THE FLIP SIDE OF REMOVAL: BRINGING APPOINTMENT INTO THE REMOVAL CONVERSATION

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INTRODUCTION

In July of 2010, the Supreme Court did something it hadn't done since the Coolidge Administration: strike down a statute for unconstitutionally restricting the President's power to remove his subordinates. Judge Brett Kavanaugh of the D.C. Circuit noted the moment's significance, calling the case "the most important separation-of-powers case regarding the President's appointment and removal powers . . . in the last 20 years."[1] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held by a five-to-four majority that certain provisions from the Sarbanes-Oxley Act[2] unconstitutionally restricted the President's power to fire members of the Public Company Accounting Oversight Board, a regulatory body created by Sarbanes-Oxley.[3]

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1. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
2. Sarbanes-Oxley Act of 2002 §§ 101, 107, 15 U.S.C. §§ 7211, 7217 (2006).
3. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3154 (2010).

The Supreme Court has considered the President's removal authority only a handful of times. The first case to address the issue was *Myers v. United States*, decided in 1926, in which the Court held that the Appointments Clause[4] prevented Congress from restricting the President's authority to remove a postmaster.[5] Ten years later, the Court significantly limited *Myers*' reach: in *Humphrey's Executor v. United States*, the Court held that no constitutional principle prevented Congress from creating independent agencies whose principal officers could be removed only upon a showing of good cause.[6] As recently as 1988, the Court reaffirmed that *Humphrey's Executor* remained good law.[7] Despite the majority's protestations to the contrary,[8] *Free Enterprise Fund* has called this entire line of jurisprudence into question.[9]

What the *Free Enterprise Fund* majority ignores is that the office of the Presidency in 2010 is fundamentally different from that office in 1926. To the extent that the Court is concerned with removal restrictions limiting the President's control over the independent agencies, its concern is misplaced. If anything, the President's influence over agency policymaking has been steadily on the rise. The expansion of the administrative state has moved the locus of federal policymaking away from Congress and toward the White House. The White House has aggressively expanded the President's authority over the agencies. The judicial branch has deferred to the President's expanding control of the regulatory process. These developments have increasingly marginalized Congress's role with respect to the agencies, and the President is often able to treat the independent agencies as falling fully under the umbrella of his own authority.

Yet the Court's concern with staffing the agencies is not entirely misplaced. The federal government presently suffers from a severe leadership deficit—not because the wrong people are in power, but because so many offices are left empty or occupied by acting officials. The consequences of our understaffed government

4. 5 U.S. CONST. art. II, § 2, cl. 2.

5. Myers v. United States, 272 U.S. 52, 163–64 (1926).

6. Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

7. *See* Morrison v. Olson, 487 U.S. 654, 686 (1988).

8. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 (2010) ("Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.").

9. *Id.* at 3179 (Breyer, J., dissenting) ("I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security . . . constitutionally at risk.").

can be disastrous: the poor intelligence that failed to prevent the attacks of September 11, the inept governmental response to Hurricane Katrina, and the immediate aftermath of the financial crisis of 2008 were all exacerbated by understaffed agencies.

What is to blame for understaffing at the highest levels? More than anything else, it is modern Senate confirmation politics. Since the increase of party polarization during the Reagan Administration, it has taken Presidents longer and longer to staff the administrative agencies.[10] Thus the Supreme Court's historic focus on removal as the marker of presidential influence over the independent agencies no longer controls. Today, the foremost challenge to the President's ability to use the independent agencies to implement his preferred policies is not removing recalcitrant officials, but rather appointing sympathetic ones. Whether one agrees with the President's policies or not, both sides of the aisle should be able to agree that regulatory failures by understaffed agencies show that prolonged confirmation fights do more harm than good.

This Note proceeds as follows. Part I traces the Supreme Court's removal jurisprudence and examines the way in which the President's authority to remove an official has come to signify the President's authority to direct independent agency policy. Part II calls this assumption into question by examining the degree to which the President is able to exert his influence on the independent agencies, despite statutes restricting the removal of independent-agency officials. Part III examines what has become the primary restraint on the President's ability to direct the agencies: the confirmations process.

I.
THE SUPREME COURT'S REMOVAL JURISPRUDENCE

The Constitution does not address the President's power to remove federal employees. Rather, the Supreme Court's removal jurisprudence traces its constitutional basis to the Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall

10. *See* discussion *infra* at Part III.A (discussing increased time-lags between the President's nomination of an agency official and that official's confirmation).

be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[11]

Though *Marbury v. Madison* is better remembered for establishing principles of judicial review, the decision also marks the Supreme Court's first consideration of the President's power to remove appointed officers.[12] After he determined that Marbury's right to his position as a justice of the peace vested when the President signed Marbury's commission, Chief Justice Marshall found no constitutional problem with Congress's limiting the President's power to remove executive-branch officials like Marbury: "Mr. Marbury . . . was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country."[13] If Congress said Marbury was to serve five years, Marbury was to serve five years.

In the first twentieth-century case considering the President's removal authority, however, the Court came to the opposite conclusion. In 1926, the Court in *Myers v. United States* ruled unconstitutional a statute limiting the President's authority to remove postmasters first class.[14] The statute creating this position provided that postmasters first class were to be "'appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.'"[15] In a lengthy opinion, Chief Justice Taft examined debates within the First Congress before concluding that the power of removal is incident only to the power of appointment, and not to the power of advising and consenting to appointment.[16] Because the Constitution entrusts to the President the exclusive responsibility of taking care that the laws be faithfully executed,[17] the President must enjoy unrestricted power of removal.

11. U.S. CONST. art. II, § 2, cl. 2.
12. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
13. *Id.* at 162. Of course, despite Justice Marshall's finding that Marbury's right to his commission had vested, Marbury's suit to enforce that right was unsuccessful, as Justice Marshall held that the Judiciary Act of 1789's grant of original mandamus jurisdiction to the Supreme Court exceeded the bounds of Article III. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 13–15 (5th ed. 2007).
14. Myers v. United States, 272 U.S. 52, 176 (1926).
15. *Id.* at 107.
16. *Id.* at 122.
17. U.S. CONST. art. II, § 3, cl. 3.

Not ten years after *Myers*, the Court did an about-face. After taking office in 1933, President Franklin Roosevelt wrote William E. Humphrey, a Commissioner on the Federal Trade Commission (FTC), to ask for Humphrey's resignation.[18] When Humphrey refused to resign, Roosevelt wrote Humphrey in October of 1933 to inform him that he was being removed from the Commission.[19] After Humphrey's death four months later, Humphrey's executor sued to recover the balance of Humphrey's salary, claiming that President Roosevelt had dismissed Humphrey unlawfully.[20] The statute establishing the FTC provided that the President could remove its Commissioners only for "inefficiency, neglect of duty, or malfeasance in office"[21]—a seemingly impermissible restriction after *Myers*'s announcement of the President's unrestricted removal authority.[22] However, in *Humphrey's Executor* the Court found no constitutional problem with the statutory removal provision,[23] distinguishing *Myers* by looking to the type of office in question. According to Justice Sutherland, *Myers* involved "an executive officer restricted to the performance of executive functions."[24] Over these types of offices Congress could not restrict the President's removal authority.[25] FTC Commissioners exercised what the Court called "quasi-legislative or quasi-judicial powers,"[26] however, and for these types of officers, Congress's authority "to require them to act in discharge of their duties independently of executive control cannot well be doubted."[27]

18. President Franklin Roosevelt wrote, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence." Humphrey's Ex'r v. United States, 295 U.S. 602, 618–19 (1935).

19. *Id.* at 619.

