8-1-2012

# Deconstructing Independent Agencies (and Executive Agencies)

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# DECONSTRUCTING INDEPENDENT AGENCIES (AND EXECUTIVE AGENCIES)

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*Volumes have been written—both by courts and commentators—about the so-called independent agencies. These agencies are thought to be distinct from executive branch agencies and constitutionally insulated from presidential influence. Yet few have paused to ask what features make an agency "independent" as opposed to "executive." To answer that question, this Article systematically surveys administrative agencies for a broad set of indicia of independence: removal protection, multimember structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority. This Article also examines the functional differences between independent and executive agencies. As it turns out, there is no single feature, structural or functional, that every agency thought of as independent shares—not even the for-cause removal provision commonly associated with independence. We therefore reject the binary distinction between independent and executive agencies. Instead, all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent. From this new understanding of administrative agencies flows a simple theory of presidential control: A President can take any action with respect to an agency (assuming it is within his Article II powers) unless Congress has prohibited that action by statute (in a manner that does not encroach upon the President's Article II powers). There is no tenable argument to justify an extra layer of constitutional or statutory limits to presidential interaction with agencies.*



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We are very grateful to Rachel Barkow, Michael Barr, Ryan Bubb, Adam Cox, Norman Dorsen, Jody Freeman, Barry Friedman, David Kamin, Sally Katzen, Michael Levine, Richard Pildes, and Peter Strauss for their helpful comments on prior drafts. We would also like to thank Shaun Werbelow for his excellent research assistance and the Filomen D'Agostino and Max Greenberg Research Fund at New York University School of Law for its generous financial support. The authors presented a version of this Article at the New York University School of Law Faculty Workshop.

## Introduction

Regulatory commissions were invented during the Progressive Era and designed to bring expertise-driven decision making to the administrative state. The commissions were insulated from outside influence through structural features such as specified terms of tenure and bipartisan membership requirements.[1] More agencies, by then re-

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1 *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1128–36 (2000) (describing theory behind the creation of the first federal independent agencies—the Interstate Commerce Commission (ICC) and the Federal Trade Commission (FTC)—and giving "the basic orga-

ferred to as "independent agencies," were created during the New Deal.[2] Generally defined as entities whose heads enjoy (or are believed to enjoy)[3] for-cause removal protection,[4] these agencies include the Commodity Futures Trading Commission (CFTC), National Labor Relations Board (NLRB), and Securities and Exchange Commission (SEC).[5] At the same time, the purpose of these agencies' structural features was recharacterized from promoting expertise to fostering independence from the President. Later, the 1935 *Humphrey's Executor v. United States* decision added a layer of constitutional protection to the agencies' existing structural protections from presidential control.[6]

But by the 1960s, it became clear that these agencies faced the same pathologies, such as capture and poor decision making, as executive agencies.[7] And so, the pendulum swung back and increased presidential influence was offered up as a means to realign these agencies with the public interest.[8] This proposal raised the question of

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nizational model for the modern [multimember] independent agency"); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 111 (1938).

2 *See* Breger & Edles, *supra* note 1, at 1116 & n.14 (listing agencies created during the Progressive Era and the New Deal, including the Federal Reserve Board (1913), FTC (1914), Federal Radio Commission (1927), Federal Power Commission (FPC) (1930), SEC (1934), Federal Communications Commission (FCC) (1934), National Labor Relations Board (1935), Bituminous Coal Commission (1935), and Federal Maritime Commission (FMC) (1936)).

3 *See infra* text accompanying note 54.

4 This is the common definition of independent agencies. *See infra* note 24 and accompanying text. This Article challenges this generally accepted dichotomy between independent and executive agencies.

5 *See* 7 U.S.C. § 2(a)(2)(A) (2006) (CFTC); 15 U.S.C. § 78d(a) (2006) (SEC); 29 U.S.C. § 153(a) (2006) (NLRB).

6 295 U.S. 602, 629–30 (1935).

7 *See* GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 327–42 (1924) (concluding that the new Federal Trade Commission had achieved "meagre results" despite its promise because, among other things, "it cannot be expected that a government commission . . . can command the services of those super-men whose decisions are always made of the substance of justice and wisdom"); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1112–19 (2000) (describing the "disillusionment" with independent agencies that began in the 1960s and the major "dissolution" of regulatory agencies in the late 1970s); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 506–07 (1952) (attributing congressional attacks on the Interstate Commerce Commission to the agency's capture by the railroads); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 94–97 (2004) (describing the reasoning and conclusions of the 1937 Brownlow Report, which criticized independent agencies for being irresponsible and unaccountable); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678–88 (1975) (discussing the criticism that agencies fail "to carry out legislative mandates and to protect the collective interests" and identifying potential causes of these failures, including capture).

8 *See generally* SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 35–87 (Comm. Print 1960) (written by James M. Landis) (discussing the structural and organizational problems with many agen-

whether and to what extent increased presidential control could be retrofitted onto agencies thought to be insulated from such control.[9]

Underlying this discussion, and almost all discussions, of independent agencies are three fundamental assumptions. First, agencies can be divided into two identifiable, distinct sets: independent and executive. Second, the presence of certain characteristics defines the members of each set. And third, those characteristics justify the accompanying legal rules governing the President's ability to interact with each type of agency. These assumptions are incorrect.

Agencies cannot be neatly divided into two categories. Independent agencies are almost always defined as agencies with a for-cause removal provision limiting the President's power to remove the agencies' heads to cases of "inefficiency, neglect of duty, or malfeasance in office."[10] But, as some scholars acknowledge, the so-called independent agencies do not share a single form.[11] This Article is the first to systematically survey the enabling statutes of *both* independent and executive agencies for a broad set of indicia of independence: removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority.[12] It finds that there is no single feature—not even a for-cause removal provision—that every agency commonly thought of as independent shares.[13] Moreover, many agencies generally considered to be executive agencies exhibit at least some structural attributes of independence. This Article also examines the functional differences between independent and executive agencies. Here too, the differences are overstated.

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cies and concluding that "executive action promises more expeditious handling of many of [those major problems]"); AM. BAR ASS'N, COMM'N ON LAW & THE ECON., FEDERAL REGULATION: ROADS TO REFORM 78–80 (1979) (calling for increased presidential oversight of regulatory agencies). *See also* Louis L. Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068, 1074 (1956) (reviewing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955)) ("[I]t seems to me sounder on balance that these policy-making agencies should be subject to presidential control.").

9 *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31, 32 n.81 (2010) (collecting academic sources that state that the permissible extent of presidential control over independent agencies is an open question).

10 Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383; *see infra* text accompanying notes 25–27.

11 *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51 ("It is not entirely clear exactly what features of the independent regulatory commissions are essential and what are merely incidental.").

12 Over a decade ago, Professors Marshall Breger and Gary Edles conducted half of this survey—of the independent agencies—and reached the conclusion that independent agencies do not share a common form. *See generally* Breger & Edles, *supra* note 1, at 1137–54. Others have made the comparison across types of agencies, but only in passing and on the basis of few examples. *See, e.g.*, Miller, *supra* note 11, at 43–44; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583–87 (1984).

13 *See infra* Tables 1–7.

So, agencies do not fall neatly into two categories. If the binary view of agencies is incorrect, what is the correct view? The continuum view. Agencies fall along a continuum ranging from most independent from presidential influence to least independent. The so-called independent agencies are simply a type of executive agency. To be sure, they are insulated from presidential authority, but so are many executive agencies.

The current rules governing the President's interactions with agencies stem from the binary view of agencies. Status as an independent agency carries limitations on presidential control that reach beyond those specified in the statute. For example, whether the President can require agencies with for-cause removal protection to submit regulations to the Office of Information and Regulatory Affairs (OIRA) for review is an open question.[14] And agencies have argued that the presence of some indicia of independence—such as a multimember structure and a set term of tenure—imply *additional* indicia of independence—such as for-cause removal protection or the ability to bypass the Office of Management and Budget (OMB) and present a budget directly to Congress.[15] Finally, there is a sort of constitutional force field around independent agencies. The consensus view is that presidents cannot constitutionally involve themselves in independent agency decision making to the same extent as executive agency decision making, though the contours of that rule are unclear.[16]

Implying additional constraints on presidential control over an agency beyond those specified in an agency's enabling statute is a mistake. Our argument rests on both statutory interpretation and constitutional analysis. On the statutory front, the diversity of agency form should affect the way we think about agencies. When designing an agency, Congress has a set of tools it can use to make the agency more or less independent from the President. To infer an additional feature of independence from the presence of another feature of independence, one must assume that Congress intended to include it, even though it did not do so explicitly. But because no one feature of independence perfectly correlates with another, there is no reason

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14 *See, e.g.*, Barkow, *supra* note 9, at 31–32, 32 n.81; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1534–35 (2002); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 28–32 (1995).

15 See *infra* notes 342–73 and accompanying text for a discussion of a line of cases addressing whether to imply a for-cause removal provision on the basis of a multimember structure and terms of tenure, and for a discussion of an attempt by the FTC to assert its exemption from executive budgets and legislative clearance requirements on the basis of its status as an independent agency with for-cause removal protection.

16 *See* Barkow, *supra* note 9, at 32 n.81 (collecting academic sources stating that the permissible extent of presidential control over independent agencies is an open question).

why any given statutory limitation, or set of limitations, on presidential power should generate additional limitations not provided for by statute.[17] Article II of the Constitution assigns the executive power to the President, so a clear statement is generally required when Congress chooses to limit this power.[18] This rule should not be different for the so-called independent agencies.

On the constitutional front, implied limitations on the President's power over independent agencies depend on the implicit assumption that independent agencies have some special status under the Constitution. The idea would be that when Congress gives an agency for-cause removal protection, it places that agency in a special constitutional category that comes with additional protections against presidential control.[19] However, the Constitution provides for no such "fourth branch."[20] And because not all of the indicia of independence are present in all agencies with for-cause removal protection, the congressional purpose argument does not hold up. There is no reason to believe that Congress means for agencies to have special constitutional protection from presidential control when it chooses not to grant those same agencies full or uniform statutory protection against such control.

Thus, the current set of rules governing presidential interactions with the so-called independent agencies are flawed because they are based on a flawed premise. We argue instead for a simpler rule: the President can constitutionally take any action with respect to independent agencies that he could with respect to the executive agencies unless a statutory provision says otherwise.

This Article ends with three applications of this rule. First, we argue that because Congress can—and does—create agencies with many different combinations of indicia of independence, any indicia that are not in the enabling statute should not be read into that statute. We believe that *Wiener v. United States*,[21] a case in which the Supreme Court implied for-cause removal protection into a silent

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17 *See* Miller, *supra* note 11, at 52 n.49 ("When the idea of independent agencies is taken as having some content other than the various specific restrictions on presidential control, then it becomes extremely tempting to draw broader—and misleading—distinctions between independent and executive branch agencies.").

18 *See infra* notes 327–29 and accompanying text.

19 *See, e.g.*, Transcript of Oral Argument at 62, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861) (question of Roberts, C.J.) ("The formulation that you use and your friend the Solicitor General . . . used is that [presidents] have the same authority [over the SEC, which lacks an explicit for-cause removal clause] that they have over every other independent agency, but I'm—it's very hard to find out exactly what that authority is. So what is your position about the authority of the President?").

20 See *infra* notes 321–33 and accompanying text for a discussion of the "fourth branch" theory of independent agencies.

21 357 U.S. 349 (1958).

statute, and lower court decisions that later relied on *Wiener* are incorrect. Second, agencies cannot claim more independence from the President than Congress granted them in their enabling statutes by wrapping themselves in the mantle of independent-agency status. Just because Congress has given an agency a certain measure of independence from the President, it does not follow that the courts should imply that the agency enjoys additional measures of independence. Third, we argue that the President can require all agencies to submit to the regulatory review process. If he does, Congress can of course exempt agencies from the regulatory review requirement, just as it has done in response to previous presidential assertions of control over the administrative state.[22]

The Article proceeds as follows. Part I traces the development of the binary view of agencies. Parts II and III then explain why the binary view is incorrect. Part II surveys the enabling statutes of both independent and executive agencies for seven indicia of independence: removal protection, specified tenure, multimember structure, litigation authority, partisan balance requirements, budget and congressional communication authority, and adjudication authority. It establishes that both independent and executive agencies have indicia of independence. Part III shows that the relationship between the President and independent agencies is not all that different in practice from the relationship between the President and executive agencies. Independent agencies, despite their name, are somewhat dependent on the President. And many executive agencies enjoy significant independence from the President. Finally, Part IV presents the core of our argument: An agency does not gain more insulation from the President than Congress provided for in the agency's governing statute simply because of its categorization as an "independent" agency. The Supreme Court dicta and robust literature that treat independent agencies as a "headless fourth branch" must therefore be abandoned. We end with three applications of our theory.

## I
## Binary View of Agencies As Either Independent or Executive

The modern administrative state is extraordinarily complex. There are "many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve [different] legislatively mandated objectives."[23] Despite this diversity of form and function, the conventional wisdom is that there are two types of agen-

22 *See infra* notes 197–218 (describing the pattern of presidential consolidation of power and the exemption from that exercise of presidential power by Congress).

23 *Free Enter. Fund*, 130 S. Ct. at 3169 (Breyer, J., dissenting).

cies: executive and independent. Each type of agency comes with a set of rules that govern how the President can interact with them. The consensus view is that the dividing line is the presence of a for-cause removal protection clause,[24] but not all agencies considered independent possess such a clause. If independent agencies are truly distinct from executive agencies, there must be another dividing line. This Part explains the development of the binary view of agencies. Parts II and III then demonstrate that the binary view lacks a statutory and real-world basis because that dividing line does not exist.

### A. Brief History of the Independent Agency Form

Congress established the first independent agency, the Interstate Commerce Commission (ICC), in 1887.[25] Five commissioners, appointed by the President with the advice and consent of the Senate, ran the agency. No more than three of those five commissioners could be from the same political party.[26] Commissioners served six-year staggered terms and could be removed from office by the President for "inefficiency, neglect of duty, or malfeasance in office."[27] Commissioners could not be employees of the railroads, which the ICC regulated, or own financial interests in the railroads.[28] The ICC was originally located within the Department of Interior,[29] a location that did not appear to be incompatible with "whatever independence

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24 *See, e.g.*, Breger & Edles, *supra* note 1, at 1138 & n.131 ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'"); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) (defining the President's removal power as "the core legal difference" between independent and executive agencies); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 953–54 (2001) (defining independent agencies as "agencies whose heads do not serve at the pleasure of the president"); Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 470 n.39 (1994) ("Immunity from discretionary removal power is a 'condition sine qua non' of independence."); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426 (1990) ("An agency is independent if Congress has provided that its members can be discharged by the President only for specified causes."); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330 (1989) ("The condition that makes the independent agency truly independent is a statutory restriction on removal for cause."); *see also* Pildes & Sunstein, *supra* note 14, at 28–33 (discussing how to interpret for-cause removal provisions to allow inclusion of independent agencies within regulatory review).

25 *See* Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383.

26 *See id.*

27 *Id.*

28 *See id.*

29 *See id.* § 21, 24 Stat. at 387.

the new commission was supposed to have."[30] Congress eventually moved the ICC out of the Department of Interior and made it a stand-alone agency.[31]

The debates over the structure of the ICC did not mention the term "independence," and "the intent was not to make the commission independent and thereby vest it with authority to wield power outside the domain of the executive branch."[32] The view that independent agencies could be a bulwark against the expansion of presidential power came later in the 1930s.[33] Initially, the primary goal of the independent agency structure was expert, impartial decision making.[34]

This goal of impartial expertise motivated many of the structural features of the early independent agencies. Commissioners and board members were appointed for a term of years because expertness "springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem."[35] Congress created new agencies to avoid the inertia and capture of existing cabinet departments, and to allow the new agencies to focus on narrow subject areas without consideration of competing programmatic interests.[36] A single agency with a single mission could be held responsible for its actions, and this accountability would be a draw for "men whose sole urge for public service is the opportunity that it affords for the satisfactions of achievement."[37] Insulation from political control would also increase the attractiveness of employment at the agencies, thereby ensuring that policies would be less shortsighted at inception and more stable over time.[38] Finally, Congress authorized these agencies to act through adjudication to appease a hostile judiciary. Courts at the time were wary of regulations, and the hope was that they would more willingly uphold decisions

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30 ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 62 (1941).

31 *See* Act of Mar. 2, 1889, ch. 382, §§ 7–8, 25 Stat. 855, 861–62.

32 Breger & Edles, *supra* note 1, at 1130.

33 *See* BERNSTEIN, *supra* note 8, at 53 (noting that during the 1930s, influential members of Congress saw independent agencies "as a device for counteracting the trend toward concentration of power in the executive branch under a strong president").

34 *See* Breger & Edles, *supra* note 1, at 1131.

35 LANDIS, *supra* note 1, at 23.

36 *See id.* at 26–28.

37 *Id.* at 28.

38 *See* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 153 (1962) (noting that too much presidential control over agency decision making would "defy the lesson that it is responsibility that breeds achievement"); *see also* LANDIS, *supra* note 1, at 111 ("[T]here seems to have been a hope that the independent agency would make for more professionalism than that which characterized the normal executive department. Policies would thus be more permanent and could be fashioned with greater foresight than might attend their shaping under conditions where the dominance of executive power was pronounced.").

made by a body that "operated more like a court than an administrative agency."[39]

### B. Development of the Binary View of Agencies

Independent agencies soon gained constitutional status as the "[f]ourth [b]ranch."[40] The content of that status is unclear, but the basic idea seems to be that because these agencies are outside the executive branch, the President cannot constitutionally attempt to interfere with their decisions.

The basis for the constitutional status of independent agencies stems not from constitutional text but from enduring dicta in the 1935 case of *Humphrey's Executor v. United States*.[41] Indeed, there is no mention of administrative agencies, much less independent agencies, in the Constitution.[42] The constitutional status of the independent agency comes instead from *Humphrey's Executor*, where the Court held that Congress could constitutionally limit the President's removal power over agencies that performed quasi-judicial or quasi-legislative functions.[43]

The *Humphrey's* case arose when President Roosevelt attempted to remove a FTC commissioner based only on their policy disagreements.[44] The Court believed that Congress's intent in granting commissioners for-cause removal protection was to ensure that the FTC would not be "subject to anybody in the government" or "subject to the orders of the President."[45] The FTC was to be "independent of executive authority, *except in its selection*, and free to exercise its judgment," and removal at will by the President would "thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office."[46] The constitutional protection from presi-

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39 BERNSTEIN, *supra* note 8, at 27–29 (discussing the relationship between adjudication and the history of judicial hostility toward administrative decisions).

40 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 525–26 (2009) ("There is no reason to magnify the separation-of-powers dilemma posed by the headless Fourth Branch . . . by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." (citations omitted)).

41 295 U.S. 602 (1935).

42 *See* FTC v. Ruberoid Co., 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (describing the terms "quasi-judicial" and "quasi-legislative" used to justify the existence of independent agencies within the constitutional scheme as merely "a smooth cover [courts] draw over [their] confusion as [they] might use a counterpane to conceal a disordered bed").

43 *See* 295 U.S. at 628–29.

44 *See id.* at 618–19.

45 *Id.* at 625.

46 *Id.* at 625–26.

dential control given to independent agencies stems from these few sentences.[47]

The Court read into the structure of the FTC a congressional desire that the agency be "free from executive control."[48] It then described the agency as situated outside the other three branches. The agency was "not only wholly disconnected from the executive department, but . . . was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments."[49] In short, the Court endorsed the idea that Congress, when it creates an agency with for-cause removal protection, intends for the agency to be totally free from presidential influence, aside from the President's role in appointments.[50]

After *Humphrey's Executor*, agencies were classified as either independent or executive. Independent agencies are fully protected from presidential influence by both their statutory features and this extra layer of constitutional protection. Executive agencies are fully controlled by the President. This view of agencies had at least three consequences.

First, agencies that shared some, but not all, of the FTC's structural features claimed to be fully independent, that is, to enjoy for-cause removal protection. After the decision, for-cause removal protection "became a symbol of independence for all members of similar regulatory independent agencies and commissions."[51] Agencies that had similar features, such as a multimember structure and set terms of tenure, claimed for-cause removal protection despite lacking such a provision in their enabling statutes.[52] Their argument was that if an

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47 *See* Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 425 (2008) ("It was thus not until . . . *Humphrey's Executor v. United States* that there was even a colorable claim that these commissions were in any way independent of the president.").

48 *Humphrey's Ex'r*, 295 U.S. at 628.

49 *Id.* at 630. This language sets up a distinction that the *Humphrey's Executor* Court drew between the FTC and the postmaster at issue in *Myers v. United States*, in which the Court declared that "[t]he power of removal is incident to the power of appointment, . . . and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." 272 U.S. 52, 122 (1926).

50 *See Humphrey's Ex'r*, 295 U.S. at 629 ("The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control . . . includes . . . [the power] to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.").

51 J. Forrester Davison, *The Place of the Federal Trade Commission in Administrative Law*, 8 Geo. Wash. L. Rev. 280, 287 (1940).

52 *See, e.g.*, FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) ("The commission suggests that the President can remove the commissioners only for good

agency looks more like an independent agency than a traditional executive agency, Congress must have intended it to be independent.[53] The omission of a for-cause removal protection provision must have been a drafting error. Courts willingly followed, implying for-cause removal protection for the SEC and the Federal Election Commission (FEC).[54] Even when there is no court decision on point, some agencies without for-cause removal provisions have historically been treated as independent, such as the SEC, the Federal Energy Regulatory Commission (FERC), the FCC, and the National Credit Union Administration (NCUA).[55]

Second, some independent agencies claimed additional insulating features not provided for by statute. For example, the FTC claimed it was not subject to the centralized budget-making process run by the President.[56] The agency argued that presidential control of an agency's budget ran contrary to the congressional purpose described in *Humphrey's Executor* because such control amounted to "policy control of at least one 'independent' agency by the Executive through the power of the purse."[57]

Finally, greater presidential control over these agencies was seen as constitutionally suspect because it is incompatible with the general congressional desire, described in *Humphrey's Executor*, to insulate agencies from presidential control. This view persisted even though scholars and former heads of independent agencies acknowledged the benefits, even the necessity, of[58] such control. But the content of the constraint on presidential control is unclear.[59] For example,

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cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms."); SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988) ("[The court] accept[s] appellants' assertions in their brief, that it is commonly understood that the President may remove a commissioner only for 'inefficiency, neglect of duty or malfeasance in office.'").

53 *See, e.g.*, *NRA Political Victory Fund*, 6 F.3d at 826; *Blinder*, 855 F.2d at 681.

54 *See infra* notes 349–53 and accompanying text.

55 *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 954 n.65 (1980) (noting that the holding in *Wiener v. United States* presumably extends to other independent agencies without explicit for-cause removal protection); *see also infra* note 91 (citing circuit court cases).

56 *See* Arthur Krock, *In the Nation: The 'Independence' of the Federal Agencies*, N.Y. TIMES, Jan. 30, 1958, at 22; *see also infra* notes 366–68 and accompanying text.

57 Krock, *supra* note 56, at 22.

58 *See generally* Philip Elman, *The Regulatory Process: A Personal View*, 39 ANTITRUST L.J. 901 (1970); Louis J. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Newton N. Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146 (1963).

