

In the draft recommendation, the discussion -- and perhaps especially footnote 10 -- is incomplete and unfortunately misleading. As Curtis's report makes clear, there WAS an OLC opinion --- one issued during the Carter administration -- affirming the President's authority to require written analyses from independent regulatory commissions respecting how they intended to perform their rulemaking responsibilities. Given the authority Article II of the Constitution explicitly confers on the President to require written reports of executive department heads on how they will perform their duties, that conclusion seems inescapable -- the more so as the Court has now clearly recognized (as in my judgment the Constitution requires it to have done) that the independent regulatory commissions are part of the executive branch. Where else could they be? They are simply built a bit differently from other parts -- as recent scholarship including the guide ACUS has just published, cited in n. 9, makes clear. Perhaps the President's revisory authority might be less -- on the model of the Paperwork Reform Act -- but that he can require written reports is as clear as it can possibly be. Neither the discussion nor Curtis's makes any mention of Article II's provision; both should.

For this reason, the parenthetical in Recommendation 9, "(or authorizes the President to require)," is unfortunate. The draft legislation that has been pending in Congress properly speaks of affirming the President's authority to act, not authorizing him to act. I strongly urge the Committee either to delete the phrase entirely from the draft, or to substitute a recognition word, such as "encourages," for "authorizes."

I would also add to Recommendation 9 between (a) and the present (b) (relettered (c)) a phrase on the order of "(b) its action should follow the model of the Paperwork Reform Act in affirming the authority of independent regulatory commissions finally to decide rulemaking issues."

In Curtis's report there are a few changes that I hope he might be willing to make.

1) As above, I hope he will introduce the President's Article II authority into his analysis -- for example, as undergirding (as it did) the advice OLC did give President Carter. The Supreme Court's decision in *Free Enterprise Inst. v. PCAOB* makes clear, as there should never have been any doubt, that independent regulatory commissions are elements of the Executive branch. Curtis is right that the requirements of EO 12044 were less sweeping than those of the subsequent EOs, but nonetheless they required written reports of IRCs on some matters, and that is the central issue.

2) Similarly, in my judgment Section 4 of the current executive order, and perhaps (I do not recall whether it extended to IRCs) its predecessor in the Reagan administration, deserve better than a couple of asides hidden in footnotes. Section 4 imposes requirements on IRCs to submit written reports to the White House that include summary CBA estimates (4(c)(1)(B)), and as such reflect a clear assertion of presidential legal authority to require this kind of information in a written report.

3) On page three Curtis states "In all cases, though, Congress gave the heads of these agencies for cause removal protection to provide a measure of independence from presidential direction and control." There are two senses in which this is not true. The most important, perhaps, is that Congress made no such provision for agencies (the SEC, FCC, FMC, perhaps others) created after *Myers v. US* and before *Humphreys' Executor*. As Justice Breyer remarks in his dissent in the *PCAOB* case, this likely was quite deliberate, to avoid risking a judicial finding that such clauses were unconstitutional. Not Congress, but force of habit and the majority's quite extraordinary willingness just to assume that the SEC Commissioners do have for cause protect, just because the parties so conceded (its reasoning depriving the *PCAOB* of that protection could not otherwise be sustained), is the source of "for cause" protection for these commissioners. The less

important sense is that even when Congress explicitly grants "for cause" protection to Commissioners, it generally provides that chairmanship results from presidential designation, with the consequence that Presidents can and do reassign that position -- often quite important for administrative authority -- without regard to "cause."

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