20. *Id.* at 618–19.

21. *Id.* at 620.

22. Myers v. United States, 272 U.S. 52, 134 (1926) ("The imperative reasons requiring an *unrestricted power to remove* the most important of [the President's] subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.") (emphasis added).

23. *Humphrey's Ex'r*, 295 U.S. at 629 (describing Congress's authority to "fix the period during which [FTC Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime").

24. *Id.* at 627.

25. *Id.* at 627–28 ("[T]he necessary reach of the [*Myers*] decision goes far enough to include all purely executive officers.").

26. *Id.* at 628.

27. *Id.* at 629.

In *Humphrey's Executor*, the text of the statute in question clearly restricted the President's removal authority. In its next case considering the President's removal power, the Court inferred congressional intent to restrict the President's removal authority, even though the relevant statute was silent on the issue. In *Wiener v. United States*, decided in 1958, the Court held that the President could not remove a member of the War Claims Commission (WCC) without cause for doing so.[28] Though the statute said nothing about the removal of Commissioners, the Court reasoned that the WCC was a quasi-judicial body and that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[29] According to *Wiener*, *Humphrey's Executor* had drawn a "sharp line of cleavage" between executive officials and quasi-legislative or quasi-judicial officials.[30] *Myers* protected the President's power to remove the former; *Humphrey's Executor* protected Congress's power to limit the President's authority to remove the latter.[31]

For almost fifty years, *Humphrey's Executor* and *Wiener* remained the rule on Congress's ability to restrict the President's removal authority. In 1988, however, the Court again reversed course. In *Morrison v. Olson*, the Court dispensed with the distinction between executive and quasi-legislative or quasi-judicial officials and upheld the constitutionality of the Ethics in Government Act of 1978.[32] The Ethics in Government Act established a framework for the investigation and prosecution of high-ranking government officials for violating federal criminal statutes.[33] It provided for the appointment of an independent counsel to prosecute any suspected wrongdoing[34] and authorized the independent counsel to exercise all investigative and prosecutorial functions and powers of the Department

28. Wiener v. United States, 357 U.S. 349, 356 (1958). President Eisenhower wrote to Wiener: "'I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection.'" *Id.* at 350.

29. *Id.* at 352, 355–56.

30. *Id.* at 353.

31. *Id.* at 352–53 (suggesting that there was a sharp division between "officials who were part of the Executive establishment and were thus removable by virtue of the President's removal powers," and independent-agency officials, "as to whom a power of removal exists only if Congress may fairly be said to have conferred it").

32. Morrison v. Olson, 487 U.S. 654, 680–81, 689 (1988).

33. *Id.* at 660.

34. *Id.* at 661. Note that the appointment of the special prosecutor was made not by the President or Attorney General but by the Special Division, a tribunal created by the Act.

of Justice and the Attorney General.[35] Once appointed, the independent counsel was removable only by the Attorney General and only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[36] All parties agreed that prosecution was a quintessentially executive function[37]—thus it would seem *Myers* should have applied and the statute should have been found unconstitutional. Still, the Court saw no problem with Congress's restricting the President's ability to remove the independent counsel. According to Chief Justice Rehnquist:

> [O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[38]

The *Morrison* Court further distinguished *Myers*: the issue at hand in *Myers*, Rehnquist wrote, was not the type of office the postmaster occupied, but rather that Congress had inserted itself into the removal process.[39] Because Congress played no part in removing the independent counsel, the Ethics in Government Act did not violate the separation of powers.[40]

In many ways, the *Morrison*-era jurisprudence represents the high-water mark of the Supreme Court's deference to congressional restriction of the President's removal authority—as well as the Court's tolerance for unusual agency structures. The year after *Morrison*, the Court in *Mistretta v. United States* upheld the constitutionality of a statute creating a Sentencing Commission composed

35. *Id.* at 662.

36. *Id.* at 663.

37. *Id.* at 691 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."); *see also id.* at 706 (Scalia, J., dissenting) ("[P]rosecution of crimes is a quintessentially executive function.").

38. *Morrison*, 487 U.S. at 689–90 (citation omitted).

39. *Id.* at 686 ("Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid.").

40. *Id.* at 692–93 ("This is not a case where the power to remove an executive official has been completely stripped from the President.").

in part of members of the federal judiciary.[41] In addition to their normal adjudicative duties, judges appointed to the Commission assumed responsibility for promulgating sentencing guidelines for use in the federal courts.[42] Facing a sentence calculated in accordance with guidelines, Petitioner John Mistretta challenged the constitutionality of the Commission, arguing that placing Article III judges on the Commission "effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity."[43] The Court acknowledged "serious concerns about a disruption of the appropriate balance of governmental power among the coordinate [b]ranches,"[44] but it nonetheless dismissed these concerns as "'more smoke than fire.'"[45] To be sure, the Sentencing Commission was an unprecedented experiment, but, according to Justice Blackmun, "Our constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[46]

Twenty years after *Morrison* and *Mistretta*, the Court has again changed course. In the final days of its 2010 session, the Court struck down part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or the Act).[47] Among other things, Sarbanes-Oxley created a body known as the Public Company Accounting Oversight Board (PCAOB or the Board).[48] The Board, which is responsible for regulating certain accounting firms, is comprised of five members appointed by the Securities and Exchange Commission (SEC) Commissioners.[49] The Act provided that Board members, who serve five-year terms, could be removed only by the SEC Commissioners, and only for "good cause shown."[50] Thus Board members enjoyed what the Court called "two layers of for-cause tenure": the President may remove SEC Commissioners only for "inefficiency, neglect of duty, or malfeasance in office,"[51] and the SEC Commissioners, in

41. Mistretta v. United States, 488 U.S. 361, 412 (1989).
42. *Id.* at 384–85.
43. *Id.* at 383.
44. *Id.* at 384.
45. *Id.*
46. *Id.* at 385.
47. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3161 (2010) (holding that the removal restrictions under 15 U.S.C. §§ 7211(e)(6) and 7217 (d)(3) violate separation of powers).
48. 15 U.S.C. § 7211(a) (2006).
49. § 7211(c), (e)(1), (6).
50. § 7211(e)(5)–(6).
51. Note that the statute creating the SEC says nothing about removal of Commissioners; rather, the parties agreed that SEC Commissioners enjoyed the same tenure protection as described in *Humphrey's Executor*. In his dissent, Justice

turn, could remove the Board members only for good cause shown.[52] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court reversed the D.C. Circuit and held that the Board's two layers of tenure protection violated the Appointments Clause.[53] "The growth of the executive branch," Chief Justice Roberts wrote in the majority opinion, "heightens the concern that it may slip from the Executive's control, and thus from that of the people."[54] Justice Roberts later warned of Congress's "reduc[ing] the Chief Magistrate to a cajoler-in-chief."[55]

Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, dissented. Justice Breyer began his opinion by citing Justice Jackson's "wise perception that 'the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.' "[56] According to Justice Breyer, in light of the dramatic expansion of the federal government—from 2400 employees at the Founding to 4.4 million in 2010—the Court should rely on a functional approach to the separation of powers, rather than the formalistic one adopted by the majority.[57] As a practical matter, the removal restrictions were insignificant: "[O]nce we . . . view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent."[58] Given that many positions within the civil service enjoy some degree of removal protection, Justice Breyer also warned of unintended consequences of the majority's ruling: "I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security . . . constitutionally at risk."[59] To illustrate his point, Justice Breyer appended to his dissent nearly thirty pages of tables listing

Breyer took issue with this assumption: "How can the Court simply assume . . . that the SEC Commissioners themselves are removable only 'for cause'? . . . [T]he Court has . . . created a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional." *Free Enter. Fund*, 130 S. Ct. at 3182 (Breyer, J., dissenting) (emphasis omitted).