59 *See, e.g.*, Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1601 (1997) (describing independent agencies as "somewhat less susceptible to direct presidential control than are executive branch agencies"); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986) (describing independent agencies as "somewhat remote from presidential direction").

scholars seem to draw a line between procedural supervision over independent agencies, which is acceptable, and substantive control, which they find troubling.[60] Professors Peter Strauss and Cass Sunstein give two examples of procedural requirements: "requiring consultation or the preparation of particular documents, such as cost-benefit statements."[61] They do not define substantive control, but presumably it would involve orders, or possibly even simple recommendations, as to specific policy outcomes.[62] The current Supreme Court seems to share this discomfort with substantive presidential control. For example, at the oral argument in *Free Enterprise Fund*, Justice Anthony Kennedy expressed skepticism that the President could "on an ongoing, daily basis . . . instruct an independent agency what he wants done," and Justice Antonin Scalia declared that the extent of the President's control over the SEC was "nothing."[63]

### C. Challenging the Binary View

The idea that the "[i]ndependent agencies occupy a different legal and political space than executive-branch agencies" rests on the assumption that all agencies can be categorized as either independent or executive.[64] But as explained above, there is not a definition—not even for-cause removal protection—that encompasses all agencies thought of, and treated, as independent.[65] Yet, using for-cause re-

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60 *See, e.g.*, Strauss & Sunstein, *supra* note 59, at 203 ("[T]o say that the President cannot dictate outcomes is not to resolve the question whether the President can impose requirements that are procedural in character . . . .").

61 *Id.*

62 It goes without saying that this distinction between process and substance, in addition to being indeterminate, is also probably incorrect. For the argument that administrative procedures are used as instruments of political control, that is, to increase the likelihood of certain substantive outcomes, see Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987); Matthew[sic] D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 431–32 (1989).

63 Transcript of Oral Argument at 60, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861).

64 Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010).

65 The Paperwork Reduction Act (PRA) is a statute designed to ease information collection costs on the public, and the government defines "independent regulatory agency" for the purposes of the Act. The definition includes a list of agencies followed by the catchall phrase, "and any other similar agency designated by statute as a Federal independent regulatory agency or commission." Paperwork Reduction Act of 1980, 44 U.S.C. § 3502(5) (2006). The Act allows "independent regulatory agenc[ies]" with two or more members to override the OMB's informational request vetoes. *Id.* § 3507(f)(1).

Along with being outdated (one of the listed agencies, the Interstate Commerce Commission, for example, no longer exists), the list is also vague. The listed agencies do not share a uniform structure, so it is not clear whether there is a unifying theme that one could extract from the list. One of the agencies is a single-member agency, some do not have explicit for-cause removal protection, and there are multimember agencies with explicit for-cause removal protection not included in the list. *See infra* Tables 1–3.

moval protection as the dividing line remains the consensus view among scholars.[66]

Scholars stress the importance of for-cause removal clauses even while acknowledging that not all agencies they treat as independent possess this feature. For example, Professors Breger and Edles extensively surveyed thirty-two agencies they classify as independent.[67] They found that these agencies varied with respect to number of members, length of terms, and bipartisanship requirements,[68] and they settled on removal protection as "[t]he critical element of independence."[69] Yet, of the agencies surveyed, only seventeen enjoy explicit for-cause removal protection. Breger and Edles suggest that the other agencies enjoy "reasonably implied" for-cause protection but do not clarify the trigger for implying such protection or why that implication is justified.[70] Some scholars acknowledge that other features influence the categorization of agencies as independent but then treat removal as the most important feature of independence without explaining its weight. Professor Geoffrey Miller argues that independent agencies almost uniformly display several characteristics: a multimember structure, a bipartisanship requirement, rulemaking authority, adjudication authority, enforcement authority, a narrow mandate, and removal protection.[71] Of these, Miller believes that the "limits on presidential removal are distinctive."[72] However, Miller reached this conclusion without examining the other six features to explain why removal is the most indicative of independence.[73]

Three recent pieces shift away from the focus on for-cause removal protection toward a more comprehensive analysis of what makes an agency independent. In *Insulating Agencies*, Professor Rachel Barkow notes that independent agencies are created not simply to insulate agency decisions from presidential influence, but also to protect them from capture by interest groups and partisan influence in general.[74] Because regulatory capture led, at least in part, to the recent financial crisis,[75] Barkow advocates for an increased emphasis on structural features that can insulate agencies from capture,

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66 *See supra* note 24 and accompanying text.

67 *See* Breger & Edles, *supra* note 1, at 1236–94.

68 *See id.*

69 *Id.* at 1138.

70 *Id.* We take issue with implying for-cause removal protection in the absence of a statutory provision in Part IV.A.

71 *See* Miller, *supra* note 11, at 51.

72 *Id.*

73 Though Professor Miller acknowledges that the other factors may raise constitutional issues, he quickly dismisses them, in part because they "do not distinguish independent agencies from traditional executive branch agencies." *Id.*

74 *See* Barkow, *supra* note 9, at 19–26.

75 *See id.* at 72–78.

such as funding sources, appointment qualification requirements, and consultation requirements.[76]

Professors Bressman and Thompson make a similar move in their piece, *The Future of Agency Independence*. They describe several mechanisms through which independent agencies have become more responsive to presidential preferences.[77] Some of these mechanisms are statutory. For example, the authors point to the Independent Payment Advisory Board (IPAB), created by the Affordable Care Act.[78] IPAB members enjoy for-cause removal protection and are responsible for devising plans to keep Medicare costs low.[79] But the Department of Health and Human Services, not IPAB, must implement those plans.[80] This separation of planning and execution is novel according to the authors, and it "blur[s] some of the usual lines" between independent and executive agencies.[81] Other mechanisms are informal. The authors note that the Chairman of the Federal Reserve and the Secretary of the Treasury have had a "public partnership," in which both have worked together to address functional stability and reform, since the end of the Bush administration.[82] By examining these mechanisms, the authors take a step toward undermining "the binary distinction that long has been understood to exist between independent and executive-branch agencies."[83]

In *Removal as a Political Question*, Professor Aziz Huq challenges the assumption that the removal power results in complete presidential control over an agency.[84] He points out that there are many structural features, substantive delegations of authority, and combinations thereof that affect how much control presidents have over an agency.[85] From that he draws several conclusions. First, the marginal increase in presidential control from removal power will be lower for an agency that is already insulated from presidential control in other ways.[86] Second, the removal power can sometimes have negative effects on presidential control.[87] Because of these complexities, he argues that courts should treat removal power as a political question.

These pieces are a much-needed contribution to the study of agency independence. However, they do not answer the underlying

76 *See id.* at 42–55.
77 *See* Bressman & Thompson, *supra* note 64, at 600.
78 *See id.* at 662.
79 *See id.* at 662–63.
80 *See id.*
81 *Id.* at 663.
82 *See id.* at 624–30.
83 *Id.* at 672.
84 Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 5–6 (2013).
85 *See id.* at 25–32.
86 *See id.* at 33–36.
87 *See id.* at 36–38.

question of what exactly makes an agency independent and justifies the independent agencies' different constitutional and political status. To try to answer this question, Part II takes up Professor Miller's charge "to 'deconstruct' the agencies into their constituent elements of independence."[88] Rather than simply surveying agencies traditionally considered to be independent, we systematically examine *both* the executive and independent agencies for seven indicia of independence: removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority.[89]

## II
## Independent and Executive Agencies: A Structural Analysis

The goal of this Part is to demonstrate that the binary distinction between independent and executive agencies is false. To that end, we examine seven indicia of independence traditionally associated with independent agencies. For each feature, we construct a two-by-two matrix. We first divide agencies into two categories: agencies with an explicit for-cause removal provision and agencies without an explicit for-cause removal protection. The set of eighty-one agencies studied is taken from the 2011 *United States Government Manual*, an annually updated document that provides detailed information on the federal government.[90] We then examine whether each feature is present across those two categories of agencies. The matrices demonstrate

88 Miller, *supra* note 11, at 44. As discussed above, Professor Miller did not follow through on his charge; rather, his piece challenged the constitutionality of removal protection. *See supra* note 73 and accompanying text.

89 These seven features are in no way an exclusive list. Other features, such as independent funding sources, location within another agency, qualification requirements for appointments, and consultation requirements can impact independence. *See, e.g.*, Barkow, *supra* note 9, at 42–45 (describing the effects of an independent funding source, requirements for expertise rather than ideological agreement, and pressure or support from other agencies on agency insulation); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1173–81 (2012) (describing presidential oversight of agency coordination); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1831–38 (2012) (examining the impact of an independent funding source on presidential and congressional control over agencies). We chose to focus on the structural features most commonly associated with independence.

90 Office of the Fed. Register Nat'l Archives & Records Admin., The United States Government Manual, at v–ix (2011), *available at* http://www.gpo.gov/fdsys/pkg/GOVMAN-2011-10-05/pdf/GOVMAN-2011-10-05.pdf. We included every agency on the "Executive Branch: Departments" and "Executive Branch: Independent Agencies And Government Corporations" lists. We did not include agencies housed within other agencies (for example, the United States Patent and Trademark Office, which is housed within the Department of Commerce) unless the agency enjoyed for-cause removal protection: those agencies were the FERC and the Surface Transportation Board (STB)). Several agencies were dropped because details from their enabling statutes could not be found in the U.S.

that each of the features most often associated with for-cause removal—and therefore with independence—are also present in non-independent agencies. Moreover, for-cause removal is not correlated with the presence of every other indicia of independence; rather, agencies within the category of agencies with for-cause removal possess different combinations of other indicia of independence.

Some preliminary explanation is in order. The discussion up to this point has made it clear that, on the basis of the removal provisions, there are three relevant categories: (1) agencies with explicit for-cause removal protection, (2) agencies believed to have such protection either because a lower court has implied such protection or because the agency has traditionally been treated as independent, and (3) agencies for which statutory silence with respect to removal is taken to mean removal at will. For the purposes of this Part, we divide agencies into only two categories: those with explicit for-cause removal protection and those without such protection. We recognize that this second category will contain agencies whose independence has been implied or assumed by lower courts (e.g., the SEC and FEC),[91] agencies generally considered to be independent (e.g., the FCC),[92] and agencies that are clearly executive (e.g., the Department of State). But we believe that the explicit for-cause removal protection dividing line is the least arbitrary. This is because, as explained in Part I.C, there is no definitive list of agencies that fall within the category of independent agencies. If the tables were reconstructed to include agencies commonly considered independent—such as the SEC, FEC, and CFTC—in the "statutory removal protection" section of the tables, our conclusion that the binary distinction between independent

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Code. These agencies include the National Railroad Passenger Corporation and the Inter-American Foundation.

From the list of forty-nine "Boards, Commissions, and Committees," we added the Advisory Council on Historic Preservation, Chemical Safety and Hazard Investigation Board, National Council on Disability, and Panama Canal Commission. We also added the Election Assistance Commission (EAC), IPAB, and Millennium Challenge Corporation (MCC)—commonly known agencies that did not appear on those lists. Finally, we added the Consumer Financial Protection Bureau (CFPB), which did not gain authority to operate until after the manual was published.

91 Lower courts have implied for-cause protection for the FEC and the SEC. *See* FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 88 (1994); SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988). The D.C. Circuit avoided the issue with respect to the National Credit Union Administration in *Swan v. Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1996) ("[W]e will assume *arguendo* that Board members have removal protection during their appointed terms and focus instead on determining whether, even if that is so, holdover members are similarly protected."). The parties' briefs in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, assumed that the SEC enjoyed for-cause removal protection. *See* 130 S. Ct. 3138, 3148–49 (2010).

92 It should be obvious why this category is impossible to define. The first question would be to ask whose treatment counts. The second would be what the indicia of "traditionally treated" would be.

and executive agencies is incorrect would still hold. Moreover, as we argue in Part IV.C, we do not believe that the presence of other indicia of independence implies the presence of for-cause removal protection as well.

## A. Removal Protection

As reported in Table 1, of the eighty-one agencies studied, twenty-three agencies possess a statutory removal protection provision and fifty-eight do not. This subsection explores the scope of statutory removal provisions and explains how the presence of varying levels of removal protection might affect the President's ability to influence agency decision making.

TABLE 1: AGENCIES WITH STATUTORY REMOVAL PROTECTION

| | |
|---|---|
| **Statutory Removal Protection** | CFPB; Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; Consumer Product Safety Commission (CPSC); FERC; Federal Housing Finance Agency (FHFA); Federal Labor Relations Authority (FLRA); FMC; Federal Reserve; FTC; IPAB; Merit Systems Protection Board (MSPB); Mine Safety and Health Review Commission; NLRB; National Mediation Board (NMB); National Transportation Safety Board (NTSB); Nuclear Regulatory Commission (NRC); Occupational Safety and Health Review Commission (OSHRC); Office of Special Counsel (OSC); Postal Regulatory Commission (PRC); Social Security Administration (SSA); STB; United States Postal Service (USPS)[93] |
| **No Statutory Removal Protection** | Administrative Conference of the United States (ACUS); Advisory Council on Historic Preservation; African Development Foundation; Central Intelligence Agency (CIA); CFTC; Corporation for National and Community Service; Defense Nuclear Facilities Safety Board; Department of Agriculture; Department of Commerce; Department of Defense (DOD); Department of Education (ED); Department of Energy (DOE); Department of Health and Human Services (HHS); Department of Homeland Security (DHS); Department of Housing and Urban Development (HUD); Department of the Interior; Department of Justice (DOJ); Department of Labor; Department of State; Department of Transportation (DOT); Department of the Treasury; Department of Veterans Affairs (VA); Election Assistance Commission; Environmental Protection Agency (EPA); Equal Employment Opportunity Commission (EEOC); Export-Import Bank; Farm Credit Administration; FCC; Federal Deposit Insurance Corporation (FDIC); FEC; Federal Mediation and Conciliation Service; Federal Retirement Thrift Investment Board; General Services Administration (GSA); International Broadcasting Bureau; MCC; National Aeronautics and Space Administration (NASA); National Archives and Records Administration (NARA); National Capital Planning Commission; National Council on Disability; National Credit Union Administration; National Endowment for the Arts (NEA); National Endowment for the Humanities (NEH); National Science Foundation (NSF); Office of Government Ethics; Office of Personnel Management (OPM); Office of the Director of National Intelligence; Overseas Private Investment Corporation; Panama Canal Commission; Peace Corps; Pension Benefit Guaranty Corporation; Railroad Retirement Board; SEC; Selective Service; Small Business Administration (SBA); Tennessee Valley Authority (TVA); U.S. Trade and Development Agency; United States International Trade Commission (ITC); US Agency for International Development (USAID) |

93 12 U.S.C. § 5491(c)(3) (2006) (CFPB); 42 U.S.C. § 7412(r)(6)(B) (2006) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (2006) (Commission on Civil Rights); 15 U.S.C. § 2053(a) (2006) (CPSC); 42 U.S.C. § 7171(b)(1) (2006) (FERC); 12 U.S.C. § 4512(b)(2) (2006) (FHFA); 5 U.S.C. § 7104(b) (2006) (FLRA); 46 U.S.C. § 301(b)(3) (2006) (FMC); 12 U.S.C. § 242 (2006) (Federal Reserve); 15 U.S.C. § 41 (2006) (FTC); 42 U.S.C. § 1395kkk(g)(4) (Supp. 2010) (IPAB); 5 U.S.C. § 1202(d) (2006) (MSPB); 30 U.S.C. § 823(b)(1) (2006) (Mine Safety and Heath Review Commission); 29 U.S.C. § 153(a) (2006) (NLRB); 45 U.S.C. § 154 (2006) (NMB); 49 U.S.C. § 1111(c) (2006) (NTSB); 42 U.S.C. § 5841(e) (2006) (NRC); 29 U.S.C. § 661(b) (2006) (OSHRC);

The ability to remove an agency head at will is an enforcement tool that helps the President ensure that the agency follows his policy preferences.[94] Of course, at-will removal is a blunt instrument for enforcing presidential preferences.[95] Any decision to remove an agency head will impose political costs on a President.[96] These costs will vary according to the reason for the removal, the popularity of the President, the popularity of the agency head, and other factors.[97] A President will therefore remove an agency head only when the political benefits exceed the political costs. Insulation from presidential removal significantly increases the political costs of a decision to remove an agency head for a President because invoking a for-cause provision will make the removal more politically salient and susceptible to judicial challenge.[98]

The exact meaning of for-cause protection clauses is uncertain. The typical removal protection clause specifies that an official can be removed only for "inefficiency, neglect of duty, or malfeasance in office."[99] But it is not clear what actions are removable offenses because the Supreme Court has not decided a case defining those terms.[100] Some scholars read the Court's removal jurisprudence as permitting a certain degree of presidential control over independent agencies. For

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5 U.S.C. § 1211(b) (2006) (OSC); 39 U.S.C. § 502(a) (2006) (PRC); 42 U.S.C. § 902(a)(3) (2006) (SSA); 49 U.S.C. § 701(b)(3) (2006) (STB); 39 U.S.C. § 202(a)(1) (2006) (USPS).

94 *See* CLINTON ROSSITER, THE AMERICAN PRESIDENCY 20 (2d ed. 1960) (describing removal as the "gun behind the door" that allows the President to require agency heads to follow his lead).

95 *See* Entin, *supra* note 59, at 1595 ("The power to remove has limited real-world significance . . . .").

96 *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1381 (2012).

97 *See id.* at 1380–82; *see also* Miller, *supra* note 11, at 87 (describing the "considerable political costs" that President Richard Nixon suffered after removing officers who refused to comply with his policy preferences); Verkuil, *supra* note 55, at 957 (noting the political costs associated with removing an officer who has strong supporters in Congress or influential interest groups).

98 *See* Barkow, *supra* note 9, at 30 ("A removal restriction undoubtedly gives an agency head greater confidence to challenge presidential pressure."). *But see* Breger & Edles, *supra* note 1, at 1149–50 (describing how regulatory commissioners generally acquiesce to a President's resignation request or fail to challenge their removal); Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive *by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 604–05 (speculating that many "voluntary resignations" were the result of presidential pressure, despite a for-cause removal requirement).

99 *See* Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383; *see also supra* note 24 (listing scholars who consider such for-cause removal protection clauses the defining feature of independence).

100 *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994) ("But the Court has not said what 'good cause' means. The Court has also failed to define 'inefficiency, neglect of duty, or malfeasance in office'—the ordinary standards for presidential removal of members of the independent commissions.").

example, Professors Richard Pildes and Sunstein suggest that the text of removal clauses might allow Presidents to discharge agency heads that frequently act "in incompetent ways" or make "consistently foolish policy choices."[101]

Different language in different removal clauses might indicate different levels of removal protection. Statutes that specify that an appointee cannot be removed except for "good cause"[102] confer the weakest protection. Statutes that protect the appointee from removal except in cases of "inefficiency, neglect of duty, or malfeasance in office" confer stronger protection.[103] Finally, the statute at issue in *Free Enterprise Fund* conferred protection against removal unless members willfully violated the Sarbanes Oxley Act, rules of the Public Company Accounting Oversight Board, or other securities laws; willfully abused their authority; or failed to perform their duties without reasonable justification.[104] The Supreme Court called this form of protection "an unusually high standard."[105] Assuming a President wished to test his powers of supervision through an attempt at dismissal, "[t]he weaker the standard, the less specific the grounds for removal are and the more room the President has to interpret the standard and thus control the officer."[106] But the differences between these removal clauses have limited practical effect. No recent President has attempted to remove the head of an independent agency for cause, or at the very least, no such attempt has led to litigation that resulted in judicial interpretation of the terms in a removal protection clause.[107]

The procedural requirements of removal also vary. For example, the President may remove members of the FLRA and the NLRB only after notice and a hearing.[108] The other statutes that grant for-cause

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101 Pildes & Sunstein, *supra* note 14, at 30.

102 *See, e.g.*, 28 U.S.C. § 596(a)(1) (2006) (stating that an independent counsel may be removed "only for good cause, physical or mental disability[,] . . . or any other condition that substantially impairs [the independent counsel's] performance").

103 *See* Pildes & Sunstein, *supra* note 14, at 30 (interpreting this standard as granting the President some degree of procedural supervision).

104 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006).

105 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3158 (2010).

106 Barnett, *supra* note 96, at 1373.

107 President George H. W. Bush, during his last few months in office, threatened to remove the Board of Governors of the USPS during a dispute over the agency's statutory authority to litigate independently of the DOJ. *See* Mail Order Ass'n of Am. v. U.S. Postal Serv., 986 F.2d 509, 512 (D.C. Cir. 1993). The U.S. District Court for the District of Columbia issued a preliminary injunction against the President, the DOJ filed a motion for reversal, and the conflict carried over into President Clinton's first term. *See id.* The U.S. Court of Appeals for the D.C. Circuit ended the litigation when it ruled, after analyzing the relevant statutes, that the USPS did have the authority to litigate independently. *See id.* at 515. Therefore, there was no opportunity for the court to reach the question of whether the President could have removed the Board of Governors.

108 5 U.S.C. § 7104(b) (2006) (FLRA); 29 U.S.C. § 153(a) (2006) (NLRB).

protection do not require such procedures. In practice, the exact substance of the removal provision does not seem to matter. The lack of litigation around the subject suggests that presidents err on the side of caution. This caution extends even further to agencies without for-cause removal clauses that are still thought to possess such protection, such as the SEC.[109]

Though not studied in detail here, it is worth noting that Congress can still choose to impose costs on the President without conferring for-cause protection. Congress sometimes requires the President to communicate his reasons for removal. For example, the President may remove the Inspector General of the Department of State and the Foreign Service, but the "President shall communicate the reasons for any such removal to both Houses of Congress."[110] The requirement of notification decreases the chance that any attempt at removal might go unnoticed, thereby increasing the political risks involved. For example, the existence of such a requirement contributed in part to the successful decision of the Comptroller of the Currency, who at the time was a Department of the Treasury employee, to ignore a presidential directive.[111]

### B. Specified Tenure

Table 2 reports whether agency heads serve for a specified term of years. For agencies marked by an asterisk, an administrator other than the head of the agency serves for a specified term of years. As shown in the Table, a roughly equal number of agencies without for-cause removal protection have heads that serve for a term of tenure. While some of those are commonly considered "independent," such as the SEC and FCC, others are not, such as the Federal Bureau of Investigation, the Millennium Challenge Corporation, and the National Endowments.

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109 *See* William L. Cary, Politics and the Regulatory Agencies 10 (1967) ("As to removal of commissioners[,] . . . there is no express limitation on the power of the President in connection with the FCC, FPC, and SEC as well as other agencies. However, doubts as to legal power, coupled with the political inadvisability of such a traumatic step, reduce the efficacy of this form of Presidential control.").

110 22 U.S.C. § 3929(a)(2) (2006); *see also* 10 U.S.C. § 139(a)(1) (2006) (same for Director of Operational Test and Evaluation in the Department of Defense); 35 U.S.C. § 3(a)(4) (2006) (same for the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office); 44 U.S.C. § 2103(a) (2006) (same for Archivist of the United States).

111 *See* Cary, *supra* note 109, at 101–03.

