

Sean Croston's Comments on Benefit-Cost Analysis at Independent Regulatory Agencies Recommendation

I just got the chance to read the final draft recommendation regarding Benefit/Cost Analysis at IRAs:

<http://www.acus.gov/sites/default/files/documents/IRC%20BCA%20Recommendation%20for%204-29-13%20Mtg%20FINAL.pdf>

For whatever it's worth, I wanted to add a few comments for your consideration:

1. On page 2, the parenthetical in the first sentence is a bit odd in that it refers to "independent regulatory agencies," defines them in relevant part as agencies "whose heads possess 'for cause' removal protection," and then continues, "like the Securities and Exchange Commission..."

As Justice Breyer pointed out in his dissenting opinion in *Free Enterprise Fund v. PCAOB*, "It is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection... [T]he statute that established the Commission says nothing about removal. It is silent on the question. As far as its text is concerned, the President's authority to remove the Commissioners is no different from his authority to remove the Secretary of State or the Attorney General. See *Shurtleff*, 189 U. S., at 315 ('To take away th[e] power of removal ... would require very clear and explicit language. It should not be held to be taken away by mere inference or implication')."

For the sake of clarity and precision, I would change this citation to reference just about any other IRA -- there are many with explicit for-cause removal protections.

2. The last sentence of the first paragraph on page 4 notes that "Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory analysis requirements for most of their rules." You could note that, at least with respect to the NRC, the D.C. Circuit has actually held that the "language of [the Atomic Energy Act] makes no reference to economic costs; its command is simple and sure: the Commission must provide 'adequate protection' of the public health and safety. . . . In setting or enforcing the standard of 'adequate protection' that this section requires, the Commission may not consider the economic costs of safety measures. The Commission must determine, regardless of costs, the precautionary measures necessary to provide adequate protection to the public; the Commission then must impose those measures, again regardless of costs, on all holders of or applicants for operating licenses." *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114 (D.C. Cir. 1987) (emphasis added). But see *Entergy v. Riverkeeper*, 129 S. Ct. 1498, 1508 (2009) (holding that statutory silence with respect to consideration of costs means that agencies have discretion to consider costs, as "[i]t is eminently reasonable to conclude that [the statute's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree").

3. I agree with the Independent Agency staff comments on the bottom of page 5, although I would keep the parenthetical regarding the probable need to hire additional staff to conduct some of these analyses, which could prove especially difficult in the era of sequesters and declining agency budgets -- where would all of these economists come from? And I would add an additional

caveat: if you insist on adding more exhaustive rulemaking analysis requirements, then you'll really just be encouraging the IRAs to conduct more of their regulatory business through the adjudicatory process (orders, licenses, going to court), even though that process is often less open to participation by all stakeholders and offers less uniform/predictable outcomes than generally-applicable rulemaking. (Is this the "regulatory certainty" that regulated industries allegedly crave so much?)

But the Supreme Court has long held that agencies can exercise discretion in choosing to proceed through adjudication or rulemaking in order to accomplish their statutory/regulatory objectives. Because they truly do want to get their job done, don't be surprised if you see more agencies taking the NLRB route and simply doing more regulation by adjudication, especially if they lack the budgets to perform all of these extra analyses. Is this the result you all want?

4. Finally, I agree with the Independent Agency staff comments criticizing the somewhat-gratuitous, repeated references to OMB/OIRA. If the goal is to force IRAs to follow OMB/OIRA's lead more than they already do through the budget submission process, Paperwork Reduction Act, Congressional Review Act, WH influence over Chairman selections and DOJ litigating positions, etc., then at what point are they still independent? Is the goal here to improve IRAs' regulatory analyses, or to reduce/eliminate their independence? Hopefully you can ensure that it's the former.

Thanks for considering these comments.