52. 15 U.S.C. § 7211(e)(6).

53. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010).

54. *Id.* at 3156.

55. *Id.* at 3157.

56. *Id.* at 3167 (Breyer, J., dissenting) (emphasis omitted) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

57. *Id.* at 3168 (Breyer, J., dissenting).

58. *Id.* at 3172 (Breyer, J., dissenting).

59. *Id.* at 3179 (Breyer, J., dissenting).

various federal positions potentially affected by the Court's decision.[60]

The difference between the *Free Enterprise Fund* majority and the *Morrison*-era jurisprudence is striking. Where in 1989 (one year after *Morrison*) the Court suggested that "[o]ur constitutional principles of separation of powers . . . are not violated by mere anomaly or innovation,"[61] in *Free Enterprise Fund* the Court quoted favorably from Judge Kavanaugh's dissent in the D.C. Circuit opinion: "'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.[62] Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure.'"[63] According to Chief Justice Roberts, the novel structure not only added to the Board's independence, but transformed it.[64]

It is difficult to say how important *Free Enterprise Fund* will be in future constitutional litigation. Despite Justice Breyer's dissent, the idiosyncratic PCAOB structure has few analogues, and the case may have limited application beyond its facts.[65] Yet what is salient is the degree to which the Court reaffirmed the principle established in *Myers*: the President's ability to control an agency is a direct function of his power to remove its officials. Without the ability to remove PCAOB members at will, the majority cautioned, "The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[66]

When viewed through the lens of the modern Presidency, Justice Roberts's concern about Congress's stripping the President's power with a statutory removal restriction seems farfetched. The great mystery of the independent agencies is that, particularly for the number of times the Supreme Court has considered their con-

60. *Id.* at 3185–215 (Breyer, J., dissenting).

61. Mistretta v. United States, 488 U.S. 361, 385 (1989).

62. *Free Enter. Fund*, 130 S. Ct. at 3159 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

63. *Id.* at 3159.

64. *Id.* at 3154.

65. *See* Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y SPECIAL ISSUE 1, 2–3 (2010).

66. *Free Enter. Fund*, 130 S. Ct. at 3154.

stitutionality,[67] there is scant evidence that removal restrictions exert significant influence on presidential behavior. Presidents do not seem to test the limits of their removal authority by removing the heads of independent agencies.[68] Nor has the Supreme Court ever had occasion to consider what constitutes "good cause" in the context of an officer's removal, or what "inefficiency, neglect of duty, or malfeasance in office" (the standard in many statutory removal restrictions) might mean.[69] It is certainly possible that removal restrictions isolate the independent agencies from political pressure and thereby pose a strong impediment to the President using the administrative agencies to implement his policy preferences. A far more likely hypothesis, however, is that removal restrictions simply do not matter as much as the *Free Enterprise Fund* court suggests. As the next section will show, despite the *Free Enterprise Fund* majority's concerns about the independent agencies "slip[ping] from the Executive's control,"[70] the President is often able to treat the independent agencies as extensions of the Executive Branch and fully within the grasp of the White House.

II.
PRESIDENTIAL CONTROL OF THE INDEPENDENT AGENCIES

Clearly the President has a strong interest in staffing the independent agencies with people of his choosing, and removing uncooperative officials is part of the President's challenge. Yet the infrequency with which removal challenges are litigated suggests that the President possesses powerful tools to bring his influence to bear on the independent agencies, such that uncooperative officials attempting to implement policies other than the President's preferred ones will find themselves swimming upstream. Resignation (and a subsequent private sector position) may seem a more appealing alternative than doing battle with the President of the

67. *See* discussion *supra* Part I (discussing *Myers*, *Humphrey's Executor*, *Morrison,* and *Free Enterprise Fund*).

68. Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 VAN. L. REV. EN BANC 63, 68 (2009), *available at* http://www.vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf.

69. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994).

70. *Free Enter. Fund*, 130 S. Ct. at 3156.

United States.[71] Indeed, few independent-agency officials serve their entire term in office.[72]

Thus the modern President enjoys great influence over even the independent agencies' policymaking. The President's increasing ability to direct independent-agency policymaking may be traced to three sources: OMB and OIRA review, judicial deference, and the President's informal jawboning. The following sections will address these factors in turn.

A. *OMB Review, OIRA Review, and Presidential Influence*

Among administrative law scholars, the Reagan Presidency marks the start of an ongoing revolution. One month after taking office, Reagan issued Executive Order 12,291, which required each executive agency to submit to the White House's Office of Information and Regulatory Affairs (OIRA) a "regulatory impact analysis" of all its proposed major rules.[73] Four years later, Reagan issued Executive Order 12,498, which required each executive agency to submit to the Office of Management and Budget (OMB) an annual regulatory plan listing its proposed actions for the upcoming year.[74] It is difficult to overstate the impact of these two executive orders. During a 1986 congressional inquiry into OMB practices, the OMB Director could think of only six instances in which an agency had promulgated a rule over OMB's objection.[75] Four of these instances were pursuant to court order, and in the other two the agency successfully appealed to the President.[76]

Given the Reagan Administration's deregulatory agenda,[77] many believed that the Clinton Administration would take a differ-

71. *See* 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, 605 (2010).

72. For instance, SEC Commissioners are appointed to 5-year terms, but the average length of service is around 2.5 years; FTC Commissioners are appointed to 7-year terms, but the average length of service is just over 4 years. *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 8 (Feb. 12, 2007) (unpublished manuscript), *available at* dho.stanford.edu/research/partisan.pdf.

73. Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128–30 (1981), *reprinted in* 5 U.S.C. § 601 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

74. Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (repealed 1993).

75. Kagan, *supra* note 73, at 2278–79.

76. *Id.*

77. *See, e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 481 (2008).

ent approach to coordinating agency policymaking.[78] Clinton's Executive Order 12,866, however, preserved the most important of Reagan's innovations: executive agencies were still required to submit notice of all proposed major rulemakings to OIRA and to present an annual regulatory agenda to OMB.[79] Moreover, the practices established by the Reagan and Clinton Administrations seem like they are here to stay. In January of 2011, President Obama released Executive Order 13,563, entitled "Improving Regulation and Regulatory Review," in which he explicitly reaffirmed the principles expressed in Executive Order 12,866.[80] In light of concern about escalating deficits and the Republicans' midterm victories, President Obama may even have adopted some of Reagan's deregulatory agenda: a critical provision in President Obama's Order requires each executive agency to submit a preliminary plan to OIRA in which the agency reviews its existing significant regulations to determine whether they should be "modified, streamlined, expanded or repealed."[81]

The relationship between these executive orders and the independent agencies is complicated. Each of the above-discussed orders is addressed to all federal agencies, excluding those that are listed as "independent regulatory agenc[ies]" in the Paperwork Reduction Act (PRA).[82] Thus the independent agencies are at least

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78. *See, e.g.*, Kagan, *supra* note 73, at 2281 ("[O]bservers might have predicted that when a Democratic President assumed office in 1993, a radical curtailment of presidential supervision of administrative action would follow. Instead, the very opposite occurred.").

79. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

80. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

81. *Id.* at 3822.

82. 44 U.S.C. § 3502 (2006)

> [T]he term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission . . . .

The PRA does not identify any common feature of these agencies that justifies their designation as "independent regulatory agenc[ies]"; rather, Congress identinominally exempt from OIRA review. But to take the standard definition of "independent agency"—that is, an agency whose top-ranking official or officials can be removed only for cause[83]—and compare it to the list of "independent regulatory agenc[ies]" in the PRA[84] produces anomalous results. The head of the Social Security Administration (SSA), for instance, is removable only for neglect of duty or malfeasance in office,[85] and the statute creating the SSA describes it as "an independent agency in the executive branch;"[86] yet the PRA does not include the SSA in its list of independent regulatory agencies, meaning that the SSA goes through OIRA review as if it were a standard regulatory agency.

Conversely, statutes creating some of the agencies that are listed as "independent regulatory agenc[ies]" by the PRA do not address the President's ability to remove agency's head official and thus do not meet the classic definition of an independent agency. The SEC, for example, is universally regarded as an independent agency, and yet the statute creating the SEC says nothing about removal of Commissioners.[87]

What is one to make of these inconsistencies? The result is a blurring of the line between the independent and regulatory agencies, such that the President's use of OIRA review to assert his authority over the regulatory agencies has concomitantly increased his influence over the independent agencies. It is an open constitu-

fied them as such without comment. For criticism of the Paperwork Reduction Act's list, see Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L. J. AM. U. 461, 473–74 (1994) (describing the language of the Paperwork Reduction Act as "problematic and ambiguous").

The Regan and Clinton orders each state that the order does not apply to the list in 44 U.S.C. § 3502. *See* Exec. Order No. 12,291, § 1(d); Exec. Order No. 12,866, § 3(b). The Obama order exempts the independent agencies by reference to Clinton's order. Exec. Order No. 13,563, § 7(b) ("For purposes of this order, 'agency' shall have the meaning set forth . . . in Executive Order No. 12,866.").

83. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 46 (3d ed. 1994) ("The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President's power to remove the head (or members) of an agency."); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'").

84. 44 U.S.C. § 3502.

85. 42 U.S.C. § 902(a)(3) (2006).

86. *Id.* at § 901.

87. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182 (Breyer, J., dissenting); *see supra* text in note 51 (describing how the Court in *Free Enterprise Fund* assumed SEC Commissioners were removable only for cause).

tional question whether the President can require independent agencies to undergo OIRA review.[88] Yet, as Peter L. Strauss pointed out in 1984, many independent agencies have nonetheless voluntarily submitted to OIRA review.[89] More recently, Congress seems to have acquiesced to the President's robust use of OIRA to supervise agency policy. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created the Financial Stability Oversight Council (FSOC), a group whose voting members include both executive officials (like the Secretary of the Treasury) and independent-agency officials (including the Chairmen of the Federal Reserve Board of Governors, the SEC, the Commodities Futures Trading Commission, the Federal Deposit Insurance Corporation, and various other financial-regulatory agencies).[90] By all accounts the FSOC "looks like" an independent agency in the sense that most of its voting members are removable only for cause, and yet Dodd-Frank did not include an amendment to add the FSOC to the list of independent agencies in the PRA. Thus the FSOC must undergo OIRA review as if it were a standard executive agency.[91]

On a less formalistic level, various OIRA Administrators have used the weight of their office to encourage independent agencies to adopt the Administration's policy preferences. For instance, in March 2002, President Bush's OMB invited public suggestions for regulatory reform.[92] More than 1700 public comments were received, nominating 316 different regulations for overhaul.[93] In a January 2003 memorandum addressed to the heads of selected independent agencies, OIRA administrator John Graham pointed out that forty-nine of the complained-about rules were regulations

88. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31 (2010).

89. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 593–94 (1984).

90. 12 U.S.C. § 532(b)(1)(A)–(J) (2006).

91. *See, e.g.*, OIRA, CONCLUSION OF EO 12866 REGULATORY REVIEW (2011), *available at* http://www.reginfo.gov/public/do/eoDetails?rrid=121000. Essentially, the FSOC structure gives the President two bites at the apple: as a voting member of the Council, the Secretary of the Treasury can express the President's views and influence whatever policies the FSOC adopts; OIRA then reviews the entire Council's rulemaking and thus gives the President a second chance to influence FSOC rules.

92. *See* Memorandum from John D. Graham to Heads of Selected Indep. Agencies (Jan. 22, 2003) [hereinafter Graham Memo], *available at* www.reginfo.gov/public/prompt/graham_response_regreform.pdf.

93. *Id.*

promulgated by independent agencies.[94] Graham went on to "request[ ] that the responsible agencies consider these public nominations and, for those they consider to be possible candidates for reform, place their evaluations on their websites."[95] There is some evidence that the independent agencies acted on Graham's request. For instance, Graham asked the FTC to consider its regulations implementing the Truth in Lending Act of 1968 (TILA),[96] a federal consumer-protection law regulating home mortgages.[97] Three months after receiving Graham's memo, the FTC sought OMB approval to conduct an empirical survey of "(1) [h]ow consumers search for and choose mortgages; (2) how consumers use and understand information about mortgages, including required disclosures; and (3) whether more effective disclosures are feasible."[98] It is difficult to say exactly to what extent Graham's memo prompted the FTC's increased attention to TILA, or if the agency's policy position ultimately reflected that of the Administration. Graham's memo says nothing of the substantive policies the Administration wished to put in place and instead directs the agencies to reach out to OMB for details.[99] However, it is fair to say that Graham's memo expressed presidential priorities, and that after receiving the memo the FTC directed its attention to those priorities, suggesting that independent agencies consider the President's policy preferences in their rulemaking.

Current OIRA Administrator Cass Sunstein has similarly used his position to exert influence on the independent agencies. Shortly after the January 2011 release of President Obama's Executive Order 13,563, Sunstein explained the order in a memorandum addressed to the heads of both the executive and the independent agencies.[100] While acknowledging that the order did not apply to the independent agencies, Sunstein nonetheless emphasized that the independent agencies "are encouraged to give consideration to all of [the Order's] provisions, consistent with their legal authority.

94. *Id.* Graham addressed his memorandum to the EEOC, FCC, FERC, Federal Reserve Board, FTC, and SEC. *Id.*

95. *Id.*

96. 15 U.S.C. § 1601 (2006).

97. Graham Memo, *supra* note 92.

98. Agency Information Collection Activities; Proposed Collection; Comment Request, 68 Fed. Reg. 19,825 (Apr. 22, 2003), *available at* http://www.gpo.gov/fdsys/pkg/FR-2003-04-22/pdf/03-9852.pdf.

99. *See* Graham Memo, *supra* note 92.

100. Memorandum from Cass R. Sunstein, Adm'r, OIRA, to the Heads of Exec. Dep'ts & Agencies, & of Indep. Regulatory Agencies (Feb. 2, 2011), *available at* www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules."[101]

Five months after Sunstein's memorandum, the Obama Administration took a further step toward bringing the independent agencies under executive direction. Executive Order 13,579, released in July of 2011, was specifically addressed to the independent agencies and urged them to comply with Executive Order 13,563.[102] In fact, Executive Order 13,579 shows a stronger directive quality than any previous order. While careful to acknowledge that nothing in the order should be read to impair the authority granted to independent agencies by law,[103] President Obama nonetheless instructed that, within 120 days of his order, "each independent regulatory agency *should* develop and release to the public a plan" for more effective regulation.[104] "With full respect for the independence of your agencies," President Obama wrote in a July 11, 2011 memorandum accompanying Executive Order 13,579, "I am asking you today to join in [reviewing existing regulations] and produce your own plans to reassess and streamline regulations."[105] It is unclear what legal authority these directives carry, and President Obama is unable to enforce Executive Order 13,579 with the threat of removal. Yet the message to the independent agencies—that the independent agencies are very much a part of the President's team—seems clear.