TABLE 2: AGENCIES WITH SPECIFIED TENURE

| | Tenure Specified | Tenure Not Specified |
|---|---|---|
| **Statutory Removal Protection** | CFPB; Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; CPSC; FERC; FHFA; FLRA; FMC; Federal Reserve; FTC; IPAB; Mine Safety and Health Review Commission; MSPB; NMB; NLRB; NRC; NTSB; OSC; OSHRC; PRC; SSA; STB; USPS[112] | None |
| **No Statutory Removal Protection** | ACUS; Advisory Council on Historic Preservation; African Development Foundation; CFTC; Corporation for National and Community Service; Defense Nuclear Facilities Safety Board; DOD*; DHS*; DOJ*; DOT*; VA*; Election Assistance Commission; EEOC; Export-Import Bank; Farm Credit Administration; FCC; FDIC; FEC; Federal Retirement Thrift Investment Board; International Trade Commission (ITC); MCC; National Capital Planning Commission; National Council on Disability; National Credit Union Administration; NEA; NEH; NSF; Office of Government Ethics; OPM; Overseas Private Investment Corporation; Railroad Retirement Board; SEC; TVA[113] | CIA; Department of Agriculture; Department of Commerce; ED; DOE; HHS; HUD; Department of Labor; Department of State; Department of the Interior; Department of the Treasury; EPA; Federal Mediation and Conciliation Service; GSA; International Broadcasting Bureau; NASA; NARA; Office of the Director of National Intelligence; Panama Canal Commission; Peace Corps; Pension Benefit Guaranty Corporation; Selective Service; SBA; U.S. Trade and Development Agency; USAID |

112 *See* 12 U.S.C. § 5491(c)(1) (2006) (CFPB, five-year terms); 42 U.S.C. § 7412(r)(6)(B) (2006) (Chemical Safety and Hazard Investigation Board, five-year terms); 42 U.S.C. § 1975(c) (2006) (Commission on Civil Rights, six-year terms); 15 U.S.C. § 2053(a) (2006) (CPSC, seven-year staggered terms); 42 U.S.C. § 7171(b)(1) (2006) (FERC, five-year staggered terms); 12 U.S.C. § 4512(b)(2) (2006) (FHFA, five-year terms); 5 U.S.C. § 7104(c) (2006) (FLRA, five-year terms); 46 U.S.C. § 301(a)(2) (2006) (FMC, five-year staggered terms); 12 U.S.C. § 241 (2006) (Federal Reserve, fourteen-year staggered terms); 15 U.S.C. § 41 (2006) (FTC, seven-year staggered terms); 42 U.S.C. § 1395kkk(g)(2) (Supp. 2010) (IPAB, six-year staggered terms); 30 U.S.C. § 823(b)(1) (2006) (Mine Safety and Health Review Commission, six-year staggered terms); 5 U.S.C. § 1202(a) (2006) (MSPB, seven-year terms); 45 U.S.C. § 154 (2006) (NMB, three-year terms); 29 U.S.C. § 153(a) (2006) (NLRB, five-year staggered terms); 42 § U.S.C. 5841(c) (2006) (NRC, five-year staggered terms); 49 U.S.C. § 1111(c) (2006) (NTSB, five-year terms); 5 U.S.C. § 1211(b) (2006) (OSC, five-year terms); 29 § U.S.C. 661(b) (2006) (OSHRC, six-year staggered terms); 39 U.S.C. § 502(f) (2006) (PRC, six-year terms); 42 U.S.C. § 902(a)(3) (2006) (SSA, six-year terms); 49 U.S.C. § 701(b)(3) (2006) (STB, five-year terms); 39 U.S.C. § 202(b)(1) (2006) (USPS, seven-year staggered terms).

113 5 U.S.C. § 593(b) (2006) (ACUS, chairman, five-year terms); 16 U.S.C. § 470i(c) (2006) (Advisory Council on Historic Preservation, four-year staggered terms); 22 U.S.C. § 290h-5(a)(2) (2006) (African Development Foundation, six-year staggered terms); 7 U.S.C. § 2(a)(2) (2006) (CFTC, five-year staggered terms); 42 U.S.C. § 12651a(c) (2006) (Corporation for National and Community Service, five-year terms); 42 U.S.C. § 2286(d) (2006) (Defense Nuclear Facilities Safety Board, five-year staggered terms); 10 U.S.C. § 3037(a) (2006) (DOD, Navy Judge Advocate General, four-year terms); 49 U.S.C. § 114(b)(3) (2006) (DHS, Transportation Security Agency Director, five-year terms); 28 U.S.C. § 532 (2006) (DOJ, FBI Director, ten-year terms); 49 U.S.C. § 106(a) (2006) (DOT, Federal Aviation Administration Administrator, five-year terms); 38 U.S.C. § 7101(b)(2) (2006) (VA, Chairman of the Veterans' Appeals Board, six-year terms); 42 U.S.C. § 15323(b)(1) (2006) (Election Assistance Commission, four-year staggered terms); 42 U.S.C. § 2000e-4(a) (2006) (EEOC, five-year terms); 12 U.S.C. § 635a(c)(8)(A) (2006) (Export-Import Bank, four-year staggered terms); 12 U.S.C. § 2242(b) (2006) (Farm Credit Administration, six-year staggered terms); 47 U.S.C. § 154(c) (2006) (FCC, five-year terms); 12 U.S.C. § 1812(c) (2006) (FDIC, six-year terms); 2 U.S.C. § 437c(a)(2)(A)

The effect of a term of tenure varies depending on the presence of other structural features. A term of tenure standing alone serves several purposes. First, a term of tenure ensures that the Senate will have a chance to review an officer's performance. For example, President Barack Obama decided to retain President George W. Bush's Secretary of Defense Robert Gates when he took office.[114] That decision was not subject to Senate approval, as there is no tenure limitation for the Secretary of Defense. In contrast, when President Obama decided to reappoint Federal Reserve Chairman Ben Bernanke to a second four-year term in 2010, he faced a political battle that threw a spotlight on the Obama administration and the Federal Reserve's handling of the financial crisis.[115] Second, and closely related, the decision to remove an officer before the end of a specified term imposes at least some costs on a President. A tenure protection "at least inhibit[s]" a President from "arbitrarily dismissing an [officer] for political reasons" because a President would have to explain his departure from the default term of office to the Senate when he nominated a successor.[116] The term might signal that the position is less political, which also limits the potential pool of nominees available to the President.[117] Third, insulation from political influence may increase with term length because the need to secure renomination is less fre-

(2006) (FEC, six-year staggered terms); 5 U.S.C. § 8472(e) (2006) (Federal Retirement Thrift Investment Board, four-year staggered terms); 19 U.S.C. § 1330(b) (2006) (ITC, nine-year staggered terms); 22 U.S.C. § 7703(c)(4) (2006) (MCC, three-year terms); 40 U.S.C. § 8711(b)(3) (2006) (National Capital Planning Commission, six-year staggered terms); 29 U.S.C. § 780(b)(1) (2006) (National Council on Disability, six-year staggered terms); 12 U.S.C. § 1752a(c) (2006) (National Credit Union Administration, six-year staggered terms); 20 U.S.C. § 954(b)(2) (2006) (NEA, four-year terms); 20 U.S.C. § 956(b)(2) (2006) (NEH, four-year terms); 42 U.S.C. § 1861 (2006) (NSF, six-year terms); 5 U.S.C. app. 4 § 401(b) (2006) (Office of Government Ethics, five-year terms); 5 U.S.C. § 1102(a) (2006) (OPM, four-year terms); 22 U.S.C. § 2193(b) (2006) (Overseas Private Investment Corporation, three-year staggered terms); 45 U.S.C. § 231f(a) (2006) (Railroad Retirement Board, five-year terms); 15 U.S.C. § 78d(a) (2006) (SEC, staggered five-year terms); 16 U.S.C. § 831a(d) (2006) (TVA, five-year terms).

114 *See* Elisabeth Bumiller, *Gates Vows Active Role in Staying On at Pentagon*, N.Y. TIMES, Dec. 3, 2008, at A20.

115 *See* Sewell Chan, *Fed Chief Wins a Second Term Despite Critics*, N.Y. TIMES, Jan. 29, 2010, at A1 (describing the confirmation fight as "an arm-twisting campaign by the administration").

116 122 CONG. REC. 23,809 (1976) (statement of Sen. Robert C. Byrd); *see also Ten-Year Term for FBI Director: Hearing on S. 2106 Before the Subcomm. on FBI Oversight of the S. Comm. on the Judiciary*, 93rd Cong. 24 (1974) (statement of John T. Elliff, Assistant Professor, Dep't of Politics, Brandeis Univ.) ("[T]he effect of the 10-year term is to create an expectation as to what should constitute a normal period of tenure for the FBI Director. There is a binding quality about any fixed time period.").

117 *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1214 (2009) ("A longer term of appointment also sends a strong message to Congress that this is not a standard political appointment, but rather one that warrants a more searching inquiry into a nominee's background and expertise for such a position.").

quent.[118] Professor Barkow argues that this feature is especially desirable for agencies that carry out economic agendas, a task that "often requires politically unpopular actions in the short term."[119]

A term of tenure combined with removal protection serves several other purposes. First, terms of tenure foster expertise and continuity.[120] Longer terms of tenure will allow officers to gain experience in the subject matter of the agency.[121] Those officers can then transfer that knowledge to newly appointed colleagues.[122] The trade-off is that with longer tenure comes an increased risk of dependence on staff and capture by interest groups.[123] Second, longer terms cut across presidential administrations, a feature that is intended to make the officer "transcend political loyalty to the current presidential administration."[124] If a President appoints a member whose term will continue into the next President's administration, the appointing President will not be able to use the incentive of reappointment to wield influence over the member.

### C. Multimember Structure

As reported in Table 3, most agencies with statutory removal protection are run by multimember bodies, and there are roughly the same number of multimember agencies without statutory removal as single-headed agencies without the removal protection.

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118 REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted in* 58 ANTITRUST L.J. 43, 124 (1989) (noting that a change from seven-year terms to five-year terms for FTC commissioners "might reduce the independence of commissioners interested in long tenures by requiring more frequent renomination"). In multimember bodies, shorter terms ensure that presidents can appoint a chair of their choice early in their first term. *See id.* at 123.

119 Barkow, *supra* note 9, at 29.

120 *See* FRIENDLY, *supra* note 38, at 157 ("[A]n important value of the independent agency is to maintain a fair degree of continuity . . . .").

121 *See* Barkow, *supra* note 9, at 29.

122 *See id.* (noting that in multimember agencies, "the terms of the members must be staggered so that institutional expertise can accumulate without gaps").

123 *Cf.* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1734 (2006) (describing this trade-off for tenure on congressional committees).

124 Lazarus, *supra* note 117, at 1213; *see also Ten-Year Term for FBI Director: Hearing on S. 2106 Before the Subcomm. on FBI Oversight of the S. Comm. on the Judiciary*, 93rd Cong. 1 (1974) (statement of Sen. Robert C. Byrd) (explaining that a ten-year term was preferable to a seven-year term because the seven-year term "could fall within the Presidency of the man who originally appointed the [official]," but with a ten-year term, the official "can be more effectively insulated from political pressures . . . and he will not be considered a politically oriented member of the President's 'team'").

TABLE 3: AGENCIES WITH MULTIMEMBER STRUCTURES

| | Single-Headed Structure | Multimember Structure |
|---|---|---|
| **Statutory Removal Protection** | CFPB; FHFA; OSC; SSA[125] | Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; CPSC; FERC; FMC; Federal Reserve; FLRA; FTC; IPAB; Mine Safety and Health Review Commission; MSPB; NLRB; NMB; NRC; NTSB; OSHRC; PRC; STB; USPS[126] |
| **No Statutory Removal Protection** | CIA; Department of Agriculture; Department of Commerce; DOD; ED; DOE; HHS; DHS; HUD; DOJ; Department of Labor; Department of State; Department of the Interior; Department of the Treasury; DOT; VA; Office of the Director of National Intelligence; EPA; Federal Mediation and Conciliation Service; GSA; International Broadcasting Bureau; NASA; NARA; NEA; NEH; NSF; Office of Government Ethics; OPM; Office of the Director of National Intelligence; Peace Corps; Pension Benefit Guaranty Corporation; Selective Service; SBA; U.S. Trade and Development Agency; USAID[127] | ACUS; Advisory Council on Historic Preservation; African Development Foundation; CFTC; Corporation for National and Community Service; Defense Nuclear Facilities Safety Board; Election Assistance Commission; EEOC; Export-Import Bank; Farm Credit Administration; FCC; FDIC; FEC; Federal Retirement Thrift Investment Board; ITC; MCC; National Capital Planning Commission; National Council on Disability; National Credit Union Administration; Overseas Private Investment Corporation; Panama Canal Commission; Railroad Retirement Board; SEC; TVA[128] |

125 12 U.S.C. § 5491(b)(1) (2006) (CFPB, Director); 12 U.S.C. § 4512(b)(1) (2006) (FHFA, Director); 5 U.S.C. § 1211(b) (2006) (OSC, Special Counsel); 42 U.S.C. § 902(a)(1) (2006) (SSA, Commissioner).

126 42 U.S.C. § 7412(r)(6) (2006) (Chemical Safety and Hazard Investigation Board, five members, President appoints Chair with Senate confirmation); 42 U.S.C. § 1975 (2006) (Commission on Civil Rights, eight members, President and Congress each appoint four members, President appoints Chair with consent from majority of members); 15 U.S.C. § 2053(a) (2006) (CPSC, five commissioners, President appoints Chair); 42 U.S.C. § 7171(b)(a)(5) (2006) (FERC, five commissioners, President appoints Chair); 46 U.S.C. § 301(b)(1) (2006) (FMC, five commissioners, President appoints Chair); 12 U.S.C. §§ 241–42 (2006) (Federal Reserve, seven members, President appoints Chair for four-year term with Senate consent); 5 U.S.C. § 7104 (2006) (FLRA, three members, President appoints Chair); 15 U.S.C. § 41 (2006) (FTC, five commissioners, President appoints Chair); 42 U.S.C. § 1395kkk(g) (Supp. 2010) (IPAB, fifteen members, President appoints Chair with Senate confirmation); 30 U.S.C. § 823(a) (2006) (Mine Safety and Health Review Commission, five commissioners, President appoints Chair); 5 U.S.C. §§ 1201, 1203 (2006) (MSPB, three members, President appoints Chair with Senate confirmation); 29 U.S.C. § 153(a) (2006) (NLRB, five members, President appoints Chair); 45 U.S.C. § 154 (2006) (NMB, three members, members annually select Chair); 42 U.S.C. § 5841(a) (2006) (NRC, five commissioners, President appoints Chair); 49 U.S.C. § 1111(b), (d) (2006) (NTSB, five members, President appoints Chair with Senate confirmation); 29 U.S.C. § 661(a) (2006) (OSHRC, three commissioners, President appoints Chair); 39 U.S.C. § 502 (2006) (PRC, five commissioners, President appoints Chair); 49 U.S.C. § 701 (2006) (STB, three members, President appoints Chair); 39 U.S.C. § 202 (2006) (USPS, eleven members, President appoints nine governors with Senate confirmation, governors appoint Chair).

127 50 U.S.C. § 403-4a(a) (2006) (CIA, Director); 7 U.S.C. § 2202 (2006) (Department of Agriculture, Secretary); 15 U.S.C. § 1501 (2006) (Department of Commerce, Secretary); 10 U.S.C. § 113 (2006) (DOD, Secretary); 20 U.S.C. § 3411 (2006) (ED, Secretary); 42 U.S.C. § 7131 (2006) (DOE, Secretary); 42 U.S.C. § 3501 (2006) (HHS, Secretary); 6 U.S.C. § 112(a) (2006) (DHS, Secretary); 42 U.S.C. § 3532(a) (2006) (HUD, Secretary); 28 U.S.C. § 503 (2006) (DOJ, Attorney General); 29 U.S.C. § 551 (2006) (Department of Labor, Secretary); 22 U.S.C. § 2651 (2006) (Department of State, Secretary); 43 U.S.C. § 1451 (2006) (Department of the Interior, Secretary); 31 U.S.C. § 301(b) (2006) (Department of the Treasury, Secretary); 49 U.S.C. § 102(b) (2006) (DOT, Secretary); 38 U.S.C. § 303 (2006) (VA, Secretary); 50 U.S.C. § 403 (2006) (Director of National Intelligence); 42 U.S.C. § 4321 (2006) (EPA, Administrator); 29 U.S.C. § 172(a) (2006) (Federal Mediation

Multimember agencies are different than single-headed agencies in three main ways. First, a multimember structure can foster more deliberative decision making, a higher level of expertise, and continuity of policy.[129] Group deliberation leads to better-informed and reasoned policy outcomes from the agency.[130] The downside that accompanies increased deliberation is the "slowness inherent in group action."[131] Second, multimember agencies allow for the development of institutional memory. The members of most multimember agencies serve staggered terms, which means that the members' terms ex-

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and Conciliation Service, Director); 40 U.S.C. § 302(a) (2006) (GSA, Administrator); 22 U.S.C. § 6206(b) (2006) (International Broadcasting Bureau, Director); 51 U.S.C. § 20111 (2006) (NASA, Administrator); 44 U.S.C. § 2103(a) (2006) (NARA, Archivist); 20 U.S.C. § 954(b)(1) (2006) (NEA, Chair); 20 U.S.C. § 956(b)(1) (2006) (NEH, Chair); 42 U.S.C. § 1861 (2006) (NSF, Director); 5 U.S.C. app. 4 § 401(b) (2006) (Office of Government Ethics, Director); 5 U.S.C. § 1102(a) (2006) (OPM, Director); 50 U.S.C. § 403(a)(1) (2006) (Office of the Director of National Intelligence, Director); 22 U.S.C. § 2503(a) (2006) (Peace Corps, Director); 29 U.S.C. § 1302(a) (2006) (Pension Benefit Guaranty Corporation, Director); 50 U.S.C. app. § 460(a)(1) (2006) (Selective Service, Director); 15 U.S.C. § 633(b) (2006) (SBA, Administrator); 22 U.S.C. § 2421(b)(1) (2006) (U.S. Trade and Development Agency, Director); 22 U.S.C. § 6592 (2006) (USAID, Administrator).

128 5 U.S.C. § 593(b) (2006) (ACUS, 75 to 101 members, President appoints Chair with Senate confirmation); 16 U.S.C. § 470i(a) (2006) (Advisory Council on Historic Preservation, twenty members, President appoints Chair); 22 U.S.C. § 290h-5 (2006) (African Development Foundation, seven members, President appoints Chair); 7 U.S.C. § 2(a)(2)(A), (B) (2006) (CFTC, five commissioners, President appoints and Senate confirms Chair); 42 U.S.C. § 12651a (2006) (Corporation for National and Community Service, fifteen members, members appoint Chair); 42 U.S.C. § 2286(b) (2006) (Defense Nuclear Facilities Safety Board, five members, President appoints Chair); 42 U.S.C. § 15323(a)(1) (2006) (Election Assistance Commission, four members, members annually appoint Chair); 42 U.S.C. § 2000e-4(a) (2006) (EEOC, five members, President appoints Chair); 12 U.S.C. § 635a(c) (2006) (Export-Import Bank, five members, President appoints CEO with Senate confirmation); 12 U.S.C. § 2242(a) (2006) (Farm Credit Administration, three members, President appoints Chair); 47 U.S.C. § 154(a) (2006) (FCC, five commissioners, President appoints Chair); 12 U.S.C. § 1812(a)(1), (b)(1) (2006) (FDIC, five directors, President appoints Chair for five-year term with Senate confirmation); 2 U.S.C. § 437c(a) (2006) (FEC, six commissioners, commissioners appoint Chair); 5 U.S.C. § 472 (2006) (Federal Retirement Thrift Investment Board, five members, President appoints Chair); 19 U.S.C. § 1330(a), (c) (2006) (ITC, six members, President appoints Chair of a different party than prior Chair); 22 U.S.C. § 7703(c) (2006) (MCC, nine members, Secretary of State serves as Chair); 40 U.S.C. § 8711 (2006) (National Capital Planning Commission, five members, President appoints Chair); 29 U.S.C. § 780(a), (c) (2006) (National Council on Disability, fifteen members, President appoints Chair); 12 U.S.C. § 1752a(b) (2006) (National Credit Union Administration, three members, President appoints Chair with Senate confirmation); 22 U.S.C. § 2193 (2006) (Overseas Private Investment Corporation, fifteen directors, President appoints President with Senate confirmation); 22 U.S.C. § 3612 (2006) (Panama Canal Commission, nine members); 45 U.S.C. § 231f(a) (2006) (Railroad Retirement Board, three members, President appoints Chair with Senate confirmation); 15 U.S.C. § 78d (2006) (SEC, five commissioners, President appoints Chairman); 16 U.S.C. § 831a (2006) (TVA, nine members, members select Chair).

129 *See* BERNSTEIN, *supra* note 8, at 70.

130 *See id.*

131 *Id.*

pire at different times.[132] This structure allows a transfer of knowledge from the existing members to newly appointed members. Third, the stability of membership leads to the continuity of policies. A multimember agency structure, assuming the members serve their full terms,[133] will not be immediately influenced by changes in Presidential administrations. When a President takes office, a multimember agency will contain some members appointed by prior presidents. This feature insulates the agency from the political preferences of a new President until he is able to make enough appointments to influence the decisions of the agency.[134]

The recent debate over the structure of the CFPB highlights the benefits and costs of a multimember structure. In December 2011, the Senate blocked the confirmation of President Obama's nominee to head the CFPB, a newly created agency whose head enjoys for-cause removal protection.[135] Those who voted against confirmation did so because they view the current structure of the CFPB as unacceptable. One of their objections is to the single-director structure; they instead prefer a multimember agency.[136] Their argument is that a switch to a multimember agency would ensure that "rules are fair, consistent and balanced, and [would] promote certainty and continuity."[137] Of course, it is likely that the opposition to a single-headed CFPB also stems from disagreement with the content of the regulations that the agency is expected to produce. For opponents of such regulations, a multimember agency might take longer to issue regulations or be unable to reach consensus.[138]

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132 *See, e.g.*, 15 U.S.C. § 41 (2006) (FTC, seven-year staggered terms); *id.* § 78d(a) (2006) (SEC, five-year staggered terms); 29 U.S.C. § 153(a) (2006) (NLRB, five-year staggered terms).

133 See *infra* Part III.B.2 for a discussion of why this assumption is generally incorrect.

134 *See* BERNSTEIN, *supra* note 8, at 107 ("[I]t was anticipated that such a commission could formulate policy without too much regard for the policies of the administration in power.").

135 *See* John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

136 *See id.* (quoting Republican Leader Senator Mitch McConnell as saying, "We won't support a nominee for this bureau—regardless of who the president is" until changes, including a change in the commission structure, are made); *see also* Letter from Senator Mitch McConnell, Republican Leader, to President Barack Obama (May 2, 2011) (on file with authors) ("[T]he Senate should not consider any nominee to be CFPB director until the CFPB is properly reformed. We urge the adoption of the following reforms: Establish a board of directors to oversee the Consumer Financial Protection Bureau.").

137 *More Calls for a Commission, Not a Director, at the CFPB*, COMMITTEE ON FIN. SERVICES BLOG (Oct. 21, 2011), http://financialservices.house.gov/Blog/?postid=265286.

138 Opponents offered their insistence on a different structure for the CFPB as the justification for their refusal to confirm a new head for the agency. Because the agency could not act without a head, the structural disagreement might have solely been designed to kill the agency.

It is not clear how much more insulation from presidential control results from a multimember agency as opposed to a single-headed agency. There is some evidence that multimember agencies are more responsive to congressional preferences than presidential preferences.[139] During periods of divided government, partisan-line voting increases and members in the minority dissent more.[140] Professors Adam Candeub and Eric Hunnicutt argue that these dissents are strategic and designed to send a signal to the reviewing court to overturn the decision.[141] The impact of these dissents has not been empirically tested, but the dissents (not possible in single-headed agencies) arguably increase the chances that policy decisions will be overturned. A larger multimember agency increases the possibility of such dissents. This is because coalitions of dissenters are easier to build, which lessens the hesitation an agency member might have to being the odd member out.[142] Overall output of regulatory activity is also lower during periods of divided government.[143]

The limitation on presidential control gained by a multimember structure is offset by the fact that each multimember agency has a designated head, referred to as a chair.[144] Chairs are typically seen as a presidential proxy because they usually hold their position as chair (but not as members of the agency) at the will of the President.[145] The responsibilities and powers of the chair vary by agency, but most chairs control the day-to-day administration of the agency, agency personnel, and the agency's agenda.[146] There is evidence that members of the same partisan affiliation as the chair tend to vote with the

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139 *See* Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 809 (2010) (stating that congressional concerns dominate independent agencies).

