determined, among other things, that the Commission: relied on "relatively unpersuasive studies" while dismissing other studies; "discounted the costs ... but not the benefits" of the new rule; and established the rule without obtaining important data relating to the frequency of election contests.[172] It determined the SEC's action to be arbitrary and capricious under the APA and vacated the rule.[173]

These cases illustrate that allowing a court to review an IRC's or executive agency's rule for compliance with centralized review requirements, such as performing an adequate CBA, could provide another tool for vacating or delaying the rule. If Congress considers subjecting agencies to such judicial review, it likely would be important for Congress to evaluate the potential policy and institutional implications as there could be more legal challenges to agency rules.

Conclusion

Federal agencies regularly adopt rules pursuant to the APA, which have the force of law, to implement the statutes and programs authorized by Congress. Beginning with President Reagan and continued by President Clinton, the executive branch, through OIRA, has maintained a centralized review process for "significant regulatory actions." The provisions of EO 12866 establish additional steps that executive agencies must follow before a rule can be finalized. Although debate surrounded whether the President has the authority to impose these procedural obligations on executive agencies, there seems to be fairly broad agreement that he has adequate legal grounds for doing so. IRCs, however, are exempt from EO 12866, but there has been consideration of extending these executive requirements to encompass the IRCs. Drawing from principles of the unitary executive, arguments have been made in favor of the President's authority to include IRCs in the OIRA review process as it is part of his constitutional authority to "take Care" that the laws are faithfully executed. Others, however, argue that the President does not have legal authority to act because Congress has not authorized this process and such action would be in contravention to Congress's implied will, as arguably evident by other statutes, to insulate the IRCs from presidential control.

However, were the President to extend EO 12866 to include the IRCs or were the Congress to codify the provisions of the Executive Order, questions arise as to the President's, as well as the courts', ability to enforce compliance. The President's direct recourse to take action against an IRC that disregards the Executive Order may be limited because members of the IRCs typically enjoy "for cause" removal protection. As the meaning of "for cause" has not been defined by Congress or the courts, it is unclear what conduct may permit the President to remove an IRC member. This may still be the case even if the provisions of EO 12866 were codified, although failure to follow a statutory requirement could be more credible grounds for removing a member of an IRC with "cause." Courts are unlikely to grant judicial review for an IRC's failure to comply with EO 12866, as there is a provision that expressly precludes judicial review for noncompliance. However, were judicial review provided via statute, claims could be brought

[171] *Id.* at 1148.

[172] *Id.* at 1150–53.

[173] *Id.* at 1156. *See also* American Equity Investment Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010) (vacating SEC rule on fixed indexed annuities based on insufficient consideration of costs and benefits because SEC did not evaluate existing state regulatory schemes when determining that new federal programs would promote efficiency).

against the IRCs under the APA challenging agency actions as arbitrary or capricious or otherwise not in compliance with the law.

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