Finally, even if the independent agencies are formally exempt from OMB/OIRA review, empirical evidence suggests that the executive orders have nonetheless influenced independent-agency practice. The principal substantive innovation of Reagan's Executive Order 12,291 was the requirement that agencies submit to OIRA the estimated costs and benefits of proposed regulations.[106] Though Clinton's order broadened the scope of cost/benefit analysis—additionally requiring that agencies consider potential environmental and economic impacts of regulation, public safety and

101. *Id.* at 6.

102. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011), *available at* http://www.gpo.gov:80/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf.

103. *Id.* at 41,587.

104. *Id.* (emphasis added).

105. *See* Memorandum from Barack Obama, President of the United States, Regulation & Indep. Regulatory Agencies (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies.

106. *See* Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128–30 (1981), *reprinted in* 5 U.S.C. § 601 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

health, equity, and the distributive impacts of proposed regulations[107]—cost/benefit analysis remains the rule in OIRA review.[108] No executive order has explicitly required the independent agencies to consider the costs and benefits of their proposed rules.[109] Nonetheless, independent agencies have in many cases voluntarily adopted the use of cost/benefit analysis in evaluating regulations. According to OMB's 2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, each of the forty-five regulations promulgated by the SEC since 2000 has contained some consideration of the rule's costs and benefits.[110] The independent agencies have not been uniform in their adoption of cost/benefit analysis: only three of the twelve rules issued by the Federal Reserve System since 2000 has considered costs and benefits,[111] and OMB has expressed skepticism as to whether the cost/benefit analysis performed by those independent agencies that do consider the costs and benefits of their rulemaking is as empirically rigorous as that required by OMB.[112] Still, OMB's data suggests that even if the independent agencies are formally exempted from the executive orders, the val-

107. Exec. Order 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

108. *See, e.g.*, Barkow, *supra* note 88, at 31 ("Every president since Ronald Reagan has used OIRA to require agencies under OIRA's jurisdiction to justify their proposed regulations using cost-benefit analysis.").

109. For an argument that federal regulation would be improved by greater use of cost/benefit analysis by the independent agencies, see Memorandum from Richard L. Revesz & Michael A. Livermore, Inst. for Policy Integrity, N.Y.U. Sch. of Law, New Executive Order Governing Regulatory Review (Feb. 13, 2009), *available at* http://policyintegrity.org/documents/EOComments_000.pdf ("No less than for agencies presided over by the executive, it is important that independent agencies arrive at decisions through rational decisionmaking processes and take full account of the consequences of their actions and inaction.").

110. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 130–31 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

111. *Id.* One hypothesis for why the SEC has been more willing than the Federal Reserve System to embrace cost/benefit analysis in its rulemaking is that the SEC is more dependent on presidential goodwill in presenting its funding requests to Congress than the Federal Reserve System, which raises its own funds by levying member banks. *See* discussion *infra* Part II.C (comparing SEC and Federal Reserve System funding).

112. *Id.* at 31. The report also suggests that exempting the independent agencies from OIRA cost/benefit review serves as a "continued obstacle to transparency, and might also have adverse effects on public policy." *Id.*

ues contained in those orders have nonetheless influenced independent-agency practice.

B. Judicial Review and Presidential Influence

Another reason that removal restrictions do not impose much of an impediment to the President's ability to implement his policy preferences is that, at least since Justice Jackson's observation that the President "heads a political system as well as a legal system,"[113] courts have increasingly acknowledged the nexus between regulatory policy and electoral accountability. With a few notable exceptions,[114] courts have tended to leave the agencies alone. It stands to reason that they would similarly assent to presidential efforts to direct the agencies. Thus while no court has ever considered what "good cause" means in the context of removal restrictions, the courts' deferential standard of review of agency action strongly suggests that a court would show great restraint before ruling that a President had improperly dismissed an independent-agency official.

Some of the most salient cases concerning judicial review of agency policy have arisen after the election of a new President with a new regulatory agenda. For instance, in *Motor Vehicles Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court ruled that the National Highway Traffic Safety Administration's (NHTSA) rescission of seatbelt regulations issued by the agency during the previous presidential administration was arbitrary and capricious as defined by the Administrative Procedure Act.[115] During the Carter Administration, NHTSA issued regulations requiring a certain type of seatbelt to be included in all American-made cars.[116] Less than a month after Reagan's inauguration, Secretary of Transportation Andrew Lewis, citing "changed economic circumstances and . . . the difficulties of the automobile industry,"[117] began the process of rescinding those regulations.

113. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

114. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 128–29, 161 (2000) (rejecting the FDA's interpretation of a statute as giving the FDA the authority to regulate the promotion, labeling, and advertising of cigarettes to youth).

115. *See* Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29, 46 (1983).

116. *See id.* at 37 (describing Secretary of Transportation Brock Adams's 1977 issuance of a mandatory passive restraint regulation).

117. *See id.* at 38 (citing Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 12,033, 12,033–34 (Feb. 12 1981)).

While the Supreme Court struck down the rescission as arbitrary and capricious, *State Farm* is perhaps most notable for Justice Rehnquist's dissent, which proved influential in pointing the way toward greater judicial deference to presidential policy preferences. According to Rehnquist:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.[118]

In *Chevron v. Natural Resources Defense Council*, another case involving the Reagan Administration's deregulatory agenda and decided the year after *State Farm*, the Court formalized the deference it would show to matters of agency policymaking.[119] In *Chevron*, the Court considered whether more industry-friendly regulations adopted by the Environmental Protection Agency (EPA) after Reagan's inauguration were based on permissible interpretations of the Clean Air Act.[120] This time the Court sided with the Administration in upholding the EPA's interpretation of the term "stationary source" as used in the statute.[121] In the now-familiar *Chevron* two-step guide to judicial review of agency statutory interpretation, the reviewing court asks first whether the statute has already spoken to the question at hand.[122] If so, the statute controls.[123] If, however, the statute is silent or ambiguous with respect to the situation, the court will treat the ambiguity as an implicit delegation from Congress to the agency and defer to the agency's interpretation, so long as the court determines the agency's interpretation to be a reasonable one.[124]

Chevron was a watershed case—one source speculated that it may have become the most-cited case in United States jurispru-

118. *Id.* at 59.

119. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

120. *Id.* at 840 (identifying the question presented as whether the EPA's revised definition of "stationary source" comported with the use of the term in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7502(b)(6)).

121. *Id.* at 866.

122. *Id.* at 842–43.

123. *Id.*

124. *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

dence.[125] For this Note's purposes, what is most salient about *Chevron* is that the Supreme Court seemed to adopt definitively Rehnquist's point from *State Farm*: substantive questions of administrative policy are for the President *qua* chief administrator, not the courts, to decide. According to Justice Stevens's majority:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[126]

While *Chevron* considered an executive agency's interpretation of a statute, in *Public Citizen v. Burke* the D.C. Circuit concluded that the Archivist of the National Archives and Records Administration—established by statute as an independent agency[127]—was entitled to similar deference in interpreting the agency's organic statute.[128] Indeed, the *Burke* court articulated an even stronger version of judicial deference to executive direction of the administrative state than did *Chevron*. According to Judge Silberman:

> Since the incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretations of statutes, it seems anomalous for the Judiciary to refuse deference merely on the grounds that it can be shown that the agency's interpretation was one pressed by the President upon reluctant subordinates.[129]

And while not considering an agency interpretation of a statute—making *Chevron* inapplicable—the Supreme Court recently held that judicial review of agency policy did not vary depending on whether the agency was considered an independent or executive agency. In *FCC v. Fox Television Stations, Inc.*, the Court considered a challenge to a revised Federal Communications Commission (FCC) policy.[130] Prior FCC policy was to bring civil fines against networks only for the repetitive use of expletives, but in 2004 the FCC an-

125. STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 247 (6th ed. 2006).

126. *Chevron*, 467 U.S. at 865–66.