140 *See* Adam Candeub & Eric Hunnicutt, Political Control of Independent Agencies: Evidence from the FCC 9–10 (July 14, 2010) (unpublished manuscript), *available at* http://www.ssrn.com/abstract=1640285 ("[W]hen a minority party commissioner's party controls one of the houses of Congress that commissioner is less likely to affirm. Conversely, the executive party commissioners are more likely to affirm in this situation.").

141 *See id.* at 13.

142 *See* Brown & Candeub, *supra* note 139, at 807 (noting that having more members makes dissent more "possible" and more "desirable").

143 *See* Candeub & Hunnicutt, *supra* note 140, at 10, 12.

144 *See* Barkow, *supra* note 9, at 37–38 (noting that a single head may be more susceptible to presidential influence, especially when the President has the power to demote the chair and appoint a new one).

145 *See, e.g.*, 15 U.S.C. § 41 (2006) (giving the President the power to designate one member of the FTC to serve as Chairman); 29 U.S.C. § 153(a)(1) (2006) (same provision for the NLRB). *But see* 12 U.S.C. § 242 (2006) (establishing a fixed four-year term for the Chairman of the Federal Reserve Board).

146 *See* Barkow, *supra* note 9, at 38–39, 39 nn.125–28 (noting that the President can remove most chairs at will and describing the powers of the typical chair).

chair.[147] This "partisan 'lockstep' behavior" allows the President to retain influence over the decisions of multimember agencies.[148]

But Congress can constrain the President's ability to influence a multimember agency through the agency's chair. Congress has several options when structuring the relationship between the chair of a multimember agency and the President. Each of these options varies the level of Presidential influence over the chair and therefore over the multimember agency. Congress can delegate the selection of the chair to the members of the agency, which limits the President's role to the appointment of individual members.[149] The intermediate choice is to replicate the regular appointments process by allowing the President to nominate a chair but requiring Senate consent.[150] Finally, the Senate can give the power to appoint the chair to the President alone,[151] which allows a new President to appoint a new chair from existing members or to appoint a new chair contemporaneously with his or her first appointment of a member.

## D. Partisan Balance Requirements

As reported in Table 4, there are partisan balance requirements for about half of the multimember agencies, both those with statutory removal protection and those without. Table 4 omits agencies reported in Table 3 as having single-head structures because those agencies will obviously not have partisan balance requirements.

TABLE 4: AGENCIES WITH PARTISAN BALANCE REQUIREMENTS

| | No Partisan Balance Requirement | Partisan Balance Requirement |
|---|---|---|
| **Statutory Removal Protection** | Chemical Safety and Hazard Investigation Board; Federal Reserve; Mine Safety and Health Review Commission; NLRB; OSHRC; NMB | Commission on Civil Rights; CPSC; FERC; FLRA; FMC; FTC; IPAB; MSPB; NMB: NRC; NTSB; PRC; STB; USPS[152] |
| **No Statutory Removal Protection** | ACUS; Advisory Council on Historic Preservation; Corporation for National and Community Service; Election Assistance Commission; Federal Retirement Thrift Investment Board; National Capital Planning Commission; National Council on Disability; Overseas Private Investment Corporation; Panama Canal Commission; Railroad Retirement Board; TVA | African Development Foundation; CFTC; Defense Nuclear Facilities Safety Board; EEOC; Export-Import Bank; Farm Credit Administration; FCC; FDIC; FEC; ITC; MCC; National Credit Union Administration; SEC[153] |

147 *See* Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive Debate: An Empirical Critique* 22 (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series, Research Paper No. 06-04, 2008).

148 *Id.* The question of what drives voting in multimember agencies is discussed in detail in Part III, *infra.*

149 *See, e.g.*, 2 U.S.C. § 437c(a)(5) (2006) (FTC); 45 U.S.C. § 154 (2006) (NMB).

150 *See, e.g.*, 5 U.S.C. § 1203(a) (2006) (MSPC); 42 U.S.C. § 7412(r)(6)(B) (2006) (Chemical Safety and Hazard Investigation Board).

151 *See, e.g.*, 7 U.S.C. § 2(a)(2)(B) (2006) (CFTC); 15 U.S.C. § 41 (2006) (FTC).

Partisan balance requirements limit politically motivated decision making within an agency.[154] They ensure that different viewpoints will be expressed—an institutional feature that Professor Sunstein argues lowers the risk that decisions will be made on a strictly partisan basis.[155] For agencies that regulate in a highly politicized environment, partisan balance requirements raise the costs to the agency for acting in a partisan manner. Because their partisan affiliation is clear, votes along partisan lines might decrease the legitimacy of their decision-making process by raising doubts that the agency is fulfilling its role as an expertise-driven body.[156]

Congress may also use partisan balance requirements to limit the ability of a President to gain control over an agency through the process of attrition and appointment.[157] Professor Daniel Ho, in an empirical study on the effects of partisan balance requirements, argues that such requirements do constrain the President's ability to use his appointment power to staff agencies with members who share his ideological preferences.[158] In a study of votes in rulemaking and adjudication decisions, he found that "partisan affiliation exhibits robust and large predictive power over votes, even holding constant the party of the appointing president."[159] Not only does partisan affiliation af-

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152 42 U.S.C. § 1975(b) (2006) (Commission on Civil Rights); 15 U.S.C. § 2053(c) (2006) (CPSC); 42 U.S.C. § 7171(b)(1) (2006) (FERC); 5 U.S.C. § 7104(a) (2006) (FLRA); 46 U.S.C. § 301(b)(1) (2006) (FMC); 15 U.S.C. § 41 (2006) (FTC); 42 U.S.C. § 1395kkk(g)(1)(E) (Supp. 2010) (IPAB); 5 U.S.C. § 1201 (2006) (MSPB); 45 U.S.C. § 154 (2006) (NMB); 42 U.S.C. § 5841(b)(2) (2006) (NRC); 49 U.S.C. § 1111(b) (2006) (NTSB); 39 U.S.C. § 502(a) (2006) (PRC); 49 U.S.C. § 701(b)(1) (2006) (STB); 39 U.S.C. § 202(a)(1) (2006) (USPS).

153 22 U.S.C. § 290h-5(a)(1) (2006) (African Development Foundation); 7 U.S.C. § 2(a)(2)(A) (2006) (CFTC); 42 U.S.C. § 2286(b)(1) (2006) (Defense Nuclear Facilities Safety Board); 42 U.S.C. § 15323(b) (2006) (EAC); 42 U.S.C. § 2000e-4(a) (2006) (EEOC); 12 U.S.C. § 635a(c)(2) (2006) (Export-Import Bank); 12 U.S.C. § 2242(a) (2006) (Farm Credit Administration); 47 U.S.C. § 154(b)(5) (2006) (FCC); 12 U.S.C. § 1812(a)(2) (2006) (FDIC); 2 U.S.C. § 437c(a)(2)(A) (2006) (FEC); 19 U.S.C. § 1330(a) (2006) (ITC); 22 U.S.C. § 7703(c)(3)(B) (2006) (MCC); 12 U.S.C. § 1752a(b)(1) (2006) (National Credit Union Administration); 15 U.S.C. § 78d(a) (2006) (SEC).

154 *See* CUSHMAN, *supra* note 30, at 63.

155 *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000).

156 *See* Joshua Kershner, Note, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 619 (2010) ("[P]olitical party restrictions shield [agencies] from the appearance of impropriety, furthering the goal of partisan impartiality.").

157 *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 46–52 (2003) (finding that Congress employs insulating characteristics and partisan balance requirements more often in periods of divided government).

158 *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 3–4 (Feb. 12, 2007) (unpublished manuscript), *available at* http://dho.stanford.edu/research/partisan.pdf.

159 *Id.* at 4.

fect votes, but the current trend suggests it also generates more nominations of more extreme partisans, which Professor Ho attributes to a decrease in senatorial deference to presidential nominees and an increase in congressional oversight.[160] One limitation of his study is that he examines only nine agencies, and only agencies considered to be independent, rather than the full set of agencies with partisan balance requirements.[161]

Partisan balance requirements are also associated with longer vacancy periods,[162] which can affect both the outcomes and the volume of agency activity. Cross-party nomination requirements give both Congress and the President an incentive to game the appointments system. For example, consider a five-member agency that currently has four members and requires three members for a quorum. If the term of the fourth member expires (or the fourth member resigns) and that seat requires a cross-party nomination, the President has little incentive to nominate a replacement, especially if the statute does not allow the member to remain indefinitely until Congress confirms a replacement.[163] Conversely, assuming that the President does nominate someone, the Senate may prefer to hold out for a better prospect.[164] It is possible then that partisan balance requirements might lead to longer periods of operation without a full slate of members, limiting the agency's ability to perform its functions.

### E. Litigation Authority

Table 5 shows that most agencies do not possess partial or full litigation authority. Instead, they must conduct litigation through the DOJ. Of the agencies that do enjoy some measure of independent litigation authority, some have statutory removal protection and some do not. The degree of litigation authority granted varies greatly across agencies: the Environmental Protection Agency has independent litigation authority over only a few discrete violations of the Toxic Substances Control Act, [165] whereas the FTC may represent itself in most

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160 *See id.*

161 *See id.* at 8.

162 *See* David C. Nixon, *Appointment Delay for Vacancies on the Federal Communications Commission*, 61 PUB. ADMIN. REV. 483, 488 (2001) (finding that vacancies in the FCC are "significantly longer when statutory restrictions require a cross-party nomination"); David C. Nixon & Roisin M. Bentley, *Appointment Delay and the Policy Environment of the National Transportation Safety Board*, 37 ADMIN. & SOC'Y 679, 688–89 (2006) (finding longer vacancies for the NTSB as well).

163 *See* Nixon & Bentley, *supra* note 162, at 686 (describing appointment incentives of the President and Congress for bipartisan commissions).

164 *See id.*

165 *See* 15 U.S.C. § 56(a)–(c) (2006) (granting relatively broad litigation authority to the FTC).

actions, including those before the Supreme Court if the DOJ declines to represent the agency.[166]

TABLE 5: AGENCIES WITH FULL OR PARTIAL INDEPENDENT LITIGATION AUTHORITY

| | No Litigation Authority | Full or Partial Litigation Authority |
|---|---|---|
| **Statutory Removal Protection** | Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; IPAB; Mine Safety and Health Review Commission; MSPB; NMB; NRC; NTSB; OSC; OSHRC; PRC; SSA | CFPB; CPSC; FERC; FHFA; FLRA; FMC; Federal Reserve; FTC; NLRB; STB; USPS[167] |
| **No Statutory Removal Protection** | ACUS; African Development Foundation; CIA; Corporation for National and Community Service; Defense Nuclear Facilities Safety Board; Department of Agriculture; Department of Commerce; ED; DOE; HHS; DHS; HUD; DOJ; Department of the Interior; Department of the Treasury; VA; Election Assistance Commission; FCC; Federal Mediation and Conciliation Service; Federal Retirement Thrift Investment Board; GSA; International Broadcasting Bureau; MCC; NASA; NARA; National Capital Planning Commission; National Council on Disability; National Credit Union Administration; NEA; NEH; NSF; Office of Government Ethics; OPM; Office of the Director of National Intelligence; Panama Canal Commission; Peace Corps; Railroad Retirement Board; Selective Service; U.S. Trade and Development Agency; USAID | Advisory Council on Historic Preservation; CFTC; DOD; Department of Labor; Department of State; DOT; EPA; EEOC; Export-Import Bank; Farm Credit Administration; FDIC; FEC; ITC; Overseas Private Investment Corporation; Pension Benefit Guaranty Corporation; SBA; SEC; TVA[168] |

Since 1966, agency litigation authority has been centralized in the DOJ.[169] The default rule is that the Attorney General is to direct all litigation to which the United States is a party "[e]xcept as otherwise

166 *See id.* §§ 2604(e), 2604(f), 2606 (listing specific instances in which the EPA Administrator may commence a civil action).

167 12 U.S.C. § 5564(a)–(e) (2006) (CFPB); 15 U.S.C. §§ 2071, 2076, 2601 (2006) (CPSC); 42 U.S.C. § 7171(i) (2006) (FERC); 12 U.S.C. § 4513(c) (2006) (FHFA); 5 U.S.C. § 7105(h) (2006) (FLRA); 46 U.S.C. § 41307 (2006) (FMC); 12 U.S.C. § 248(p) (2006) (Federal Reserve); 15 U.S.C. § 56(a)–(c) (2006) (FTC); 29 U.S.C. §§ 154(a), 160, 161 (2006) (NLRB); 28 U.S.C. § 2323 (2006) (STB); 39 U.S.C. § 409 (2006) (USPS).

168 16 U.S.C. § 470m(b) (2006) (Advisory Council on Historic Preservation); 7 U.S.C. §§ 2(a)(4), 13a-1 (2006) (CFTC); 10 U.S.C. § 1037 (2006) (DOD); 29 U.S.C. §§ 216(e), 663, 1852, 2005(b), 2617(e) (2006), 30 U.S.C. § 822, 2005(b) (2006) (Department of Labor); 22 U.S.C. § 2698(a) (2006) (Department of State); 49 U.S.C. § 507 (2006) (DOT); 15 U.S.C. § 2606 (2006) (EPA); 42 U.S.C. §§ 2000e-4(b), 2000e-4(g) (2006) (EEOC); 12 U.S.C. § 635(a)(1) (2006) (Export-Import Bank); 12 U.S.C. § 2244(c) (2006) (Farm Credit Administration); 12 U.S.C. § 1819 (2006) (FDIC, as construed in FDIC v. Irwin, 727 F. Supp. 1073 (N.D. Tex. 1989)); 2 U.S.C. §§ 437c(f), 437d(a)(6) (2006), 26 U.S.C. §§ 9010(a), 9040(a) (2006) (FEC); 19 U.S.C. § 1333(g) (2006) (ITC); 22 U.S.C. §§ 2193(d), 2199(d) (2006) (Overseas Private Investment Corporation); 29 U.S.C. §§ 1302(b)(1), 1303 (2006) (Pension Benefit Guaranty Corporation); 5 U.S.C. § 612 (2006) (SBA); 15 U.S.C. §§ 78aa, 78u, 78u-1, 78u-3, 78y (2006) (SEC); 16 U.S.C. § 831c(b) (2006) (TVA, as construed in Tenn. Valley Auth. v. EPA, 278 F.3d 1184 (11th Cir. 2002)).

169 *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 516, 80 Stat. 613 (codified at 28 U.S.C. § 516).

authorized by law."[170] Congress has carved out numerous exceptions to the centralized control of litigation in the DOJ.[171] These exceptions—all related to civil, not criminal, litigation—"have been anything but systematic."[172] The choice to delegate independent litigation authority can affect both independence and policy outcomes. So, in contrast to some scholars who view exceptions from centralized litigation authority as haphazard,[173] one might instead conclude that the choice to carve out an exception is a deliberate and thoughtful one.

The effect of independent litigation authority is a degree of insulation from executive control. The use of the term executive control, rather than presidential control, is deliberate here. The Office of the Solicitor General supervises federal government litigation in the courts of appeals and the Supreme Court. Though the Solicitor General serves the Attorney General and the President, decisions of the Office are generally regarded as motivated by legal doctrine rather than purely political rationales.[174]

Centralized litigation control increases agency independence from Congress but decreases agency independence from the Executive. DOJ officials are subject to committee oversight, but the programmatic committees that are most likely to be upset about the DOJ over- or underenforcement of agency priorities have little control over the DOJ's budget or decision making.[175] The result is that by

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170 *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *id.* § 519 ("Except as otherwise authorized by law, the Attorney General shall supervise all [such] litigation . . . ."); *see also id.* § 518 ("Except when the Attorney General . . . directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . ."); 5 U.S.C. § 3106 (2006) ("Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party . . . but shall refer the matter to the Department of Justice.").

171 As of 1978, Congress had authorized at least thirty-one executive and independent agencies to conduct at least some of their own litigation. *See* Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1057 (1978). By 1996, that number had increased to forty-one agencies and government corporations with some authority over their own litigation. *See* James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1573 (1996).

172 Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205, 207–08 (1998).

173 *See, e.g.*, *id.* at 208.

174 *See infra* notes 266–70 and accompanying text (discussing the Office of the Solicitor General's independence).

175 *See* Devins & Herz, *supra* note 172, at 211. In contrast, the Judiciary Committee has a strong, concentrated interest in increasing centralization in the DOJ and thereby increasing its own power. *See id.* at 221.

centralizing control of litigation in the DOJ, congressional oversight over agency enforcement is weakened.[176] In contrast, executive control over agency enforcement increases when litigation is centralized within the DOJ.

While most policymaking does not occur in litigation,[177] control over positions taken in litigation and litigation decisions results in a degree of control over substantive enforcement decisions.[178] First, when agencies must rely on the DOJ to initiate litigation, at least some of the time the DOJ will say no. This means that the centralization of litigation control in the DOJ leads to less enforcement of laws than agencies would prefer.[179] Second, agencies are "captive clients."[180] They cannot threaten to take their cases elsewhere and therefore have little bargaining power to convince the DOJ to take the positions the agency wishes to take.[181] Professor Margaret Lemos has studied the impact of centralized litigation control on agency statutory interpretation positions taken before the Supreme Court.[182] Her study examined all agencies, not just those considered independent.[183] She argues that "some degree of [Solicitor General]-agency conflict [is present] in roughly 27% of the cases involving agency statutory interpretation."[184] Control over litigation positions is significant because it affects the substantive positions agencies can take. For example, if the DOJ chooses to forgo an appeal or proceed on a jurisdictional defense rather than on the merits, an agency may be left uncertain about the scope of its authority.

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176 *See id.* at 211.

177 *See id.* at 212.

178 *See S. 1358—The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing on S. 1358 Before the S. Comm. on Governmental Affairs*, 108th Cong. 7 (2004) (statement of Peter Keisler, Assistant Att'y Gen., Civil Division, U.S. Department of Justice) (listing "presidential supervision over Executive Branch policies implicated in [the course of] governmental litigation" as one of the justifications for centralized litigation authority).

179 The reason for this is twofold. DOJ lawyers wish to avoid losing cases, which makes them more risk averse than agency lawyers, whose goal is to advance agency priorities. *See* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 588 (2003). In addition, the DOJ also takes the position that interagency litigation is usually nonjusticiable and will therefore block agency efforts to enforce their own statutes against other agencies. *See* Devins & Herz, *supra* note 172, at 210.

180 Susan M. Olson, *Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority*, 68 JUDICATURE 71, 73 (1984) (quoting JUDITH V. MAY, PROFESSIONALS AND CLIENTS: A CONSTITUTIONAL STRUGGLE 13 (1976)) (internal quotation marks omitted).

181 *Id.*

182 *See* Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 186–87.

183 *See id.* at 203 (examining agencies traditionally considered independent as well as agencies traditionally considered executive).

184 *Id.* at 201.

Despite centralized control of litigation, agencies retain significant control over the enforcement of their statutory schemes. Only litigation is centralized. Other forms of agency lawyering, such as administrative enforcement and counseling, remain decentralized.[185]

There are strong policy reasons to centralize litigation authority that are unrelated to independence. First, centralization may be more efficient because "the development of litigation expertise in more than one agency [is] unnecessary duplication."[186] Second, centralized control ensures consistency. When the government speaks with one voice, particularly on issues that recur across the government, citizens can better predict what the government's position will be.[187] Third, centralization increases accountability because the President is ultimately politically responsible for the position the government takes on any given issue.[188] Fourth, the DOJ sees itself as a gatekeeper for the courts with an obligation to guard against an overwhelming and inconsistent flood of litigation. If the government took inconsistent positions in litigation, those positions would be less credible to the courts.[189] Finally, the generalist expertise of the DOJ benefits both its agency clients and the courts.[190]

It is difficult to isolate the precise reason for granting independent litigation authority in any given instance, but it is clear that the parties involved consider the stakes of the decision whether to grant litigation authority very high. During the Reagan administration, the Special Counsel of the MSPB, an agency with explicit for-cause removal protection, requested independent litigation authority in cases where the position taken by the MSPB would not conflict with the position taken by the DOJ in the same litigation.[191] The request was strongly opposed by the Office of Legal Counsel (OLC), the legal advisor to the executive branch.[192] The OLC opinion stated that the executive branch has a general opposition to "any legislative proposal that would further erode the Attorney General's litigating authority

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185 *See* Devins & Herz, *supra* note 172, at 213–14; Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1367–69, 1371–74 (2000).

186 Olson, *supra* note 180, at 78.

187 *See id.*

188 *See id.* at 78–79.

189 *See* Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 122–27 (1998); *cf.* FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994) ("[A]n individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems.").

190 *See* Olson, *supra* note 180, at 79–80.

191 *See* Auth. of the Special Counsel of the Merit Sys. Prot. Bd. to Litigate & Submit Legislation to Con., 8 Op. O.L.C. 30, 31–32 (1984).

192 *See id.* at 30–31.

under 28 U.S.C. §§ 516 & 519."[193] For that reason, President Ronald Reagan eventually pocket-vetoed the bill that would have enacted the MSPB's suggestions.[194]

### F. Congressional Comments, Legislative Proposals, and Budget Authority

As reported in Table 6, the authority to avoid centralized review of congressional testimony, legislative proposals, and budget submission is present in about half of the agencies with statutory removal protection and slightly fewer than half of agencies without statutory removal protection. For agencies marked by an asterisk, a subcabinet level component possesses the authority.

TABLE 6: AGENCIES WITH FULL OR PARTIAL BYPASS AUTHORITY

| | No Bypass Authority | Full or Partial Bypass Authority |
|---|---|---|
| **Statutory Removal Protection** | Commission on Civil Rights; FLRA; FMC; FTC; IPAB; Mine Safety and Health Review Commission; NLRB; NMB; NRC; OSHRC | CFPB; Chemical Safety and Hazard Investigation Board; CPSC; FERC; FHFA; Federal Reserve; MSPB; NTSB; OSC; PRC; SSA; STB; USPS[195] |
| **No Statutory Removal Protection** | ACUS; African Development Foundation; CIA; Corporation for National and Community Service; Department of Agriculture; Department of Commerce; DOD; ED; HHS; DHS; HUD; DOJ; Department of Labor; Department of State; Department of the Interior; VA; FCC; Election Assistance Commission; EPA; EEOC; Export-Import Bank; Federal Mediation and Conciliation Service; GSA; International Broadcasting Bureau; MCC; NASA; NARA; National Capital Planning Commission; National Council on Disability; NEA; NEH; NSF; Office of Government Ethics; OPM; Office of the Director of National Intelligence; Overseas Private Investment Corporation; Panama Canal Commission; Peace Corps; Pension Benefit Guaranty Corporation; Selective Service; TVA; U.S. Trade and Development Agency; USAID | Advisory Council on Historic Preservation; CFTC; Defense Nuclear Facilities Safety Board; DOE*; Department of the Treasury*; DOT*; Farm Credit Administration; FDIC; FEC; Federal Retirement Thrift Investment Board; ITC; National Credit Union Administration; Railroad Retirement Board; SBA*; SEC[196] |

193 *Id.* at 32.

194 *See* Ronald Reagan, Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 1988–1989 PUB. PAPERS 1391, 1391–92 (Oct. 26, 1988).

195 12 U.S.C. §§ 5492(c)(4), 5497(a)(4)(e) (2006) (CFPB, self-funded, bypass authority); 42 U.S.C. § 7412(r)(6)(R) (2006) (Chemical Safety and Hazard Investigation Board, concurrently to Congress); 7 U.S.C. § 1a(10)(A)–(B) (2006) (CPSC, concurrently to Congress); 42 U.S.C. § 7171(j) (2006) (DOE must send both FERC's budget request and DOE's request for FERC to Congress, comments, proposals, and testimony concurrently to Congress); 12 U.S.C. § 250 (2006) (FHFA, bypass authority for comments, proposals, and testimony); 12 U.S.C. §§ 247, 250 (2006) (Federal Reserve, full report of operations to Congress, bypass authority for comments, proposals, and testimony); 5 U.S.C. § 1204(k)-(l) (2006) (MSPB, budget and proposals concurrently to Congress, bypass authority for testimony and comments); 49 U.S.C. § 1113(c) (2006) (NTSB, budget concurrently to Congress, bypass authority for comments, proposals, and testimony); 5 U.S.C. § 1217 (2006) (OSC, comments, proposals, and testimony sent concurrently to President); 39 U.S.C. § 2009 (2006) (PRC, self-funded); 42 U.S.C. § 904(b)(1)(A) (2006) (SSA, budget submit-

Centralized review of budget proposals, congressional testimony, and legislative proposals is a relatively new development in the administrative state. The Budget and Accounting Act of 1921 empowers the President to require agencies to submit budget requests for inclusion in a comprehensive budget proposal.[197] The 1939 amendments to the Act explicitly included the independent regulatory commissions and boards, which had claimed to be exempt by virtue of their independence.[198] In the wake of the *Humphrey's Executor* decision, several agencies claimed to be exempt from OMB budget control. Congress quickly responded to the President's request for help in making it clear that independent agencies were covered.[199]

The OMB has implemented the statute through Circular A-11, which sets out a complex process of coordination, review, and clear-

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ted by President to Congress without revision); 49 U.S.C. § 703(g) (2006) (STB, concurrently to Congress); 39 U.S.C. § 2401(e) (2006) (USPS, budget submitted concurrently to Congress).

196 16 U.S.C. §§ 470r, 470t(b) (2006) (Advisory Council on Historic Preservation, budget concurrently to Congress, bypass authority for comments, proposals, and testimony but if voluntarily submit to OMB review, revisions must be identified); 7 U.S.C. § 2(a)(10)(A)–(B) (2006) (CFTC, concurrently to Congress); 42 U.S.C. § 2286h-1 (2006) (Defense Nuclear Facilities Safety Board, recommendations, and testimony concurrently to Congress); 42 U.S.C. § 8820(c) (2006) (DOE, must identify initial request along with its request, comments, proposals, and testimony concurrently to Congress for Office of Alcohol Fuels); 26 U.S.C. §§ 7802(d)(5), 7803(c)(2)(B) (2006), 12 U.S.C. § 5343(d) (2006) (Department of Treasury, IRS budget submitted without revision to Congress, National Taxpayer Advocate report submitted to Congress, Office of Financial Research has bypass authority for comments, proposals, and testimony); 49 U.S.C. § 48109 (2006) (DOT, Federal Aviation Administration budget, comments, proposals, and testimony concurrently to Congress); 12 U.S.C. §§ 2250, 2252(a)(3) (2006) (Farm Credit Administration, self-funded, comments and proposals submitted directly to Congress in annual report); 12 U.S.C. § 250 (2006) (FDIC, budget included in annual request submitted concurrently, bypass authority for comments, proposals, and testimony); 2 U.S.C. § 437d(d) (2006) (FEC, concurrently to Congress); 5 U.S.C. § 8472(i)-(j) (2006) (Federal Retirement Thrift Investment Board, concurrently to Congress); 19 U.S.C. § 1330(e)(4) (2006) (ITC, submits budget to Congress on or before date President does); 12 U.S.C. §250 (2006) (National Credit Union Administration, comments, proposals, and testimony submitted concurrently to Congress); 45 U.S.C. § 231f(f) (2006) (Railroad Retirement Board, budget concurrently to Congress, bypass authority for comments, proposals, and testimony); 15 U.S.C. § 634f (2006) (SBA, reports of Chief Counsel submitted to President and Congress without review); 12 U.S.C. § 250 (2006) (SEC, bypass authority for comments, proposals, and testimony).

197 31 U.S.C. § 1108(b)(1) (2006).

198 *See* Strauss, *supra* note 12, at 589 n.60.

199
> With respect to title II of the bill, under the decision in the Humphrey case, we had something new to appear down here in respect of some of these agencies. They shrugged their shoulders and said, "We are not under any budgetary control," quoting that case . . . . Title III provides help for the President, not this President but all Presidents. It is not up to us to question or quibble about what the Executive needs in the way of help.

84 CONG. REC. 2315 (1939) (statement of Chairman Lindsay C. Warren).

ance of budget requests.[200] Professor Strauss describes presidential coordination of the budget process as "one in which the agencies generally cooperate and from which they receive benefit as well as occasional constraint."[201] Centralized budget control allows the President to produce an "annual review, from a fiscal perspective, of the government's overall priorities and plans."[202] At the same time, the relationship between independence from the President and OMB budget control is clear: "[I]t cannot be denied that there is a direct relation between budget control and policymaking."[203]

Congress has exempted several agencies from this baseline rule. No agency is entirely exempt from the consolidated budget process, though some agencies are required to submit their budget requests to Congress at the same time they submit their requests to the OMB.[204] For other agencies, the President must include in his budget an independent statement by the agency of what it requested from the OMB.[205] These bypass procedures have several consequences. First, they decrease presidential control over the agencies' agendas by decreasing the information asymmetry between Congress and the President.[206] Second, independence from the President during the budget process may result in these agencies receiving less funding than other agencies because the President's support is a determinant of success in the budget process.[207]

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200 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2011.pdf.

201 Strauss, *supra* note 12, at 589.

202 Strauss & Sunstein, *supra* note 59, at 194.

203 Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1219 (1981); *see also* 115 CONG. REC. 1836 (1969) (statement of Everette MacIntyre, FTC Comm'r) ("What was intended as a purely housekeeping measure not infrequently has become an instrument of control over policy.").

204 *See, e.g.*, 2 U.S.C. § 437d(d) (2006) (requiring that the FEC submit budget requests concurrently to Congress and the OMB); 7 U.S.C. § 2(a)(10)(A)–(B) (2006) (same for the CFTC).

205 *See, e.g.*, 42 U.S.C. § 904(b) (2006) (requiring that in each annual request for appropriations by the President, the President include a statement by the SSA showing the amount requested and providing an assessment of budgetary needs); 49 U.S.C. § 703(f) (2006) (same for the STB).

206 Professor David Lewis has argued that agencies with indicia of independence, including exemption from the OMB budget clearance process, are more durable because they produce outcomes closer to Congress's preferences. *See* David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 389–90, 400–02 (2004).

207 *See* Kenneth J. Meier, *The Impact of Regulatory Organization Structure: IRCs or DRAs?*, 3 S. REV. PUB. ADMIN. 427, 438 (1980) (finding that from 1970 to 1976, dependent regulatory agencies (DRAs) received an average 12% increase in their budgets while independent regulatory agencies (IRCs) received only a 5% increase); Christopher G. Reddick, *IRCs Versus DRAs: Budgetary Support for Economic and Social Regulation*, PUB. BUDGETING & FIN.,

Presidents have consistently opposed these exemptions. In 1972, the CPSC became the first agency able to submit budget requests concurrently to the President and Congress.[208] When signing the legislation, President Nixon protested the provision and urged Congress not to pass similar provisions in the future.[209]

The OMB's authority to review and clear legislative comments, recommendations, and testimony stems not from a statute, but from Circular A-19.[210] The Circular was created under the Nixon administration and was later substantially revised by the Carter administration.[211] The need for coordination, from the President's perspective, followed from "an episodic pattern of direct communications from executive staff to Congress, accompanied by fairly regular assertions by their superiors that it ought to stop."[212] The Circular covers "[a]ll executive branch agencies . . . except those agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to the Congress without prior clearance."[213] "Agency" is defined broadly to cover all executive departments, independent agencies, and government corporations.[214] The Circular requires agencies to submit "proposed legislative program[s]" and "proposed legislation or report[s] or testimony" for OMB coordination and clearance, and it sets forth detailed procedures for agency submissions and the incorporation of OMB comments.[215] Professor Harold Bruff has noted that the Circular "has generally been effective, although members of Congress grumble about it regularly and leaks undermine it."[216]

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Winter 2003, at 21, 47–48 (finding that IRCs received less budgetary support in social regulatory fields than DRAs, but not in economic fields).

208 *See* Robert G. Dixon, Jr., *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1, 6–7 (1975).

209 *See id.* at 7.

210 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, REVISED LEGISLATIVE COORDINATION AND CLEARANCE § 4 (1979), *available at* http://www.whitehouse.gov/omb/circulars_a019.

211 *See* Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 659, 688–89 (2005). Attempts by the Executive to require clearance for legislative comments and proposals date from the 1920s. *See generally* Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 643–47 (1954) (describing the history of financial clearance requirements, beginning with President Warren G. Harding in 1921 and continuing through the terms of President Calvin Coolidge and President Herbert Hoover).

212 Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 479 (2010).

213 OFFICE OF MGMT. & BUDGET, *supra* note 210, §4.

214 *See id.* § 5(b) ("Any executive department or independent commission, board, bureau, office, agency, Government-owned or controlled corporation, or other establishment of the Government, including any regulatory commission or board and also the municipal government of the District of Columbia.").

215 *Id.* §§ 6(a), 7(a); *see id.* §§ 6–9.

216 Bruff, *supra* note 212, at 479.

Congress has apparently acquiesced in this practice. By statute, Congress has granted some agencies bypass authority, meaning that no executive branch entity can require review, but Congress has required others to submit any material given to the OMB concurrently to Congress.[217] In the former case, the OMB cannot demand revisions but can still comment independently on the agency's submission. In the latter case, the OMB subjects the agency's materials to review, but Congress has the agency's original submission to use as a benchmark.[218] Just as with budget proposals, these bypass provisions decrease presidential control over agencies because they allow Congress to receive information that has not been vetted to reflect only the administration's views.

### G. Adjudication Authority

Table 7 reports the agencies that possess at least some authority to proceed through formal adjudication.[219] It confirms an assertion fairly common in the literature that the authority to proceed through adjudication is common and not limited to agencies with statutory removal protection.[220]

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217 The Office of Legal Counsel (OLC) has taken the position that concurrent submission requirements "may breach the separation of powers by disrupting the chain of command within the executive branch and preventing the President from exercising his constitutionally guaranteed right of supervision and control over executive branch officials." As a result, the OLC construes those provisions as "applying only to 'final' recommendations that have been reviewed and approved by the appropriate superiors within the executive branch, including [the] OMB, and if necessary, the President." Common Legislative Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 255 (1989). This language was softened, though reaffirmed, by President William Clinton's OLC. *See* The Constitutional Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 173–75 (1996) ("[T]he presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.").

218 *See* Breger & Edles, *supra* note 1, at 1152.

219 Some agencies included in our study possess neither adjudication nor rulemaking authority. For example, the Administrative Conference of the United States produces formal recommendations for improving the federal administrative process. These regulations do not have independent force; rather, the goal is for the relevant actors to voluntarily adopt the recommendations. *See* 5 U.S.C. §§ 591–596 (2006).

220 *See, e.g.*, Edward R. Murray, Note, *Beyond* Bowsher*: The Comptroller General's Account Settlement Authority and Separation of Powers*, 68 GEO. WASH. L. REV. 161, 175 (1999) ("[M]any executive agencies legislate through rulemaking and also perform judicial functions through the adjudication of cases."); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1157 (1984) (noting that "the court-like process of adjudication is often carried out by executive agencies").

TABLE 7: AGENCIES WITH ADJUDICATION AUTHORITY

| | No Adjudication Authority | Full or Partial Adjudication Authority |
|---|---|---|
| **Statutory Removal Protection** | Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; IPAB; NMB; OSC | CPSC; FERC; FHFA; FMC; Federal Reserve; FTC; Mine Safety and Health Review Commission; NLRB; NRC; OSHRC; PRC; STB; CFPB; FLRA; MSPB; NTSB; SSA; USPS[221] |
| **No Statutory Removal Protection** | FDIC; ACUS; Advisory Council on Historic Preservation; African Development Foundation; CIA; Corporation for National and Community Service; Department of Commerce; DOD; DHS; HUD; Department of State; Department of Treasury; EAC; Export-Import Bank; Farm Credit Administration; Federal Mediation and Conciliation Service; Federal Retirement Thrift Investment Board; GSA; International Broadcasting Bureau; MCC; NASA; NARA; National Capital Planning Commission; National Council on Disability; NEA; NEH; NSF; Office of Government Ethics; OPM; Office of the Director of National Intelligence; Overseas Private Investment Corporation; Panama Canal Commission; Peace Corps; Pension Benefit Guaranty Corporation; Railroad Retirement Board; TVA; U.S. Trade and Development Agency; ITC; USAID | CFTC; Defense Nuclear Facilities Safety Board; Department of Agriculture; ED; DOE; HHS; DOJ; Department of Labor; Department of the Interior; DOT; VA; EPA; EEOC; FCC; FEC; National Credit Union Administration; SBA; SEC; Selective Service[222] |

Both agencies with statutory removal protection and agencies subject to at-will removal may proceed through adjudication.[223] In addition to issuing roughly 4,500 rules per year, agencies engage in at least several hundred formal adjudications per year and around 500,000 informal adjudications per year, of which at least several hundred are regulatory as opposed to enforcement matters.[224]

221 15 U.S.C. § 2064(c)–(g) (2006) (CPSC); 42 U.S.C. § 7171(g) (2006) (FERC); 12 U.S.C. § 4581 (2006) (FHFA); 46 U.S.C. § 41304 (2006) (FMC); 12 U.S.C. § 1818 (2006) (Federal Reserve); 15 U.S.C. § 45 (2006) (FTC); 30 U.S.C. § 823(d) (2006) (Mine Safety and Health Review Commission); 29 U.S.C. §§ 155, 160 (2006) (NLRB); 42 U.S.C. § 2201(c) (2006) (NRC); 29 U.S.C. § 661 (2006) (OSHRC); 39 U.S.C. § 504(f) (2006) (PRC); 49 U.S.C. § 722 (2006) (STB); 12 U.S.C. §§ 5492(a)(10), 5563 (2006) (CFPB); 5 U.S.C. § 7118 (2006) (FLRA); 5 U.S.C. § 1204(a) (2006) (MSPB); 49 U.S.C. § 1131(a) (2006) (NTSB); 42 U.S.C. § 405 (2006) (SSA); 39 U.S.C. § 3005 (2006) (USPS).

222 7 U.S.C. § 18 (2006) (CFTC); 42 U.S.C. § 2286b(a) (2006) (Defense Nuclear Facilities Safety Board); 7 U.S.C. § 6997 (2006) (Department of Agriculture); 20 U.S.C. § 1232h(f) (2006) (ED); 42 U.S.C. § 7193 (2006) (DOE); 42 U.S.C. § 1395ff (2006) (HHS); 8 U.S.C. § 1229a (2006) (DOJ); 29 U.S.C. § 2936 (2006) (Department of Labor); 30 U.S.C. § 1275 (2006) (Department of the Interior); 49 U.S.C. § 336 (2006) (DOT); 38 U.S.C. § 7102 (2006) (VA); 40 C.F.R. pt. 124 (2006) (EPA); 42 U.S.C. § 2000e-5 (2006) (EEOC); 47 U.S.C. § 154(j) (2006) (FCC); 2 U.S.C. § 437g (2006) (FEC); 12 U.S.C. § 1786(b) (2006) (National Credit Union Administration); 13 C.F.R. § 134.102 (SBA); 15 U.S.C. § 78w (2006) (SEC); 50 U.S.C. app. § 471a (2006) (Selective Service).

223 *See* Kenneth C. Cole, *Presidential Influence on Independent Agencies*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1942, at 72–73 (noting that independent boards, independent commissions, and traditional executive agencies all exercise quasi-adjudicative and quasi-legislative functions).

224 *See* Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 102–03, 108–11 (2008).

Rulemaking and adjudication are not wholly separate spheres. Rulemaking tends to be initiated by an agency and results in forward-looking, generally applicable rules. Adjudications can be initiated either by the agency, as with enforcement proceedings, or by parties, as with licensing proceedings or disputes arising under a statute. In theory, adjudication simply resolves private disputes. In practice, however, "[a]gencies, like courts, frequently evolve detailed and precise rules in the course of adjudication."[225] The relationship between how an agency chooses to develop policy and the potential for political influence over that policy therefore has less to do with anything inherent in the two forms of policymaking and more to do with the rules that developed to govern those forms.

Administrative law doctrines permit less political interference in the form of ex parte contact during formal adjudication than during informal adjudication, notice-and-comment, or rulemaking (which is how agencies conduct virtually all rulemaking).[226] So agencies with the authority to proceed through adjudication rather than rulemaking are more insulated from the President and interest groups. An ex parte contact is an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given,"[227] meaning that political influence can go unnoticed. The cost of influencing an agency decision rises when ex parte contacts are prohibited—because unlawful contacts can result in an agency action being vacated—and when ex parte contacts must be disclosed—because the political cost of influencing an agency decision rises.

The Administrative Procedure Act (APA) prohibits ex parte contacts after an agency initiates a formal adjudication.[228] An interested person outside the agency is barred from making or causing to be made an ex parte communication to an agency decision maker that is relevant to the merits of the proceeding, and if such prohibited communication is made, the agency must disclose it.[229] In contrast, the APA does not contain rules on ex parte contacts during an informal

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225 David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 926 (1965).

226 *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 901 (2008) ("Most rulemaking occurs through 'informal' mechanisms, such as notice-and-comment rulemaking . . . ."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 66 n.287 (2009) ("Rulemaking today, however, overwhelmingly takes place under the rubric of informal notice-and-comment rulemaking, *not* formal rulemaking.").

227 Administrative Procedure Act, 5 U.S.C. § 551(14) (2006).

228 *See id.* § 557(d)(1)(A). This rule applies to formal regulation as well, but there are almost no formal rulemaking proceedings today, so we do not discuss them. *See* Watts, *supra* note 226, at 66 n.287.

229 *See* 5 U.S.C. § 557(d)(1).

rulemaking.[230] However, courts have imposed some constraints on informal rulemaking based on due process and the requirement that an appellate court rely on the whole record when reviewing an agency action.[231] Furthermore, legislation or regulations governing an individual agency may specify additional controls or prohibitions on ex parte contacts.[232] There are no uniform procedures governing ex parte contacts during informal adjudication.

Of course, agencies may go further than the requirements of the APA and promulgate stricter ex parte contact rules for formal and informal adjudication and rulemaking. Those rules bind the agency[233] but may be revised at the agency's discretion. The FCC, for example, has a Sunshine Rule that governs ex parte contact during rulemaking and rules governing ex parte contact during adjudication.[234] As a result of this ability to promulgate stricter rules, an agency's ability to proceed through formal adjudication is one of the weaker indicia of independence because an agency that is permitted to proceed only through rulemaking could promulgate rules governing ex parte contact to insulate its decision making to a similar degree.

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230 *See* Kagan, *supra* note 24, at 2280 n.142 (noting that "[t]he APA contains no prohibitions on ex parte contacts between agency personnel and outside persons in notice-and-comment rulemaking"); Watts, *supra* note 226, at 48 ("The APA expressly regulates ex parte contacts in the context of formal adjudications and formal rulemakings required to be conducted on the record but not in the context of informal notice-and-comment rulemakings.").

231 *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 56–59 (D.C. Cir. 1977) (requiring ex parte contacts to be docketed in the rulemaking record after the agency gives notice of a rulemaking). *But see* Sierra Club v. Costle, 657 F.2d 298, 402–05 (D.C. Cir. 1981) (holding that not all informal ex parte contacts must be docketed in the informal rulemaking record).

232 *See, e.g.*, 15 U.S.C. § 57a(j) (2006) (prohibiting ex parte contacts in Federal Trade Commission informal hearings); 14 C.F.R. § 300.2 (1983) (prohibiting contact between interested parties and Civil Aeronautics Board employees until after final disposition of proceedings).

233 *Cf.* Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389 (1932) (noting that an agency may not ignore its own rules in subsequent proceedings and retroactively apply a new rule).

234 In all proceedings at the FCC, a certain period ("the Sunshine Period") is designated in which all presentations to Commission decision-making personnel are prohibited. This period

> begins with the issuance of a public notice one week before the public meeting at which the Commission will consider an NPRM or final rule. Unless an exemption applies, outside parties—other than members of Congress and other federal agencies—may not make presentations, oral or written, on items that will be considered at the public meeting once the Sunshine Notice is issued.

*Rulemaking Process at the FCC*, FCC (Mar. 3, 2011), http://www.fcc.gov/encyclopedia/rulemaking-process-fcc. For more detailed guidance on acceptable conduct during the Sunshine Period, see generally *Ex Parte Rules (2011)*, FCC (May 26, 2011), http://www.fcc.gov/encyclopedia/ex-parte-rules-2011.

Adjudication also allows agencies to conduct policymaking in a less visible form than rulemaking. Agencies that act through adjudication can choose policy-making vehicles from a steady flow of enforcement actions, unlike the regulation process, which agencies must initiate when they decide to change policy. In describing the benefit of proceeding through adjudication rather than rulemaking, one former EEOC Commissioner said, "[T]he more overt the policymaking, the more endangered the agency's independence [is]. Better to make policy through adjudication and prosecution. It is safer because [it is] incremental and you present a moving target."[235] The authority to proceed through adjudication grants agencies the authority to choose which actions they wish to shield from outside influence, which in turn allows agencies greater flexibility to create policies as they see fit.

* * *

This Part demonstrated that the structural features most commonly associated with independence are not unique to agencies whose heads enjoy statutory removal protection. By dividing agencies into those with explicit statutory for-cause removal protection and those without, it showed that each of the features most often associated with independent agencies are present in executive agencies as well. It therefore confirmed a statement sometimes made, although never properly proven, in the literature that "there is no distinctive character of independent agencies."[236]

At this point, two questions remain. First, leaving aside agency design, to what extent do independent agencies and executive agencies function differently *in practice*? Second, what theory of presidential control flows from the observation that agencies fall on a spectrum ranging from more independent to less independent rather than in a binary categorization? Parts III and IV take up these questions in turn.

## III
## Independent and Executive Agencies: A Functional Analysis

Whereas Part II demonstrated that the *formal* division of agencies into the binary categories of independent and executive agencies is untenable, Part III aims to show that the *functional* difference between independent and executive agencies is overstated.

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235 Symposium, *Independent Agencies—Independent from Whom?*, 41 ADMIN. L. REV. 491, 516 (1989) (statement of R. Gaull Silberman, former Vice-Chairman, EEOC).

236 Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1772 (1985).

A. Independence of Executive Agencies

The traditional description of an executive agency is one that is subject to plenary control by the President, subject to the limits of the authorizing statute. However, while some may argue that the President can and should exercise complete control over the administrative state,[237] practical and political considerations limit the ability of the President to control executive agencies.