127. Public Citizen v. Burke, 843 F.2d 1473, 1475 n.1 (D.C. Cir. 1988).

128. *Id.* at 1477.

129. *Id.* at 1477–78.

130. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 505, 508–10 (2009).

nounced that even a single fleeting use of an expletive could be actionable.[131] After the FCC brought an action against Fox, Fox challenged the FCC's revised policy on a variety of statutory and constitutional grounds.[132] In a five-to-four judgment (with three dissenting opinions), the Court upheld the revised policy as a permissible response to changed political circumstances.[133] Justice Scalia rejected Justice Breyer's argument that in the case of independent agencies a reviewing court should more closely scrutinize changes in agency policy: "[I]t is assuredly not 'applicable law' that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency nor in the standards for reviewing agency action."[134] Justice Scalia went on: "There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch" by adopting different standards of review for independent agencies than used for executive agencies.[135]

Justice Scalia's opinion notes that the FCC revised its policy after Congress (rather than the President) pressured it to do so.[136] Nonetheless, *Fox* and *Chevron* together reflect a very different vision of independent agencies from that which prevailed in the age of *Humphrey's Executor*. Where once the Court viewed independent agencies as repositories of expertise "free to exercise [their] judgment without the leave or hindrance of any other official or any department of the government,"[137] and "wholly disconnected from the executive department,"[138] the modern Court treats the independent agencies as political creatures, adopting policies largely at the behest of the political branches.

Thus, based on the Court's deference to agencies in interpreting statutes and determining agency policy, it seems likely that the Court would similarly defer to the President's decision to remove an independent agency official, so long as the President described his removal decision as at least nominally based on "inefficiency,

131. *Id.* at 508–10.
132. *Id.* at 510–11.
133. *Id.* at 504, 516–17.
134. *Id.* at 525 (citations omitted).
135. *Id.* at 525–26.
136. *Id.* at 523–24 n.4.
137. Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935).
138. *Id.* at 630.

neglect of duty, or malfeasance in office."[139] And while the Supreme Court has never considered what "inefficiency, neglect of duty, or malfeasance in office" means in the context of restricting the authority of the President, it has nonetheless suggested in a related context that the phrase is susceptible to a wide range of meanings. In the 1986 case *Bowsher v. Synar*, the Court cited separation-of-powers concerns in striking down a statute creating the Office of the Comptroller General.[140] The statute provided that the Comptroller General was to be appointed by the President with the advice and consent of the Senate, but that he could be removed at any time by a joint resolution of Congress for permanent disability, inefficiency, neglect of duty, malfeasance in office, or a felony or conduct involving moral turpitude.[141] Chief Justice Burger, writing for the majority, suggested that the statutory-removal restriction gave Congress "very broad" removal power and could be used by the Congress for "any number of actual or perceived transgressions of the legislative will."[142] In a concurring opinion, Justice Stevens described the Comptroller General as "an agent of the Congress."[143]

Cass Sunstein and Richard Pildes have suggested two readings of *Bowsher*, each of which supports the President's authority to direct the independent agencies. On the stronger reading of the case, "traditional removal constraints still leave the President with considerable *legally permissible* latitude to remove—and hence supervise—independent agency heads."[144] The weaker reading admits that *Bowsher* might not apply in the context of presidential removal, but it recognizes that, "however legally constrained removal authority might be, as a practical matter even supposedly independent officials can still be subject de facto to considerable pressure and oversight."[145] With respect to the latter interpretation, presumably the President, as the single figure at the top of the executive pyramid, could exert far more effective pressure on an independent official than could Congress, a collective body whose members may disagree on what regulatory policies the agency should adopt. Whatever the case, it seems clear that either reading suggests that "for cause"

139. "Inefficiency, neglect of duty, or malfeasance in office" being a common standard in many statutory removal restrictions. *See supra* notes 67–70 and accompanying text.

140. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

141. *Id.* at 727–28.

142. *Id.* at 729.

143. *Id.* at 740–41 (Stevens, J., concurring).

144. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 31 (1995).

145. *Id.*

limitations on the President's removal authority only slightly limit the President's ability to direct the administrative state.

Finally, while not directly related to judicial deference, an additional indication of the degree to which the independent agencies have submitted to increasing presidential authority is the infrequency with which an independent agency disagrees with positions taken by the Solicitor General, the presidential appointee who represents the United States in litigation before the Supreme Court. During the Nixon and Carter Administrations, independent agencies frequently took conflicting positions with the Solicitor General, either by refusing to join in the Solicitor General's briefs to the Court or by filing their own competing briefs.[146] Since the Reagan Presidency, however, there have been few instances of public conflict between the independent agencies and the Solicitor General's office.[147] And on those rare occasions when an agency has attempted to take a position apart from that of the Solicitor General, the Solicitor General's office has fought to suppress the agency's grab at independence. For instance, in January of 1994, the Federal Election Commission (FEC) filed a petition for certiorari before the Supreme Court seeking reversal of a D.C. Circuit decision in a campaign-finance case.[148] The FEC had not asked the Solicitor General for permission to file its petition, and in March of 1994 the Supreme Court invited the Solicitor General to file its own brief addressing whether the FEC had the authority to represent itself before the Supreme Court.[149] The Solicitor General argued that the FEC did not have such authority, and the Supreme Court agreed that only the Solicitor General could argue the issue before the Court.[150] Thus the FEC's attempt to act outside White House supervision only resulted in its litigation authority being stripped. The message to the independent agencies—that the Solicitor General will resist an independent agency's attempts to broaden its litigation authority—has probably served as a warning to other independent agencies considering taking a litigation position without the support of the White House.

Thus not only does the judicial branch increasingly defer to the administrative agencies' discretion in policymaking, but the

146. Devins & Lewis, *supra* note 77, at 494–95.

147. *Id.* at 496.

148. George F. Fraley, III, Note, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L. J. AM. U. 1215, 1219 (1996).

149. *Id.*

150. *Id.* at 1219–20.

agencies themselves are showing less resistance to the positions taken by the White House. Both judicial deference and the agencies' increasing compliance with Executive Branch litigation strategies have served to reinforce the President's influence over the administrative state.

C. Jawboning and Presidential Influence

In a seminal article on the independent agencies' place within the three branches of government, Peter Strauss identified one of the most significant difficulties with evaluating the President's influence on the independent agencies: "[A] basic difficulty in writing about the President's legal authority over the affairs of government lies precisely in the infrequency with which that authority is tested in a legal rather than a political arena."[151] Leaving aside speculation about what "for cause" removal means as a legal matter, the President possesses powerful political clout to bring the independent agencies into line with his policy preferences. Richard Neustadt aptly summarized the President's political influence: "The President of the United States has an extraordinary range of formal powers . . . . [But] despite his 'powers' he does not obtain results by giving orders—or not, at any rate, merely by giving orders . . . . Presidential power is the power to persuade."[152]

The President's ad hoc powers of persuasion are not entirely distinct from the institutional methods discussed above: the better a President is able to persuade others to embrace his preferred policies, the more he will benefit from judicial deference and OIRA review. Still, the President's ad hoc jawboning constitutes an important supplement to his legal authority, and Presidents often find that using informal ex parte contacts is less politically costly than testing the outer limits of their legal authority.[153] This section will consider some examples of the ways in which the President can use the bully pulpit to direct the administrative state.