1. *Political Costs of Political Control*

The argument that a President's ability to remove an agency head translates to a robust ability to control the actions of that agency head, though perhaps intuitive, is flawed. That the President exerts some influence over the administrative agencies is undeniable. But in order to effectively control these decisions of an agency, or even to influence a particular agency decision, the President must bear certain costs. Then-Professor Elena Kagan described the relationship between the agencies and the President as "a typical principal-agent dilemma."[238] The President must monitor agency activity to know when an objectionable decision needs to be cut off at the pass. Arguably, executive orders allowing centralized review of regulations decrease these monitoring costs, though only to the extent that OIRA acts as a "fire alarm" to flag actions the President may be interested in.[239] Given the massive output from the modern administrative state and the President's competing non-bureaucratic priorities, Kagan argues that "no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy."[240] It follows then that the President will be able to discover, and attempt to influence, only a small, politically salient set of agency decisions.[241]

Once the President decides he does want to influence an agency head, the threat of removal is an imperfect tool for enforcing his preferences.[242] First, agency heads can push back by publicizing the at-

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[237] Proponents of the unitary executive theory make this argument. *See* CALABRESI & YOO, *supra* note 47, at 4 (asserting that all nonlegislative and nonjudicial officials exercise power by a delegation of constitutional authority from the President and thus are "all subject to the [P]resident's powers of direction and control").

[238] Kagan, *supra* note 24, at 2273.

[239] We borrow the fire alarm analogy from Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

[240] Kagan, *supra* note 24, at 2273.

[241] *See* Cole, *supra* note 223, at 77 (arguing that the number of issues in which the President is personally invested or over which his delegates will exert influence is small).

[242] This is not to say that removal is never an effective tool. As Professors Pildes and Sunstein note: "[A]n agency head who rejects the President's policies knows that he is risking his job. For this reason, and because of the general understanding that the Presi-

tempted interference. Presidents often prefer to use agencies as a political shield by defending controversial decisions as the product of agency expertise, even if there was political influence during the decision-making process.[243] The risk that an agency head may publicly link an agency decision to the President may deter some presidential involvement. Second, most agency heads develop support that insulates them to some degree from the President's removal power. The agency head's support—which could be from Congress, interest groups, or interpersonal relationships—raises the political cost of removing the official.[244] A President will not exercise the removal power "if the agency head's regulatory agenda imposes fewer political costs than firing him would."[245]

An agency head can also use his or her political support to impose costs on the President, reversing the traditional direction of political control.[246] By analogy then, a President will not oppose an agency head's decision unless the agency head's decision will impose higher costs than the President's public opposition to the agency head will. Of course, an agency head will generally have less influence over the President than the President does over the agency head. For example, in 1975, President Ford was forced to choose between vetoing a bill to regulate union picketing at construction sites and risking the almost certain resignation of his Secretary of Labor, John Dunlop.[247] After promising to support a compromise negotiated by Dunlop, President Gerald Ford reversed his position and vetoed the bill to avoid alienating Republicans who might support Ronald Reagan in the upcoming presidential primary.[248] Dunlop's threat to resign, and eventual resignation, imposed clear costs on President Ford; the President

dent is in charge of the executive branch, agency heads will generally follow the President on matters of importance." Pildes & Sunstein, *supra* note 14, at 25.

243 *See* Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y. 362, 369–70 (2008) ("The appointment process has allowed presidents to use agencies as a means for major—and often unpopular—policy changes.").

244 *See* Kagan, *supra* note 24, at 2274 ("[T]he President often cannot make effective use of his removal power given the political costs of doing so."); *see also* Strauss, *supra* note 12, at 590 ("An administrator with a public constituency and mandate, such as William Ruckelshaus, cannot be discharged—and understands that he cannot be discharged—without substantial political cost." (footnote omitted)).

245 McGinnis, *supra* note 24, at 918.

246 For a discussion of various examples of how resignation threats can affect presidential policy, see Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2496–500, 2510–11, 2523–28 (2011).

247 *See Ford Faces Decision on 'Common Situs Picketing*,*'* NASHUA TELEGRAPH, Dec. 18, 1975, at 13 (noting that President Ford was weighing the costs of strikes and losing conservative votes against the costs of risking a Dunlop resignation and antagonizing organized labor).

248 *See* Lee Dembart, *President Intends to Veto Construction Picketing Bill*, N.Y. TIMES, Dec. 23, 1975, at 1 (noting that President Ford felt he had no choice but to veto in the face of Ronald Reagan's opposition to the bill).

directly addressed the Dunlop issue in his veto statement and organized labor was openly hostile to the President in response to the veto.[249]

In 1980, the resignation of Secretary of State Cyrus Vance had a clear impact on the Carter presidency. Vance opposed a rescue attempt during the Iranian hostage crisis and resigned after the attempt failed.[250] The failed attempt was described as the last straw in an underlying disagreement over the administration's military-focused foreign policy.[251] The resignation, which was the "first resignation of conscience by a Secretary of State in [sixty-five] years," "puncture[d] the atmosphere of political solidarity" for President Carter in the wake of the failed rescue attempt.[252] The resignation was described as strategic, designed to send a signal to the public about the risks of Carter's foreign policy.[253] After news of Vance's resignation, President Carter faced a flood of criticism with respect to foreign policy.[254] It was at least partially successful: Edmund Muskie succeeded Vance as Secretary of State.[255] Muskie's appointment was a win for Vance, as Muskie shared his views and was also seen as more likely to win political battles within the administration.[256]

2. *Serving Multiple Masters*

The ability of agency heads to adopt policies somewhat independently of presidential monitoring and control matters only if agency heads will diverge from the President's preferences in the absence of direct presidential control. One might ask why the preferences of an agency head would ever diverge from those of the President who appointed him, given that the President presumably appoints agency

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249 *See* Gerald R. Ford, Statement Announcing Intention to Veto the Common Situs Picketing Bill, 1975 PUB. PAPERS 742, 743 (Dec. 22, 1975) (explaining the reversal of his position after giving "private assurances" to Dunlop and despite "the good faith efforts" of Dunlop); Philip Shabecoff, *Dunlop, in Quitting Labor Post, Sees a Loss of Trust After Veto*, N.Y. TIMES, Jan. 15, 1976, at 1 (reporting that every labor representative on the President's labor-management advisory board quit after the veto and that the head of the AFL-CIO "made it clear that organized labor could no longer cooperate with the Ford Administration").

250 *See* Jim Anderson, *Vance Says Iran Mission Was Last Straw in Rift*, PITTSBURG PRESS, June 6, 1980, at A10.

251 *See id.*

252 Hedrick Smith, *A Political Jolt for Carter: White House Fears That Resignation of Vance Could Cut Away Earlier Support for Iran Mission*, N.Y. TIMES, Apr. 29, 1980, at A1.

253 *See* Editorial, *Mr. Vance and His Duty*, N.Y. TIMES, Apr. 29, 1980, at A22 (concluding that Vance's resignation was timed to raise red flags about the direction of American foreign policy).

254 *See* Bernard Gwertzman, *The State of State Is Weary*, N.Y. TIMES, May 4, 1980, at E2 (describing the widespread perception that the National Security Council had won over the President after years of "guerrilla warfare against State").

255 *See id.*

256 *See id.*

heads who share his policy preferences. But the President is not the only "principal" of an agency head. Congress, political parties, regulated interest groups, and the agency staff exert influence on the agency head.[257]

Congress primarily exerts influence over agency heads (and presumably also conveys the preferences of the political parties) through the power of the purse. Thus "[an] agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement."[258] The preferences of members who serve on the agency's appropriations committee will presumably carry more weight than those of Congress generally. Congress also can influence agencies through hearings and legislative proposals.

Political parties also influence agency heads and can cause an agency head to diverge from the President's preferences. Because agency heads tend not to retire from public life after their tenure, they therefore consider the impacts of their decisions on future career prospects.[259] Agency heads will consider the preferences of their political party, which controls (or at least influences) their potential for advancement. Decisions that will "optimize the agency head's future stream of income and reputational benefits will not necessarily be compatible with the [P]resident's agenda at all times."[260]

Interest groups also exert influence over agency heads. The phenomenon of interest group influence is commonly referred to as agency capture. The capture thesis recognizes that because interest groups representing regulated entities tend to be overrepresented in the agency decision-making process compared to interest groups representing public interests, the outputs of agencies will tend to be biased in favor of those interests.[261] Interest groups are overrepresented in agency decision making because they are well organized, well funded, possess an information advantage over the agency, and can offer perks such as future employment.[262]

Finally, agency staff members are able to influence agency heads as a result of several factors. First, "government administrators will seek employment at an agency because of an ideological identification with that agency's mission."[263] Then, as agency heads serve in their

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257 *See* Kagan, *supra* note 24, at 2273 (describing a "multiprincipal structure" that creates a "welter of cross-pressures").

258 Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 602 (1989).

259 *See* McGinnis, *supra* note 24, at 918–19.

260 *Id.* at 919.

261 *See* Stewart, *supra* note 7, at 1713.

262 *See* Barkow, *supra* note 9, at 21–24 (listing the reasons that interest groups tend to be overrepresented in the agency decision-making process).

263 Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1300 (2006).

positions, they gain expertise and "adopt the preferences and perspectives of agency careerists on policy issues"—called "going native."[264] Finally, the agency staff simply spends more time with the agency head than the President or his advisors can.[265]

### 3. *Practical Independence*

Some offices, while not structurally independent, are still understood to be independent, or to be best operated independently from the President. For example, the Solicitor General of the United States "is a member of the executive branch and owes a duty to his governmental clients,"[266] but is still said to have "an affirmative duty both to the Court and to the legislature."[267] Indeed, the official legal position of the OLC, considered the legal voice of the executive branch, is that the Office of the Solicitor *should* be independent of political control.[268] Such a tradition of independence may create a feedback loop: the efficacy of the Office will be judged by reference to its independence, and Solicitors General may accept the position on the assumption that they will be allowed to operate with relative independence. The extent to which the Office has fulfilled this ideal of independence is the subject of debate.[269] But the example demonstrates that structural indicia of independence are not a necessary condition of functional independence.[270]

The Food and Drug Administration (FDA) is another executive agency that has enjoyed a great deal of practical independence from presidential influence. The FDA is located within the HHS and is responsible for regulating the safety of food, drugs, cosmetics, tobacco, and medical devices.[271] The head of the FDA does not enjoy for-cause

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264 David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 431 (1997).

265 *See* Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) ("An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.").

266 Lemos, *supra* note 182, at 190.

267 Todd Lochner, Note, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 565 (1993).

268 *See* Memorandum Opinion for the Attorney Gen.: Role of the Solicitor Gen., 1 Op. O.L.C. 228, 229–31 (1977).

269 *See* Lemos, *supra* note 182, at 187–92 (summarizing the debate).

270 *See id.* at 216 ("[E]mpirical research has revealed substantial differences in the filings of different SGs serving under the same President. Those findings strongly suggest that the SG has at least some discretion to pursue his own agenda."); *see also* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1382 (2010) (conducting an empirical study and concluding that "there is little cause for concern that the Solicitor General is too officious in entering private controversies, or . . . cases that present highly-charged political issues but only marginally affect the federal government").

271 *See* B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 812–13 (1991).

removal protection. Yet the agency, through the power of its reputation as an effective watchdog agency, enjoyed a degree of practical independence from political and interest group pressure.[272] Like the Office of the Solicitor General, the practical independence of the FDA has fluctuated over time. For example, in 2011, HHS Secretary Kathleen Sebelius overruled the FDA's approval of the sale of Plan B, a contraceptive pill, to adolescents without a prescription.[273] This was the first time an HHS Secretary had used her statutory authority to overrule a drug-approval decision by the FDA.[274] The unprecedented nature of Secretary Sebelius's decision—and the sharp public criticism that resulted[275]—indicates that a tradition of independence can still insulate agencies from presidential control, even if only to a lesser degree than statutory indicia of independence.

### B. Dependence of Independent Agencies

Just as traditional executive branch agencies operate with a certain degree of independence from the President, independent agencies are often reasonably responsive to presidential influence. Independent agencies are also responsive to other actors, such as Congress and interest groups. Our point is simply that independent agencies are influenced by the same set of actors as executive agencies, a set that includes the President.

#### 1. *Appointment of Independent Agency Heads*

The President appoints the heads of almost all independent agencies, the chairs of multimember agencies, and the administrators of single-head agencies.[276] The appointment power matters because these agency heads generally control the agenda of the agencies; that is, they have control over agency output and can limit agency actions that the President might oppose. The chairs of multimember agencies have been granted budget, personnel, and agenda control by statute.[277] On paper, the chair is the chief executive and administrative

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272 *Cf.* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 213 (2010) (describing the increased statutory authority provided to the FDA in 1962—and further secured by implementing regulations in 1963—over final approval of drugs in the wake of the thalidomide incident).

273 *See* Daniel Carpenter, Op-Ed., *Free the F.D.A.*, N.Y. TIMES, Dec. 14, 2011, at A35.

274 *See id.*

275 *See, e.g.*, Gardiner Harris, *F.D.A. Overruled on Availability of After-Sex Pill*, N.Y. TIMES, Dec. 8, 2011, at A1 (reporting reactions to HHS Secretary Sebelius's decision to overrule the FDA).

276 See *supra* notes 149–51 and accompanying text for a description of the various ways Congress can structure the Chair-appointment process, and see notes 126 and 127 for a catalogue of the appointment process of agency chairs.

277 *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE. L.J. 257, 265.

officer of the agency, though some statutes require participation of the full agency, at least when there is disagreement.[278] Because there is no judicial or executive forum to resolve intra-agency management disputes, chairs are often able to assert their authority when there is ambiguity or a gap in the enabling statute.[279] Most support for the argument that the position of the chair influences agency output (and the transitive argument that presidential influence over the chair can impact agency output) is anecdotal.[280] Professor Ho conducted a survey of FCC experts to determine whether empirical studies based on voting records that point to the power of the chair are accurate.[281] He found that formal voting studies might not capture the full set of levers the chair uses to exercise control over an agency, for example "alternative channels to voting, such as supervisory authority over staff, agenda control, oversight over expenditures, and the power to represent the Commission publicly."[282]

The chair of a multimember agency usually holds the position of chair—but not as a member of the agency—at the will of the President. After removal of an existing chair, the President can then appoint a new chair with preferences closer to his.[283] The ability of the President to retain policy influence through the selection of the chair is important because, as explained above, the "chair of a [multimember] agency is ordinarily its most dominant figure."[284] While there is room for debate, it is clear that the ability to appoint the head of an independent agency allows the President to retain some control over that agency's activities. An appointed chair will align with the President for multiple reasons. First, appointees might wish to be reappointed, and the President's power to withhold renomination "casts its shadow" before renomination.[285] Second, an appointee might

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278 *See* Breger & Edles, *supra* note 1, at 1166–72 (surveying and describing statutes that govern chairs).

279 *See id.* at 1176–78 (citing anecdotal evidence of chair control in the absence of statutory guidance).

280 *See, e.g.*, Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 208–12, 217–18 (1982) (noting the influence of chairmen on the NLRB, FTC, and SEC); Wood & Waterman, *supra* note 271, at 807–16 (analyzing the agency output under the guidance of different commissioners of the FTC, NRC, FDA, and NHTSA).

281 *See* Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 334–39 (2010). These studies typically link the number of times the chair is in the majority with chair power over the agency. *See, e.g.*, Jack H. Knott, *The Fed Chairman as a Political Executive*, 18 ADMIN. & SOC'Y 197, 207–09 (1986) (evaluating the "power" of Federal Reserve Board chairman by comparing the average number of dissenting votes per meeting from chairman to chairman).

282 Ho, *supra* note 281, at 360.

283 This is most true for agencies whose chairs the President can appoint without Senate confirmation. *See supra* notes 126–27.

284 Breger & Edles, *supra* note 1, at 1164.

285 *See* Cole, *supra* note 223, at 74 ("Only individuals who have no ambition to succeed themselves in their present jobs can be uninfluenced by this fact."). It is not only a desire

want access to the political rewards that come with being on the head of a political party's good side, such as support in a run for office or support for a placement in a higher-level federal position or in the private sector.[286] Third, the President might have greater control over these appointments than he does over, for example, judicial appointments. This is because the tradition in judicial appointments of deference to the Senator whose state the court sits in does not apply.[287] There is some evidence that confirms these intuitions. Professor Glen Robinson, a former FCC Commissioner, has written that the regulatory agendas of both independent and executive agencies "fit closely with presidential programs in the Ford, Carter[,] and Reagan administrations and yet did not require close presidential control" to do so.[288] He suggests that the appointment power is a very effective tool of control, especially when favorable actions by agencies are then codified by presidentially supported legislation.[289] For all of these reasons, it is not surprising that "consultation and coordination on general policy issues of national interest naturally occurs" between the President and the chair.[290]

2. *Appointment Frequency*

Presidents gain control over independent agencies more quickly than a formal reading of the enabling statutes would predict. One of the motivations behind for-cause removal protection is stability: the President will be faced with at least some holdover appointees and will not be able to exert influence over independent agency action until the agency head's term expires (or until enough terms on a multimember agency expire for the President to have a voting majority). The FCC, whose five members serve five-year staggered terms, is a helpful example.[291] One term will expire each year, so if all members serve out their terms, it will take three years for the President to appoint a majority. The presence of a bipartisan requirement complicates the picture slightly,[292] but the basic point holds. However,

to continue serving in a current position that might motivate officials to placate a President; an official might desire appointment to a position in a traditional executive department.

286 *See* Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 245–46 (arguing that the absence of removal power does not eliminate the President's ability to influence agency heads or their incentives to follow the President's preferences).

287 *See* Cole, *supra* note 223, at 74–75.

288 Robinson, *supra* note 286, at 249–50.

289 *See id.*

290 Strauss, *supra* note 12, at 591.

291 *See* 47 U.S.C. § 154(a), (c) (2006).

292 If there is a bipartisan requirement, the President may need to replace only one or two members (assuming his party is currently in the minority).

because of early resignations, the President is able to gain control much earlier in practice. Members of independent agencies often resign when a President of the opposing party is elected.[293] For example, the Chairman of the SEC typically resigns both the chairmanship and the commission seat upon the election of a new President.[294] Members of independent agencies also may choose not to serve out their full terms.[295] A study of turnover in independent agencies from 1945 to 1970 found that turnover occurs "twice as fast within the twelve months after a new president takes office than later on," and the rate is higher when there has been a change in party control of the presidency.[296] Finally, the President can apply pressure short of removal to convince a member of an independent agency to resign before the expiration of his or her terms.[297] When John C. Doerfer came under fire for his contacts with broadcast network executives while serving as Chairman of the FCC, there was "no doubt . . . that if the President gave the word, Mr. Doerfer's resignation would be forth-

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293 *See* Moe, *supra* note 280, at 200 ("[C]ommission chairmen have tended to resign from their commissions (not simply from the chairmanship) upon losing presidential support, bolstering the [P]resident's effective power of removal."). *But see* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 497 (2008) (arguing empirically that opposition-party commissioners serve out most, if not all, of their terms).

294 *See* Floyd Norris, *Levitt To Leave S.E.C. Early; Bush To Pick 4: Chairman Is Critical of Reform Opponents*, N.Y. TIMES, Dec. 21, 2000, at C1 (Arthur Levitt, appointed by President Clinton, resigned a month after the election of George W. Bush); E. Shiver, Jr., *Arthur Levitt Jr. Is Clinton's Pick To Head SEC*, L.A. TIMES, Apr. 29, 1993, at D2 (Richard Breeden, appointed by President George H.W. Bush, resigned within four months of President Clinton taking office); Jesse Westbrook, *Cox Quits at SEC, Leaves Schapiro To Restore Clout (Update2)*, BLOOMBERG.COM (Jan. 21, 2009, 8:31 PM), http://www.bloomberg.com/apps/news?pid=email_en&refer=&sid=aJuH2AuRdpnA (Christopher Cox, appointed by President George W. Bush, resigned his chairmanship and commission on the day President Obama took office); *see also* Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 288 n.6 (1988) ("Upon a change in administration, the Chairman of the SEC is expected to tender his resignation to the new President. However, neither he nor the other commissioners are required to resign their posts.").

295 *Cf.* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009) (citing a GAO study reporting that the median tenure for Senate-confirmed appointees—including both executive and independent agencies—is 2.1 years).

296 Charles T. Goodsell & Ceferina C. Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291, 301 (1971).

297 *See, e.g.*, Stephen Labaton, *S.E.C.'s Embattled Chief Resigns in Wake of Latest Political Storm*, N.Y. TIMES, Nov. 6, 2002 at A1 ("Mr. Pitt announced his resignation just before 9 o'clock as polls were closing nationwide. For days, he had insisted he would continue to serve as long as he had the confidence of the president . . . . Administration officials said tonight that Mr. Bush had not requested Mr. Pitt's resignation but that White House officials welcomed it."); *see also* Barkow, *supra* note 9, at 30 ("[O]fficials typically voluntarily accept a presidential request for their resignation or otherwise fail to challenge their removal.").

coming."[298] Doerfer eventually resigned at the request of President Dwight D. Eisenhower, despite his insistence that he had done nothing improper.[299] There is no authoritative tally of resignations due to political pressure from the White House, but the Doerfer incident and others like it[300] demonstrate that Presidents can use informal pressure to speed up turnover of agency heads. Once a President's appointees control an agency, presidential influence on those appointees operates in the same way as presidential influence on an agency chairman or head.

### 3. *Interaction with the Executive Branch*

There are good reasons for all agencies—no matter what degree of statutory insulation from presidential influence they enjoy—to give up some independence and seek input from the President or his aides. Agencies "need goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy."[301] To the extent that agencies wish to operate in the public interest, the President can offer an important perspective on the impact of the agencies' policy proposals.[302] The President (or his aides) may also have valuable political advice for the agencies, as he can describe the other actions his administration is pursuing and how receptive the relevant constituencies will be to the agency's action.[303] And there are even more informal mechanisms of presidential influence, such as personal connections.[304] Therefore, agencies thought to be independent "can

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298 William M. Blair, *Conduct of F.C.C. Chief Is Studied by White House*, N.Y. TIMES, Mar. 10, 1960, at 1.

299 *See* William M. Blair, *Doerfer Resigns as F.C.C. Chairman at President's Bid: Quits While Under Fire for Trip on TV Official's Yacht*, N.Y. TIMES, Mar. 11, 1960, at 1 (reporting that Doerfer's refusal to change his behavior led to a "White House summons" from which Doerfer left "with the clear understanding that the letter of resignation would be forthcoming within twenty-four hours").

300 Another example, though unconfirmed, is the resignation of Paul Volcker as Chair of the Federal Reserve in 1987 due to pressure from the Reagan administration. While Volcker did not publicly state that he resigned due to direct pressure from the administration, it was widely reported that President Reagan's appointees clashed with Volcker and that their ability to outvote him and his allies played a role in his decision to resign. *See* Paul Blustein, *Tense Fed: Volcker's Fate Is Seen Hinging on Two Men New to Reserve Board*, WALL ST. J., Mar. 20, 1986, at 1; William R. Neikirk, *Volcker Resigns As Fed Chief: Reagan Turns to Greenspan*, CHI. TRIB., June 3, 1987, at C1 (noting that, as Chairman, Volcker stuck to a rigid policy "despite considerable political heat from Congress and, at times, Reagan administration officials").

301 Strauss, *supra* note 12, at 594.

302 *See id.*

303 *See id.* ("[Agencies] understand that the view they bring to policy issues is intentionally specialized . . . and that the President is in a position to learn and appreciate the views of other responsible agencies, and to supply a useful broader perspective.").

304 *See* Kagan, *supra* note 24, at 2376 (noting other mechanisms, including lesser sanctions, institutional incentives, and personal ties).

be susceptible to substantial presidential oversight."[305] To give just one example, Rosalie ("Ricky") Silberman, who served as a Commissioner and Vice-Chairman of the EEOC, noted that the President's preferences had a deterrent effect on the agency's annual regulatory agenda submissions. As she explained, agencies "tend not to put on those lists things that are controversial, because if you do, then you're going to get problems."[306]

Agencies with removal protection often interact with agencies that do not have removal protection, and the agency without removal protection can transmit the President's policy preferences, even if only indirectly. This interaction takes two forms. First, authority over a certain policy space is sometimes delegated to more than one agency. For example, the FTC and DOJ both have roles in antitrust enforcement,[307] the Nuclear Regulatory Commission (NRC) and the EPA both have roles in regulating radiation,[308] and the Department of Treasury and the Federal Reserve both have roles in ensuring financial stability.[309] This overlapping authority results in a need for coordination, which gives the President an opportunity to assert his influence.[310] Even delegation of simply related authority, such as the related agendas of the DOJ and the FTC can present opportunities for presidential coordination.[311] Second, if agencies deadlock and dispute jurisdiction, the "usual course is to put the matter before [the] OMB, which [attempts] more informally to bring the agencies to an understanding."[312] The OMB can take that opportunity to mediate a

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305 Strauss, *supra* note 12, at 594.

306 Symposium, *supra* note 235, at 504.

307 *Compare* 15 U.S.C. § 45 (2006) (allowing the FTC to engage in antitrust enforcement), *with* Exec. Order No. 13,519, 3 C.F.R. 60,123 (2009) (granting power to a task force, consistent with the powers of the Attorney General, to investigate unfair competition cases and to engage in outreach to detect and enforce antitrust violations).

308 *Compare* 42 U.S.C. § 5844 (2006) (establishing the Office of Nuclear Reactor Regulation within the NRC, which is involved in evaluating transportation and storage of radioactive material to prevent radiation hazard), *with id.* § 4364 (specifying the Office of Radiation Programs within the EPA to research and develop regulatory programs for radiation activities).

309 *Compare* 12 U.S.C. § 5214 (2006) (establishing the Financial Stability Oversight Board within the Department of the Treasury to supervise the Troubled Asset Relief Program), *with id.* § 248 (enumerating the powers of the Federal Reserve Board to include investigating and supervising the financial condition of Federal Reserve banks and notes).

310 *See* Freeman & Rossi, *supra* note 89, at 1178–81 (offering the annual regulatory agenda process run by the OMB as an example of how a "President can seek to promote coordination across the executive branch and, to a limited extent, among independent agencies").

311 *See id.* at 1146 ("In theory, the agencies could execute their missions separately. Yet since they are parts of a larger enterprise, they would be more effective if their policies were consistent.").

312 Strauss, *supra* note 12, at 588.

policy resolution that is in line with the President's preferences or conclude that the executive agency has jurisdiction.[313]

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Part II demonstrated there is no neat structural divide between agencies that are "independent" and agencies that are "executive." This Part demonstrated that there is also no neat functional divide between the two types of agencies. Part IV now takes up the theoretical implications of this new understanding of the complexities of agency independence.

## IV
## Rejecting the Executive/Independent Divide: A New Theory of Presidential Control of the Administrative State

This Article has shown that the term "independent agency" is both vaguely defined and fundamentally flawed. The structural features associated with independence are present in many executive agencies, and an agency's practical degree of independence from presidential influence depends on many functional considerations. Part IV builds on these findings to offer a new theory of presidential control of administrative agencies. We first explain why the current view that independent agencies have a separate constitutional status is incorrect. Congress can impose constraints on the President's Article II authority by statute.[314] But statutory constraints on the President's control over an agency do not give rise to a different constitutional status for the agency and are not generative of further constraints that lack a statutory basis. We then present our thesis: there is no such thing as an "independent agency." Instead, all agencies fall on a spectrum ranging from most insulated from presidential control to least insulated. The President's power with respect to any given agency is

313 *See* Freeman & Rossi, *supra* note 89, at 1201 n.312 ("Interagency coordination facilitates the President's ability to arbitrate interagency disputes and can help him extend his reach to independent agencies that he may otherwise not be in a position to control."). For example, in the 1970s, the Atomic Energy Commission (AEC), whose members enjoy for-cause removal protection, and the EPA, whose administrator does not, were involved in a "series of conflicts . . . over their respective regulatory authority" in the area of radiation standards. These disputes were referred to the OMB, which sided with the AEC. *See* Richard Burleson Stewart & Jane Bloom Stewart, Fuel Cycle to Nowhere: U.S. Law and Policy on Nuclear Waste 33–34 (2011) (describing the development of the jurisdictional conflict between EPA and AEC, and OMB's role in resolving the dispute).

314 Congress can only limit the President so much before running into constitutional troubles. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting that the relevant question is whether a limitation "impede[s] the President's ability to perform his constitutional duty"). The scope of permissible limitations that Congress can place on the President is beyond the scope of this Article.

determined by reference to the agency's enabling statute. Finally, we take up three applications of this theory.

## A. Rejecting the Binary View in Favor of the Continuum View

Agencies are created by statute. Therefore, the statutory text is the best indicator of congressional intent with respect to how much control the President has any given agency. It should be clear by now that Congress has a menu of options when creating an agency. Congress deploys these various options when designing an agency to structure the agency to be more or less insulated from presidential control. The typical approach of the literature on administrative agencies is to survey the landscape, note the haphazard distribution of indicia of independence, and conclude that there is "no coherent theory of why agencies have been designed to be executive or independent in any particular case."[315] These pieces ignore the fact that the haphazard distribution, which can be seen in Table 8, points to a different theory of administrative agencies.

TABLE 8: AGENCIES BY NUMBER OF INDICIA OF INDEPENDENCE

| Number of Indicia | Agencies |
|---|---|
| 7 | CPSC; FERC; STB; USPS |
| 6 | CFTC; FEC; SEC; Federal Reserve; FLRA; FMC; FTC; MSPB; NTSB; PRC |
| 5 | CFPB; FHFA; NLRB; NRC; Defense Nuclear Facilities Safety Board; EEOC; Farm Credit Administration; FDIC; ITC; National Credit Union Administration |
| 4 | NMB; Chemical Safety and Hazard Investigation Board; Commission on Civil Rights; IPAB; Mine Safety and Health Review Commission; OSHRC; SSA; Advisory Council on Historic Preservation; DOT; Election Assistance Commission; Export-Import Bank; FCC |
| 3 | OSC; African Development Foundation; Federal Retirement Thrift Investment Board; MCC; Overseas Private Investment Corporation; Railroad Retirement Board; SBA; TVA |
| 2 | ACUS; Corporation for National and Community Service; Department of Labor; DOD; DOE; DOJ; EPA; National Capital Planning Commission; National Council on Disability; VA |
| 1 | Department of Agriculture; Department of State; Department of the Interior; Department of the Treasury; DHS; HHS; NEA; NEH; NSF; Office of Government Ethics; OPM; Panama Canal Commission; Pension Benefit Guaranty Corporation; Selective Service |
| 0 | CIA; Department of Commerce; Department of Education; Federal Mediation and Conciliation Service; GSA; HUD; International Broadcasting Bureau; NARA; NASA; Office of the Director of National Intelligence; Peace Corps; U.S. Trade and Development Agency; USAID |

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315 Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 232; *see also* Miller, *supra* note 11, at 51–52 ("It is not entirely clear exactly what features of the independent regulatory commissions are essential and what are merely incidental."); Strauss, *supra* note 12, at 584 ("[R]egulatory and policymaking responsibilities are scattered among independent and [executive branch] agencies in ways that belie explanation in terms of the work agencies do.").

The binary conception of agencies as either "independent" or "executive" is incorrect. As shown in Parts II and III, agencies cannot be divided into two categories based on their common structural or functional features. Of the seven structural features surveyed, none correlates perfectly with another.[316] Not all agencies thought of as independent possess all of the indicia of independence. All of the indicia of independence, with the exception of for-cause removal, are present in agencies thought of as executive as well. And the indicia of independence themselves do not come in one form, but instead have stronger and weaker forms. The binary view forces agencies into one of two categories even though there is no clear dividing line. In doing so, the binary view fails to acknowledge the diversity of agency form.

Instead of falling into two categories, agencies fall along a continuum. All agencies are "subject to presidential direction in significant aspects of their functioning, and [are] able to resist presidential direction in others."[317] The continuum ranges from most insulated to least insulated from presidential control. An agency's place along that continuum is based on both structural insulating features as well as functional realities. And that placement need not be static. It can shift depending on statutory amendments or an increased (or decreased) presidential focus on the agency's mission. On this view, an agency gains the ability to resist presidential influence from its enabling statute, rather than from its classification.

The continuum view provides a simple answer to questions of whether the President can take a certain action with respect to an agency: straightforward statutory interpretation.[318] The President can take any action toward an agency that is within the scope of his Article II powers unless an agency's enabling statute prohibits such action. The President's ability to gain compliance by the agency will vary based on what features the agency's enabling statute contains. For example, it will be easier for the President to secure compliance if he can threaten to fire the agency head, credibly threaten to reduce the agency's budget request during the next budget cycle, or have his Justice Department refuse to represent the agency in litigation before the federal courts. The outer bounds of presidential power (or powerlessness) are set by the Constitution. Congress cannot insulate an agency to the point where the President cannot perform his Article II du-

316 All agencies with for-cause removal protection also have terms of tenure. And all agencies with a bipartisan membership requirement are multimember agencies. Those correlations occur by definition.

317 Strauss, *supra* note 12, at 583.

318 We stress that our theory is about how to *approach* questions of the relationship between the President and a given agency. The answers will depend not only on the facts but also on the interpretive philosophy—textualism, purposivism, etc.—used.

ties.[319] Similarly, the President cannot go beyond his Article II powers when interacting with an agency.[320] But beyond those Article II issues, other questions can and should be resolved through basic statutory interpretation.

### B. Debunking the Constitutional Status of Independent Agencies

Even though the so-called independent agencies do not share a common form, they have gained constitutional status as a "[f]ourth [b]ranch" due to enduring dicta in *Humphrey's Executor*.[321] The content of that status is unclear, but the basic idea seems to be that because these agencies are outside the executive branch, the President cannot constitutionally attempt to interfere with these agencies' decisions. Affording a constitutionalized status to independent agencies is improper. There is no basis for doing so, and there is no reliable way to define what that status means or what protections it brings.

In *Humphrey's Executor*, the Court found that Congress's purpose in granting the FTC for-cause removal protection was to make it to-

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319 There is an ongoing debate over how much of the President's Article II powers Congress can limit. *See generally* CALABRESI & YOO, *supra* note 47, at 55 (arguing that the executive power, which includes the removal power, lies completely with the President); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (arguing that Congress's restriction of the executive branch is more radical than its restrictions on the federal judiciary, even though Congress is supposedly coequal to both); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (arguing against absolute presidential control over the executive branch); Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757 (1979) (examining the inconsistencies between the "active theory" of executive control and actual administrative practices, and presenting an alternative "passive theory" of limited executive supervision of independent executive officers); Lessig & Sunstein, *supra* note 100, at 2 (attempting to reconcile the unitary executive structure with historical framework and intent); Miller, *supra* note 11, at 44 (supporting presidential removal power when an official has "refused an order of the President to take an action within the officer's statutory authority"). We do not take sides on this debate in this Article.

320 There is also an ongoing debate over the level of authority the President has to direct the executive branch. *See generally* CALABRESI & YOO, *supra* note 47 (discussing the scope and exercise of the power of the unitary executive throughout presidential history); Kagan, *supra* note 24 (asserting that delegation to an executive officer should be read as Congress allowing the President to assert direct authority over agency policymaking); Lessig & Sunstein, *supra* note 100 (noting that recent case law leaves ambiguous the relationship between the President, executive agencies, and independent agencies); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (challenging the idea that delegations of power to executive branch officials impliedly delegate that power to the President as well); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997) (admonishing presidents who publicly behave as if agency "rulemakings were [their] rulemakings"). Again, we do not take sides on this debate in this Article.

321 *See supra* note 40 and accompanying text.

tally "free from executive control."[322] That logic is flawed because the Court's view of congressional purpose is not reflected in agencies' enabling statutes. First, as explained in Parts II.A and III.B, for-cause removal protection does not result in full insulation from the President. For-cause removal still allows for removal in some cases, and the President can influence those agencies in a whole host of ways. Second, if Congress intended to divide the administrative state into two types of agencies, then the matrices created in Part II would reflect that clear division. Instead, they paint a more complex portrait of agency design.

*Humphrey's Executor*'s logic is also underinclusive. Other indicia of independence can have weighty implications for the relationship between an agency and the President. If for-cause removal provisions create a separate constitutional status for some agencies, there is no compelling reason why other indicia could not do so as well. To argue otherwise, one must demonstrate that for-cause removal is in all instances a more significant constraint on presidential authority than any other indicia of independence and that its presence is significant enough to create a branch of government not contemplated by the text of the Constitution.

One counterargument is that while for-cause removal alone may not justify constitutional status, some other combination of features might. But there is no combination that would capture all of the agencies currently considered to be independent without sweeping in a whole host of other agencies. For example, the set that possesses two other features commonly associated with independence—a multimember structure and heads who serve for a term of years—includes agencies such as the Advisory Council on Historic Preservation, the Defense Nuclear Safety Facilities Board, the Farm Credit Administration, the National Credit Union Administration, the Railroad Retirement Board, and others.[323] These agencies are not typically considered independent.[324] And if more features are required for independent agency status, more agencies commonly considered independent will be left out of the set. Salvaging the binary view is simply not worth the effort.

A further complication is that most indicia of independence have weak and strong forms. For example, within the set of agencies that have specified terms of tenure, the agencies with longer terms of ten-

322 295 U.S. 602, 628 (1935).

323 *See supra* Tables 2–3.

324 As we have explained, there is no consensus list of agencies "considered to be independent." So we use the Paperwork Reduction Act definition as a baseline for which agencies are commonly considered independent. *See* 44 U.S.C. § 3502(5) (2006); *supra* note 65 and accompanying text.

ure are more insulated from presidential control than agencies with shorter terms.[325] And within the set of agencies that enjoy independent litigation authority, some agencies are permitted to initiate litigation without prior DOJ approval, some may litigate only if the DOJ declines to litigate the case itself, and some may not litigate even when the DOJ declines to do so.[326] If one were to ascribe constitutional significance to a particular measure of independence, one would also need to specify what form of that measure is sufficient to trigger constitutional status.

For this reason, if for-cause removal can somehow create an entity outside the President's Article II power, then other statutory indicia of independence should as well. As Table 9 shows, only thirteen of the eighty-one agencies studied have none of the seven structural indicia of independence. Taken to its most extreme conclusion, the logic of *Humphrey's Executor* would upset the traditional understanding of presidential power, turning most of the administrative state into agencies constitutionally protected from presidential control.

TABLE 9: THE DISTRIBUTION OF INDICIA OF INDEPENDENCE ACROSS AGENCIES

| **Number of Indicia of Independence Possessed** | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|---|---|
| **Total Number of Agencies** | 13 | 14 | 10 | 8 | 12 | 10 | 10 | 4 |

Some might respond, "So what?," and argue that this data simply shows that more agencies should be considered independent than previously were. The problem with that argument is that there must be a basis for a default rule that favors sweeping more agencies under the "independent" heading. The *Humphrey's Executor* dicta creates a strange parallel set of constitutional default rules for agencies. For executive agencies, the default is set in favor of presidential supervisory power. This default stems from the Vesting and Take Care Clauses in Article II.[327] To be sure, Congress can circumscribe the

[325] *See supra* notes 114–24 and accompanying text.

[326] *See, e.g.*, 7 U.S.C. § 13a-1(a), (f), (g) (2006) (providing that the CFTC may pursue enforcement actions itself if it keeps the DOJ informed or may request that the DOJ pursue actions on its behalf); 15 U.S.C. § 2076(b)(7) (2006) (allowing the CPSC to represent itself only if the DOJ does not choose to do so within forty-five days of receiving a request from the CPSC); 33 U.S.C. § 1366 (2006) (requiring the EPA to request representation by the Attorney General in civil and criminal actions under the Clean Water Act but allowing it to represent itself if the DOJ declines to appear); 42 U.S.C. § 7171(i) (2006) (providing that the FERC may represent itself in all actions, except before the Supreme Court).

[327] U.S. CONST. art. II, § 1, cl. 1; *id.* § 3; *see* CALABRESI & YOO, *supra* note 47, at 316 (noting that the Vesting and Take Care Clauses "give the [P]resident power over removals and law execution").

President's power by statute.[328] But when it does so, it must speak clearly in order to avoid separation of power concerns.[329] Courts will construe statutes to avoid interpretations that would result in an impermissible encroachment on presidential power.[330] For so-called independent agencies, the default is set against presidential supervisory power. To change the default rule and erect a constitutional barrier between the President and an agency, all Congress has to do is grant an agency head for-cause removal protection. This barrier, though strong, is undefined and without a basis in statute. This reversed default makes sense only if there is some competing constitutional basis for it that is similar to the separation of powers concern that animates the clear statement rule against interference with executive power. To state the issue in these terms is enough to refute it.

Even if we could assume that there is some set of agencies whose structures qualify them for constitutional status, nothing in the constitutional text or the *Humphrey's Executor* decision offers guidance on what level of presidential control (if any) is permissible. After *Humphrey's Executor*, independent agencies came to be treated as a "headless 'fourth branch'" of government, meant to be independent from all Presidential control.[331] The early practice of "both Presidents and Congress [was to treat] these agencies . . . as entities outside the executive branch, whose officers the President does not supervise."[332] As described in Part III.B, this early practice gave way to more active presidential oversight of independent agencies. Presidents use tools such as budgetary promises, publicity, and friendship to persuade independent agencies to produce policies in line with their prefer-

328 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."); *see also* Strauss, *supra* note 12, at 649 (explaining that Congress can, by statute, choose to place the responsibility for decisions with the agency rather than the President).

329 *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *see also* Pub. Citizen v. U.S. DOJ, 491 U.S. 440, 466–67 (1989) (construing the Federal Advisory Committee Act not to apply to the DOJ's use of the ABA during the judicial nomination process to avoid the question of whether that application would "infringe[ ] unduly on the President's Article II power to nominate federal judges and violate[ ] the doctrine of separation of powers").

330 *See, e.g.*, *Pub. Citizen*, 491 U.S. at 466.

331 The Brownlow Commission coined the term. *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 40 (1937) (internal quotation marks omitted).

332 Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 512 (1987).

ences.[333] The problem is that it is unclear whether such persuasion is constitutional given the *Humphrey's Executor* dicta.

The unclear nature of what constitutionally permissible actions a President can take with respect to an independent agency was on display during the recent oral argument in *Free Enterprise Fund*. Chief Justice John Roberts stated: "[I]t's very hard to find out exactly what [the President's authority over an independent agency] is."[334] Justice Scalia argued that the President could have no interaction with independent agencies because the "whole purpose" of an independent agency is "to be independent from the President."[335] He stated his belief that if the President told an independent agency, such as the FCC, that he wanted them to rule a certain way, the result would be "an impeachment motion in Congress."[336] And Justice Kennedy asked if respondent's counsel was encouraging the President to, "on an ongoing, daily basis, . . . instruct an independent agency what he wants done."[337] Of course, questions at oral argument are not constitutional doctrine, but the questions indicate that independent agencies are seen as having a constitutional status that limits the President's ability to supervise their activities.[338] The questions also demonstrate that there is no consensus on what limits on presidential interference come with status as a fourth branch, which is unsurprising given the slim doctrinal basis for that status.

We therefore conclude that the *Humphrey's Executor* dicta should be abandoned. It rests on a flawed understanding of the ways Congress insulates agencies from presidential control. The subsequent significant expansion of the administrative state and increased complexity of the President's relationships with administrative agencies underscore the untenable logic of the *Humphrey's Executor* dicta. To be clear, we are not arguing that the holding of *Humphrey's Executor* should be overruled on the ground that Congress cannot constrain the President's power over administrative agencies. That argument is alive and kicking,[339] but it is not one we endorse. The argument is made by those who espouse the "unitary executive" theory, which holds that Article II "is a grant to the president of all of the executive power, which includes the power to remove and direct all lower-level

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333 *See supra* notes 301–04 and accompanying text.

334 Transcript of Oral Argument at 62, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861) (question of Roberts, C.J.).

335 *Id.* at 60.

336 *Id.*

337 *Id.*

338 For academic discussions on the permissible extent of presidential influence over independent agencies, see *supra* notes 59–62 and accompanying text.

339 Judge Kavanaugh recently laid out a strong defense of the argument. *See In re* Aiken Cnty., 645 F.3d 428, 438–48 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

executive officials."[340] Instead, we accept that, within limits, Congress can by statute impose certain constraints on the President's exercise of his Article II powers.[341] Our argument is simply against fashioning a constitutional doctrine that would bootstrap onto a statutory constraint a set of other constraints not specified in that statute.

### C. Applications

This Article's theory of agency independence may seem at first like a definitional quibble, but it has some important implications. First, we believe a line of precedents that imply for-cause removal protection into silent statutes is incorrect because there is no basis for inferring that the presence of one feature of independence indicates congressional intent to include another. Second, agencies have no basis for asserting independence from presidential control beyond that granted to them by statute. Third, we believe that under the statutory and constitutional arguments made above, the President clearly may require the so-called independent agencies to participate in the regulatory review process run by OIRA. We address each of these implications in turn.

#### 1. Wiener *and Implied For-Cause Removal Protection*

There is a line of cases that permits the implication of for-cause removal protection from other statutory indicia of independence. The assumption underlying these cases is that if an agency possesses certain indicia of independence, Congress intended for others to exist as well. But there is no statutory or constitutional basis for that assumption.

In *Wiener v. United States*, the Court implied for-cause removal protection for members of the War Claims Commission.[342] The Commission was created in 1948, and a built-in sunset provision provided for the dissolution of the Commission three years after the time limit for filing claims ran.[343] The statute was silent on removal.[344] The case arose when President Eisenhower requested Commissioner Wiener's resignation and removed Wiener after he refused.[345] Wiener then sued for back pay.[346] The Court acknowledged that there was no

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340 Calabresi & Yoo, *supra* note 47, at 3–4. For a comprehensive explanation of the theory, see generally *id.*

341 Determining the permissible contours of these constraints is outside the scope of this Article.

342 357 U.S. 349, 354 (1958) (holding that the structure of the War Claims Act left "no doubt" that Congress did not intend for the President to have at-will removal power).

343 *See id.* at 350.

344 *See id.*

345 *See id.*

346 *See id.* at 350–51.

doubt that Congress was aware of the decision in *Humphrey's Executor*, but it described *Humphrey's Executor* as dividing agencies into those whose functions are executive in nature and those whose functions require "absolute freedom from Executive interference."[347] The Court concluded that because the Commission was an adjudicatory body and was separate from any existing executive agency, statutory silence did not implicitly confer removal power on the President.[348] Instead, the Commissioners enjoyed implicit for-cause removal protection.

Since *Wiener*, lower courts have similarly assumed that the FEC and the SEC enjoy for-cause removal protection despite the lack of a for-cause removal provision. In *SEC v. Blinder, Robinson & Co.*, the Tenth Circuit accepted the argument that the SEC is "commonly understood" to possess for-cause removal protection.[349] In *FEC v. NRA Political Victory Fund*, the D.C. Circuit assumed from the structure and mission of the FEC that its Commissioners enjoyed for-cause removal protection.[350] In that case, the plaintiffs challenged the FEC's actions on the grounds that because the agency's enabling statute did not mention removal, the commissioners served at will. Because the agency took enforcement actions without presidential oversight, the plaintiffs argued that the agency was acting unconstitutionally.[351] The D.C. Circuit rejected the challenge and explained that the FEC was "patterned on the classic independent regulatory agency."[352] It conceded that silence could mean at-will removal, but agreed with the FEC that it could "safely assume" FEC commissioners enjoyed for-cause removal protection because it was "implied by the Commission's structure and mission as well as the commissioners' terms."[353]

These cases were incorrectly decided because their central premise—that the presence of certain features of independence is evidence of congressional intent to endow an agency with other features of independence—is wrong. As demonstrated in Part II, there is only one feature of independence that is perfectly correlated to another: for-cause removal protection is always accompanied by a set term of tenure. However, the relationship does not hold in the opposite direction. A set term of tenure does not always correspond to for-cause removal protection. For example, the heads of the National Endowments, the Office of Personnel Management, the FBI, the Advisory Council on Historic Preservation, and the Farm Credit Administration

347 *Id.* at 353.
348 *See id.* at 354.
349 855 F.2d 677, 681 (10th Cir. 1988).
350 *See* 6 F.3d 821, 826 (D.C. Cir. 1993).
351 *See id.*
352 *Id.*
353 *Id.*

all serve for a term of years with no statutory removal protection.[354] Therefore there is no statutory basis for implying for-cause removal protection from a set term of years.

Furthermore, there is good reason to believe that Congress intentionally choses not to endow agencies with removal protection. With respect to the SEC and the FCC, Congress created these agencies in between the *Myers v. United States* and *Humphrey's Executor* decisions, during "a time when, under this Court's precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause."[355] One might argue this is proof that Congress would have included for-cause removal protection had it been able to. But of course, the proper recourse for Congress in that case would have been to amend the statutes, something it has done twelve times for the SEC and twenty-one times for the FCC since *Humphrey's Executor*.[356] After *Humphrey's Executor*, Congress created some agencies with for-cause removal protection, like the NLRB and the FERC, and some without, like the FEC, the CFTC, and the EEOC.[357] When properly viewed in context, the presence or absence of a removal provision looks more like a deliberate choice than a drafting error.

Yet another fact refutes the central assumption of that line of cases. As explained above,[358] a term of tenure does affect the president-agency relationship. It constrains presidential control over an agency even in the absence of a for-cause removal provision. Congress thus could rationally decide to give an agency the amount of independence that comes with a term of tenure but not the additional independence that for-cause removal protection provides.[359]

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354 *See supra* Table 2.

355 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3183 (2010) (Breyer, J., dissenting).

356 For these numbers, we counted the number of times the provision establishing the membership of the agency was amended since 1935, relying on the revision notes accompanying the current statutory provisions. *See* 15 U.S.C. § 78d (2006) (SEC); 47 U.S.C. § 154 (2006) (FCC).

357 *See supra* Table 1.

358 *See supra* Part II.B.

359 Professor Adrian Vermeule, in a recent piece, argues that agencies gain independence by "convention," meaning the history of interactions between the President and an agency. *See* Adrian Vermeule, Conventions of Agency Independence 23–40 (July 10, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103338. This is similar to our argument in Part III that agencies have functional, as well as formal, measures of independence. He believes that *Wiener* should be limited to its facts. *See id.* at 6. But he goes on to argue that in some cases, it is appropriate for courts to "implicitly recognize[e]" those conventions, as he believes the Court did in the *Public Co. Accounting Oversight Board* decision when it assumed that SEC Commissioners enjoy for-cause removal protection. *See id.* at 41–42. We disagree. While Vermeule does not delineate the contours of such an implicit recognition, it would suffer from the same problems as implying removal protection into a statute. There is no explanation of what amount of convention would be enough to allow a court to recognize it. Moreover, even if there were

The cases that imply for-cause removal protection from other indicia of independence are not grounded in statutory text, historical context, or a tenable theory of congressional intent.[360]

2. *Broader Assertions of Independence*

Beyond its infidelity to statutory text and historical context, the logic of the *Wiener* decision invites another problem. It gives agencies a hook on which to hang claims of independence from presidential control that go beyond their enabling statutes. The *Wiener* Court read the dicta from *Humphrey's Executor* as drawing "a sharp line of cleavage between" agencies headed by officials removable at will and those headed by officials removable only for cause.[361] That "sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."[362] As explained in Part IV.A, this binary view of agencies is incorrect. Agencies instead fall along a spectrum. But *Wiener* implies that if an agency has a for-cause removal protection provision, it can claim for itself additional protections to achieve that "absolute freedom" from presidential control.[363]

Even before *Wiener*, agencies deployed similar logic to resist presidential attempts to include them in efforts to reform the bureaucracy. For example, the Budget and Accounting Act of 1921 gave the President the power to require agencies to submit budget requests for inclusion in a comprehensive budget proposal.[364] As one member of Congress noted, "[i]t was clearly the intent of Congress to include [independent agencies] within the budgetary provisions . . . ."[365] Yet, another representative stressed that some agencies cited *Humphrey's Executor* and "shrugged their shoulders and said, 'We are not under any budgetary control,' quoting that case."[366] Congress amended the Act at President Roosevelt's request to explicitly include those agencies in 1939.[367] Even after that, the FTC and the SEC again asserted the ability to present budget requests directly to Congress.[368] The

an explanation, it is unclear why the courts must enforce a convention that is also enforced through political mechanisms when there is no statutory basis for doing so.

360 For an argument that later cases have limited *Wiener*'s precedential value, see Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 787–90 (2013).

361 Wiener v. United States, 357 U.S. 349, 353 (1958).

362 *Id.*

363 *See id.*

364 *See supra* note 197 and accompanying text.

365 84 CONG. REC. 2306 (1939) (statement of Rep. John Cochran).

366 84 CONG. REC. 2315 (1939) (statement of Rep. Lindsay C. Warren).

367 *See supra* note 198 and accompanying text.

368 *See* Krock, *supra* note 56, at 22 ("The F.T.C. Chairman construed the latitude Congress assigned to his unit when creating it to cover the right of the commission to appeal to Congress for funds the [Budget Bureau] had refused to include in an annual Presidential budget.").

SEC and the FTC claimed that their enforcement duties, mandated by Congress, required certain information from businesses and industries, and therefore they were exempt from early executive branch efforts to control the paperwork burdens agencies imposed on regulatory entities under the Federal Reports Act.[369] The OMB "was not inclined to make a head-on confrontation,"[370] but later versions of the statute explicitly included those agencies.[371] And when President Carter proposed an executive order that would require agencies to write regulations in plain English and submit semiannual regulatory agendas to allow for public comment, the SEC and other so-called independent agencies were vocal opponents. They argued that "the order usurp[ed] Congressional powers to oversee the agencies."[372] The General Counsel of the SEC wrote a twenty-four page "declaration of independence" that "warned that the order could set a precedent that might undermine the agency's independence."[373] While we do not take issue with agencies arguing for independence on policy grounds, as a legal matter these arguments have no merit. Agencies enjoy protections from presidential power only to the extent the power is limited by Article II or the agencies' enabling statutes.

### 3. *OIRA Review of Agency Regulations*

The debate over whether the President can require so-called independent agencies to comply with executive orders governing regulatory review is as old as the executive orders themselves. These executive orders contain three main requirements. First, executive agencies must prepare and submit a cost-benefit analysis of all major regulations to OIRA within the OMB.[374] Second, executive agencies must also develop a plan for retrospective review of existing regulations.[375] Third, both executive and independent agencies must submit an annual regulatory plan detailing all regulations underway or planned for review by OIRA.[376] Eight presidents have now embraced

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369 *See* COMM'N ON FED. PAPERWORK, THE REPORTS CLEARANCE PROCESS: A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK 43 (1977).

370 *Id.*

371 *See, e.g.*, Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3502, 3507(f) (2006) (including independent agencies but creating a process for agency bypass of OMB denials).

372 Judith Miller, *Congress Resisting Plans for Agencies*, N.Y. TIMES, Mar. 14, 1978, at 23 (noting similar objections of the FTC, ICC, and CPSC).

373 *Id.*

374 *See* Exec. Order No. 12,866, § 1(b)(6), 3 C.F.R. 638, 639 (1994).

375 *See* Exec. Order No. 13,563, § 6, 76 Fed. Reg. 3821 (Jan. 18, 2011). The goal of retrospective review is to determine "whether any such regulations should be modified, streamlined, expanded, or repealed." *Id.* § 6(b). A second executive order stated that the independent agencies "should" prepare retrospective review plans. Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011).

376 *See* Exec. Order No. 12,866, § 4(b), 3 C.F.R. 638, 642. President Clinton required participation of the independent agencies in the regulatory planning process. *See id.* Presi-

regulatory review as an important executive tool in the modern administrative state, yet they were unwilling to require that independent agencies comply with the regulatory review executive orders.[377]

The hesitation to include independent agencies in regulatory review stems from two related issues. The first is the legal debate over whether the President has the authority to review actions by independent agencies.[378] The second is the political cost of doing so in light of the legal uncertainty, which risks provoking a fight with Congress over control of these agencies.[379] We believe the answer to the legal question is clear. Because Congress has not by statute insulated the so-called independent agencies from regulatory review, the President can require them to comply with the governing executive orders. The President can, of course, decline to do so if he decides that the political costs of doing so are not worth the benefits. We take up each argument in turn.

The argument against presidential authority to require independent agencies to comply with the regulatory review executive orders takes two forms. The first argument is that the constitutional status of independent agencies insulates them from such control. When President Ford issued Executive Order 11,821 in 1974, which required agencies to prepare "inflation impact statements" for all major regulations in compliance with procedures developed by the OMB,[380] the executive order applied to every "executive branch agency."[381] A number of agencies refused to comply, including the CPSC, FTC, FCC, SEC, Federal Reserve Board, ICC, ITC, and the PRC.[382] Their argument for exemption was based on dicta in *Humphrey's Executor* that stated that agencies with for-cause removal protection were

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dent Reagan had declined to do so. *See* Exec. Order No. 12,498, § 1, 3 C.F.R. 323, 323 (1986), *reprinted in* 5 U.S.C. § 601 (1988) (holding only executive agencies subject to the order), *repealed by* Exec. Order No. 12,866, 3 C.F.R. 638, *reprinted as amended in* 5 U.S.C. § 601 (2006).

377 For a summary of the development of centralized regulatory review from the Nixon administration to the Obama administration, see REGULATORY ACCOUNTABILITY ACT OF 2011, H.R. REP. NO. 112-294, at 18–22 (2011).

378 *See* Barkow, *supra* note 9, at 31–32 ("It is an open constitutional question whether the President could require traditional independent agencies . . . to submit cost-benefit analyses of proposed regulations to OIRA for review, or if Congress has the power to prevent such review.").

379 *See id.*; *see also* Memorandum from Larry L. Simms, Acting Assistant Att'y Gen., Office of Legal Counsel to David Stockman, Dir., Office of Mgmt. and Budget, at 7–8 (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. 158–59 (1981) (claiming that an attempt to subject independent regulatory agencies to cost-benefit-analysis requirements would be "very likely to produce a confrontation with Congress").

380 *See* Exec. Order No. 11,821, 3 C.F.R. 926, 926 (1974).

381 *Id.*

382 *See* Charles W. Vernon, III, Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 AM. U. L. REV. 1138, 1151–52, 1152 n.87 (1977).

meant to be totally free from presidential control.[383] Perhaps because of the response of these agencies, President Carter solicited public comments on a proposal that later became Executive Order 12,044.[384] The independent agencies sharply contested the President's ability to require them to participate.[385] Members of Congress argued that independent agencies were "arms of Congress" and that the President could not lawfully apply the executive order to them.[386] In the end, President Carter exempted these agencies to avoid "a confrontation with Congress over the applicability of the order to the independent regulatory agencies."[387] The question arose again when President Reagan expanded the regulatory review program. His Department of Justice concluded that he could require independent agencies to participate, but only if the Supreme Court was willing to retreat from the *Humphrey's Executor* dicta that denied the President any influence over those agencies.[388] Like Carter, Reagan decided to exclude those agencies from the scope of his executive order.[389] A similar discussion occurred during the Clinton Administration, and President Clinton also exempted independent agencies.[390] If, as we explain above, the *Humphrey's Executor* dicta is wrong because it relies on a flawed binary understanding of the administrative state, then the constitutional argument against including independent agencies in the regulatory review requirements also fails.

The second argument is that any requirement would be empty because the President could not fire the head(s) of an agency who

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383 *See id.* at 1151–53.

384 *See* Moreno, *supra* note 24, at 494–95.

385 *See supra* notes 372–73 and accompanying text.

386 Summary and Analysis of Public Comments, 43 Fed. Reg. 12,665, 12,670 (Mar. 24, 1978) (noting that some members of Congress stated that the President could not subject independent agencies to regulatory review); *see also* Martin Tolchin, *Carter Orders Agencies to Cut Out the Jargon*, N.Y. TIMES, Mar. 24, 1978, at A12 (quoting a letter from twelve "chairmen and ranking Republican members of Senate committees that oversee regulatory issues" and arguing that applying the executive order to these agencies would be unlawful because it would "violate the intent of Congress that the executive branch not control the rules these agencies issue").

387 Summary and Analysis of Public Comments, 43 Fed. Reg. at 12,670. The Justice Department told President Carter that most of the executive order could be applied to these agencies. *See id.*

388 *See* Memorandum from Larry L. Simms to David Stockman, *supra* note 379, at 9–12 ("We believe that the foregoing constitutional and statutory analysis supports the application to the independent agencies of those portions of the Order that would be extended to them.").

389 *Cf.* Exec. Order No. 12,498, § 1, 3 C.F.R. 323, 323 (1986) (requiring "each Executive agency" to submit reports to the OMB).

390 *See* Sally Katzen, Remarks at the Congressional Research Service Symposium on Presidential, Congressional, and Judicial Control of Rulemaking 20 (Sept. 11, 2006) (transcript on file with authors) ("We reconsidered the question and chose not to do it . . . . It's not one based on the law. I think we had the authority; I think it's purely a question of desirability.").

refused to comply because doing so would violate the for-cause removal provision. One response to this argument is that failure to engage in regulatory review permits removal because it is "inefficiency" or "neglect of duty."[391] Professors Robert Hahn and Sunstein have made this argument, apparently because they view cost-benefit analysis as a basic requirement of rational regulation. [392] However, they do not explain why—even assuming the statutory language can be twisted to reach this result—agency heads must comply with the President's regulatory review program to avoid being removed instead of simply instituting their own review program. Our argument is simpler and flows from the theory of executive power developed in Part IV.A. Presidents can require all agencies to participate in the OIRA-led regulatory review process because there is no statutory bar prohibiting them from doing so. They may enforce that requirement using all of the traditional tools of presidential oversight. It is likely that a President could fire an agency head who refused to comply with regulatory review without a basis in statute,[393] but we do not take a position on that issue. In any case, the focus on removal power is unhelpful. Removal is a blunt instrument. If an agency is not exempted from regulatory review, the President has tools other than removal, described in Part III.B.3, to ensure that agencies comply with the regulatory review orders.

The lack of a clear answer to the legal question raises the political costs to the President of subjecting these agencies to the regulatory review executive orders. Congress historically viewed independent agencies as "arms of Congress," meaning that any attempt by a President to exert authority over the agencies might provoke a costly political fight.[394] As we have explained, Congress's position lacks a sound legal basis, and deference to the "arm of Congress" view is unwarranted. As a policy matter, it is also unsound for the President to keep exempting independent agencies from the regulatory review program. These agencies have issued and will continue to issue regula-

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391 *See* Hahn & Sunstein, *supra* note 14, at 1535 ("If agencies proceed when the benefits do not exceed the costs, they might reasonably be thought to be acting 'inefficiently.'").

392 *See id.* at 1531–37 (concluding that inclusion of the independent agencies within OIRA regulatory review would be lawful).

393 *Cf.* Morrison v. Olson, 487 U.S. 654, 692 (1988) (stating that a "good cause" limitation on removal power still allows the President to ensure that the appointee "is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [relevant] Act").

394 Summary and Analysis of Public Comments, 43 Fed. Reg. 12,665, 12,670 (Mar. 24, 1978); *see* Memorandum from Larry L. Simms to David Stockman, *supra* note 379, at 7–8 ("[A]n attempt to infringe the autonomy of the independent agencies is very likely to produce a confrontation with Congress, which has historically been jealous of its prerogatives with regard to them.").

tions that impose significant costs on the economy, just as executive branch agencies do. Not only do so-called independent agencies impose great costs on regulated entities, they often do so with little analysis of those costs or alternatives during the drafting process.[395] If regulatory review is a good practice for agencies traditionally considered to be part of the executive branch, as Presidents have recognized for more than three decades, it is also a good practice for agencies that have traditionally been regarded as independent.

One counterargument is that Congress might legislate against a background assumption that the President could not include certain agencies within the regulatory review program.[396] Congress might not have delegated certain powers to an agency, or might have included additional safeguards, had it known that greater presidential involvement was possible or probable.[397]

This counterargument comes in two forms. One assumes that Congress created a set of agencies that it meant to be insulated from regulatory review. As explained above, this view of congressional purpose is not reflected in the agencies' enabling statutes. Congress did not create two categories of agencies, so there is no principled basis for stating that Congress meant for one set of agencies to be free from regulatory review. And because no measure of independence is perfectly correlated to another, there is also no plausible argument that because Congress insulated an agency in one way it also meant for that agency to be free from regulatory review.

The other form of this argument relies on dicta from *Humphrey's Executor* stating that independent agencies are totally insulated from presidential control as a background rule. Under this version, the

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395 *Cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 15, 37–39 (2011) (finding that rules promulgated by independent agencies under Dodd-Frank do not meet the standards set out in *OMB Circular A-4*, which "serves as best practices for conducting regulatory analysis"); OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 31 (2011) (noting that it "would be desirable to obtain better information on the benefits and costs of the rules issued by independent regulatory agencies" and that the "absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy").

396 *Cf.* Kagan, *supra* note 24, at 2327 (arguing that Congress chooses between delegating power to an executive or an independent agency based on the desired level of presidential oversight).

397 This argument would apply to all pre-OIRA delegations of power to executive agencies as well. Regulatory review requires a cost-benefit analysis for all major agency regulations. Before regulatory review existed, Congress presumably legislated with the background assumption that, though the President could influence executive agencies, he did not have the capacity to do so methodically. Congress might not have delegated as much authority to executive agencies had it known that the President would be able to assert some greater control over those agencies (thereby decreasing congressional control in comparison) through regulatory review.

President could subject agencies created between *Myers* and *Humphrey's Executor* to regulatory review because Congress was not acting against that background rule, but could not subject agencies created after *Humphrey's Executor* to regulatory review. But this version has the same flaws as the first. If Congress thought that the default rule was freedom from presidential supervision, then the statutes would reflect that. There would be no need to exempt agencies with for-cause removal protection from presidential legislative review or control, for example. Because Congress did exempt some of those agencies, the statutes more likely reflect a congressional understanding that the default is set in favor of presidential control. There is no reason regulatory review should be different. In response to past assertions of executive power, such as centralized control over legislative comments and testimony, Congress exempted some agencies by statute.[398] Congress can, of course, do the same here.

The Federal Reserve presents the hardest case because it possesses almost all of the indicia of independence studied here (and some that are not).[399] The Federal Reserve's market actions do not meet the definition of "regulations" and would not be subject to regulatory review, but its new duties under the Dodd-Frank Act do meet the definition. Most believe that the Federal Reserve is designed to be independent, so the congressional intent argument is most compelling for an agency like this. But here again, a look at the statute shows that Congress took the time to exempt the Federal Reserve from centralized presidential control over litigation and congressional communications. Again, the statute is evidence that even for an agency like the Federal Reserve, Congress does not believe the default rule is total freedom from presidential control. Finally, just because presidents can assert more influence over an agency such as the Federal Reserve under our theory does not mean that they will. If interfering with the Federal Reserve is bad policy (and bad politics), there is little reason to believe a President would do so.

Our argument has focused on regulatory review, but it has broader implications for presidential management of the administrative state. From centralized budget control, to centralized communi-

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398 *See, e.g.*, Act of Oct. 28, 1974, Pub. L. No. 93-495, § III, 88 Stat. 1500, 1506 (codified as amended at 12 U.S.C. § 250 (2006)) (exempting the SEC, Federal Reserve, FDIC, and various other agencies regulating financial institutions from centralized clearance of legislative proposals, testimony, and comments); Trade Act of 1974, ch. 36, § 175(a)(1), 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2232 (2006)) (requiring the President to submit budget requests of the International Trade Commission to Congress without revision).

399 The Federal Reserve has an independent funding stream that does not depend on the annual appropriations process. *See* 12 U.S.C. § 243 (2006). For a list of other agencies with this feature, see U.S. GEN. ACCOUNTING OFFICE, GAO-02-864, SEC OPERATIONS: IMPLICATIONS OF ALTERNATIVE FUNDING STRUCTURES 2 (2002).

cations with Congress, to OMB resolution of interagency disputes, to regulatory review, the history of the presidency has been one of managerial innovation. The administrative state is large and growing, and our hope is that future presidents will not limit their attempts to improve agency oversight to only executive agencies.

We recognize that some might be troubled by our view, which permits the President to exercise, or at least attempt to exercise, more control over agencies that most believe should operate independently. Our goal is to break down the binary view of agencies and to rebut the constitutional status of independent agencies. This shift in thinking about the relationship between the President and the administrative agencies leaves much of the status quo in place. Imagine a scenario where the President wants to tell an agency what to do. Under our view, an agency that disagrees can respond in several ways. The agency can point to a for-cause removal protection clause. The agency can threaten to publicize the suggestions, pointing to a longstanding tradition of independence. The agency can claim the relevant statute delegates authority to the agency but not the President.[400] Or the agency can simply stand its ground based on a policy disagreement. In each of these cases, the President can press on and attempt to bring the agency around to his view. Whether presidents do so will depend on how much political capital they are willing to spend rather than how the agency is categorized. Our view does not upend the administrative state. It merely offers a theory of administrative agencies that has a basis in statutory text rather than unfounded assumptions about congressional purpose.

## Conclusion

This Article began with a basic question: What is the basis for classifying agencies as either independent or executive? It turns out, contrary to the almost universal understanding of agencies, that there is no binary distinction between agency types. Indeed, there is no single feature that every agency commonly thought of as independent shares, not even a for-cause removal provision. Agencies fall along a spectrum ranging from more insulated to less insulated from the President. Once agencies are understood in this way, the flaws in the current theory and doctrine surrounding independent agencies become clear. There is no perfect correlation between any two features of independence, other than for-cause removal and a term of tenure, so there is no reason to infer additional, unwritten limitations on presi-

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400 *See* Stack, *supra* note 320, at 280–81, 284–91, 294–96 (arguing that Congress meant to exclude consideration of presidential preferences from some agency decisions because some statutes state that an agency's action is subject to presidential approval while others do not).

dential control from the presence of any given limitation. And there is no reason to infer a constitutionally based measure of independence from the presence of a statutory measure of independence. The degree of independence from presidential control an agency enjoys should be determined only by looking at the agency's enabling statute.