One strong lever of presidential control of the independent agencies is OMB's role in agency funding. Before 1921, government agencies submitted their annual budget requests directly to

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151. Strauss, *supra* note 89, at 580.

152. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 10–11 (The Free Press 1990 ed.) (1960).

153. *See, e.g.*, Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 (1980) ("[T]he President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.").

Congress.[154] The inefficiency of dealing with each agency piecemeal led Congress to pass the Budget and Accounting Act, which allowed the President to submit a single annual budget that would provide for all of the administrative agencies.[155] Today, most independent agencies submit their budgets to OMB for inclusion in an overall budget request,[156] thereby allowing the President an opportunity to reduce the agency's request if he sees fit.

Presidential control over agency funding can force the agency's chair into the awkward position of testifying before Congress in favor of a budget that reflects the President's preferences more than it does the agency's. The Clinton Administration, for example, never showed much interest in securities regulation, and for much of Clinton's Presidency only two or three SEC Commissioners were in office.[157] Further, OMB did not look kindly on the SEC's initial budget requests, and in 1997 and 1998, Clinton's final budget proposals reduced the SEC's initial requests so as not to provide for any significant increases over the previous years.[158] In testimony before Congress, SEC Chairman Arthur Levitt repeatedly pleaded that the agency's appropriations had failed to keep pace with the rapidly expanding securities markets,[159] but without the support of the White House, his efforts fell on deaf ears.[160] The years of meager appropriations affected the SEC's ability to fulfill its responsibilities: between 1998 and 2000, the SEC lost one-third of its staff,[161] and, more recently, the SEC has been portrayed by media as being "asleep at the switch" in failing to prevent both the dot-com crash and the 2008 credit crisis.[162] Nonetheless, the SEC remains a "strikingly vulnerable political actor,"[163] and often SEC

154. *Id.* at 963.

155. *Id.*

156. Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 253 (2004).

157. *Id.* at 239. The Commission even modified its quorum rules to allow it to conduct business should only one or two Commissioners remain. *Id.*

158. *Id.* at 244–45.

159. *Id.* at 240.

160. *See id.* (describing Levitt's annual testimony before Congress as "an exercise in frustration, or, at best, damage control").

161. *Id.* at 248 (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-302, SEC OPERATIONS: INCREASED WORKLOAD CREATE CHALLENGES 11–13, 25 (2002)).

162. *See, e.g.*, Theo Francis, *SEC's Cox Catches Blame for Financial Crisis*, BLOOMBERG BUS. WK. (Sept. 19, 2008, 12:01 AM), http://www.businessweek.com/bwdaily/dnflash/content/sep2008/db20080918_764469.htm.

163. Seligman, *supra* note 156, at 250.

market-regulation policy more closely reflects the President's priorities than those of the Commissioners.[164]

Unsurprisingly, Presidents have more difficulty controlling those independent agencies that are able to provide for their own budgets. The Board of Governors for the Federal Reserve, (the Fed), for example, obtains its funding by levying assessments on member banks.[165] The Fed's self-funding has been described as the key to its "high level of performance, its professionalism, and its ability to withstand political pressures."[166] Historically, the Fed has not shied away from confrontation with the Executive Branch. Upon his 1979 confirmation as Chairman of the Fed, Paul Volcker began implementing strict monetary policies to control the country's rising inflation.[167] Unemployment soared, and the White House unsuccessfully lobbied the Fed to relax the money supply.[168] Volcker ultimately resigned in 1987, six years before the end of his fourteen-year Board of Governors term.[169]

Yet in light of steadily expanding presidential influence, Volcker's successors have not been nearly as intent on maintaining the Fed's hermetic independence from the White House. Where Volcker refused to visit the White House or to host Reagan at the Federal Reserve, his successor Alan Greenspan visited the White House almost weekly.[170] And throughout the financial crisis and

164. *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 602–03 (2010) ("Although Secretary Paulson could not back any directive to the SEC with the threat of Presidential removal, he achieved the desired result. Through Secretary Paulson, the President steered securities regulation.") (citing Amit R. Paley & David S. Hilzenrath, *SEC's Cox Defends Approach*, L.A. TIMES (Dec. 27, 2008), http://articles.latimes.com/2008/dec/27/business/fi-cox27 ("But in publicly acknowledging for the first time that the [short-selling] ban was not productive, Cox said he had been under intense pressure from Treasury Secretary Henry M. Paulson Jr. and Fed Chairman Ben S. Bernanke to take the action and did so reluctantly.")).

165. 12 U.S.C. § 243 (2006).

166. *See, e.g.*, Seligman, *supra* note 156, at 255.

167. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 547 (2000).

168. *Id.* at 548–49.

169. *See* Robert D. Hershey, Jr., *Volcker Out After 8 Years as Federal Reserve Chief; Reagan Chooses Greenspan*, N.Y. TIMES (June 3, 1987), http://www.nytimes.com/1987/06/03/business/volcker-out-after-8-years-as-federal-reserve-chief-reagan-chooses-greenspan.html. Note that members of the Federal Reserve Board of Governors are appointed to fourteen-year terms. 12 U.S.C. § 241 (2006).

170. Sebastian Mallaby, *The Charm of the Chairman*, WASH. POST (Sept. 23, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092002060.html (reviewing ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN THE NEW WORLD (2007)).

the subsequent recession, Fed Chair Ben Bernanke worked so closely with Treasury Secretary Timothy Geithner that one critic said the two "cast one shadow."[171] While it is impossible to know the degree to which informal contact between the White House and the Fed has resulted in the Fed's adopting presidential policy preferences, such contacts do suggest that Greenspan and Bernanke have been much more receptive to presidential influence on Federal Reserve policymaking than was Volcker.

Another important means by which the President may exert ad hoc influence over the administrative state is through the appointment of the Chair of independent regulatory commissions. For instance, the President selects the Chair for many independent agencies, including the FTC, the FCC, and the National Labor Relations Board.[172] Even though the statutes creating these agencies restrict the President's authority to remove a commissioner entirely from the relevant agency,[173] the President is generally understood to be free to demote the current Chair from his Chairmanship without having to show cause.[174] As a functional matter, however, the difference might be negligible: often, the demotion of a Chair by a new presidential Administration effectively secures a new appointment to the Commission, as demoted Chairmen frequently resign their posts soon after losing the leadership position.[175] This is more a matter of practice than of law: many statutes give minimal detail

171. Bressman & Thompson, *supra* note 164, at 630. Bernanke worked closely with Geithner's predecessor as well. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1663 (2009) ("[T]he chair of the Fed, Ben Bernanke, acted hand in glove with the Treasury secretary, Henry Paulson, with the latter in the role of lead partner.").

172. *See* Verkuil, *supra* note 153, at 955 n.75.

173. Note again that SEC Commissioners have been determined to be removable only for cause by judicial decision, not by statute. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182 (2010) (Breyer, J., dissenting); *see supra* text in note 51.

174. *See, e.g.*, 15 U.S.C. § 41 (2006) ("The President shall choose a chairman from the [FTC]'s membership. . . . Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."). Note also that tenure for chairmanship may be significantly shorter than tenure as an agency commissioner. For instance, by statute, the Chairman of the Federal Reserve serves as chair for only 4 years, as compared to the 14-year term for all other members of the Board of Governors. 12 U.S.C. §§ 241–242 (2006). Likewise, the Commissioners on the FEC serve six-year terms, but the statute prohibits any Commissioner from serving as chair for more than one year. 2 U.S.C. § 437c(a)(2)(A), (5) (2006).

175. Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 338 (2010).

about the role of the Chair in relation to the agency as a whole,[176] and chairmanship may carry little extra formal power.[177] Still, informal powers possessed by the Chair often include supervisory authority over staff; agenda setting; control over agency finances; and, perhaps most importantly, the ability to represent the agency in public.[178] Frequent appearances with the President strongly influence how the public evaluates the agency. For instance, during his tenure as Chairman of the FCC, Mark Fowler met frequently with President Reagan to discuss telecommunications policy.[179] Despite Fowler's relatively moderate voting record, a survey of experts ranked him the second most conservative Commissioner ever to serve on the FCC.[180]

In addition to the above-discussed methods, before her appointment to the Supreme Court then-Dean Kagan identified two further ad hoc methods by which the President is able to influence the administrative agencies. First, Kagan referred to President Clinton's use of formal directives to influence agency policy. As one example, Clinton announced at a commencement address that he would use his executive authority as President to direct the Secretary of Labor to issue a rule allowing states to offer paid leave to new mothers and fathers.[181] According to Kagan, Clinton issued 107 similar directives to agency heads during his tenure in office, encouraging them to implement his policy initiatives on topics ranging from carbon dioxide emissions to food safety laws to hate crimes in schools and colleges.[182]

Kagan also described Clinton's practice of appropriating agency action. Clinton made extensive use of the bully pulpit to claim as his own countless agency reports, rulings, regulations, waivers, and even lawsuits initiated by the bureaucracy.[183] Even when these appropriations came entirely after the fact, according to Kagan, the message they delivered was clear: these were Clinton's agencies, and Clinton alone was entitled to claim credit for agency successes.[184] To return to the Secretary of Labor example, even before the comment period for the regulation ended, Clinton was speaking of the regulation as essentially consummated, and when

176. Breger & Edles, *supra* note 83, at 1172.
177. Ho, *supra* note 176, at 338.
178. *Id.* at 360.
179. *Id.*
180. *Id.*
181. Kagan, *supra* note 73, at 2284.
182. *Id.* at 2294–95.
183. *Id.* at 2299.
184. *Id.*

the final regulation was promulgated Clinton announced it in his weekly radio address.[185]

President Obama has made use of both directives and appropriation in managing the administrative state. For instance, speaking at a public event in September 2010, President Obama conceded that passing pro-union "card check" legislation through Congress would be politically infeasible, but that he was nonetheless committed to using the administrative process to advance the interests of organized labor.[186] Similarly, in a June 2010 memorandum from the White House Press Secretary addressed to the heads of executive and independent agencies, President Obama directed his Secretary of Commerce to collaborate with the FCC to form a plan to auction off 500 megahertz of wireless broadband Internet access to the public.[187] Later, in a February 2011 address at Northern Michigan University, President Obama announced that the Administration would begin selling access to the broadband spectrum to private companies.[188] Despite the FCC's formal independence, President Obama claimed its regulation as his own.

It is important to note that these methods of extralegal ad hoc control are much more controversial than OIRA review or judicial deference. In certain narrow circumstances, ad hoc presidential lobbying may be unlawful: in the context of formal adjudications, the Administrative Procedure Act (APA) prohibits ex parte communications from non-interested persons,[189] and the Ninth Circuit has held that off-the-record communications between the White House

185. *Id.* at 2284.

186. Sean Higgins, *Obama: Pro-Union 'Card Check' Dead, So We'll Use Regulation*, CAPITAL HILL: INVESTOR'S BUS. DAILY'S POL. & MARKETS BLOG (Sept. 13, 2010, 9:08 PM), http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/2051-obama-pro-union-card-check-dead-so-well-use-regulation ("Frankly, we don't have 60 votes in the Senate. So the opportunity to actually get [card-check legislation] passed right now is not real high. What we've done instead is try to do as much as we can administratively to make sure that it's easier for unions to operate and that they're not being placed at an unfair disadvantage.") (statement of President Barack Obama).

187. Memorandum for the Heads of Executive Departments and Agencies, Unleashing the Wireless Broadband Revolution, 75 Fed. Reg. 38387 (June 28, 2010), *available at* http://www.gpo.gov:80/fdsys/pkg/FR-2010-07-01/pdf/2010-16271.pdf.

188. Press Release, Office of the Press Sec'y, White House, Remarks by the President on the Nat'l Wireless Initiative in Marquette, Mich. (Feb. 10, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/remarks-president-national-wireless-initiative-marquette-michigan.

189. 5 U.S.C. § 557 (2006). Note that Supreme Court precedent has narrowly defined "formal adjudication." *See* BREYER ET AL., *supra* note 125, at 492.

and an agency engaged in formal adjudication would run afoul of the APA.[190] The legality of informal presidential jawboning in the context of everyday agency policymaking, however, is an open question, even as jawboning increasingly becomes a part of the way governmental business is done. For instance, Vice President Cheney frequently circumvented traditional chains of command and reached down the administrative ladder to make clear the Bush Administration's policy preferences.[191] While effective, Cheney's practices prompted strong criticism for undermining governmental transparency.[192] Nonetheless, despite its controversial nature, ad hoc jawboning represents one of the primary means by which the President brings the independent agencies into line with his policy preferences. To whatever extent removal restrictions might limit the President's authority over the independent agencies, it seems that his extralegal tools of influence are far more powerful.

III.
RESISTANCE TO PRESIDENTIAL CONTROL

While the President exerts strong influence on the independent agencies, directing the administrative state is a formidable task, and the President's powers to use the agencies to implement his policy preferences are limited. However, statutory removal restrictions produce more controversy among legal scholars than restraint on the President's influence. At least since the rise of party polarization, the confirmation process has served as the primary impediment to the President's ability to staff the administrative agencies.

From a normative perspective, confirmation politics are bad for government. High-level policymaking positions are too often left empty or filled by interim appointments, and the resulting un-

190. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993).

191. *See, e.g.*, Jo Becker & Barton Gellman, *Leaving No Tracks,* WASH. POST (June 27, 2007), http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/ (describing Cheney's unsolicited phone call to the nineteenth-ranking Interior Department official to request her assistance in mediating a conflict between Oregon farmers and environmental advocates).

192. *See, e.g.*, *White House Climate Change Policy—Delay, Delete and Deny*, OMB WATCH (July 22, 2008), http://www.ombwatch.org/node/3741 ("Evidence of alterations [of an EPA report] by the vice president's office is indicative of a larger pattern of high-level administration officials exercising influence over expert recommendations by withholding information. . . . These incidents indicate a behavior of censorship targeting the scientific community and the government's career staff.").

derstaffed bureaucracy can lead to drastic consequences. What is particularly surprising is that confirmation politics are also a less-than-optimal means of resisting the President's influence. In fact, a deadlocked Congress moves the locus of policymaking away from the legislative branch and towards the agencies, thereby further centralizing presidential control. Extended battles over independent-agency appointments, it seems, are bad policy and bad politics.

This Part examines in turn the rise of modern contentious confirmation politics, the consequences of these politics, and the means by which they actually increase the President's control over the agencies

A. *Confirmation Politics*

As the administrative agencies have grown more powerful, the confirmation process has grown more contentious. In a recent empirical survey, Neal Devins and David Lewis studied independent-agency appointments from the Harding Presidency to the George W. Bush Administration, finding that every President except one was able to secure a majority for his party on each of the independent regulatory commissions,[193] usually within the first year after inauguration.[194] However, it is taking Presidents longer and longer to make the necessary appointments to secure a party majority on the independent commissions,[195] and opposition-party Senators are making greater use of delay tactics—hearings, floor votes, filibusters, and holds—to hinder the President's appointments.[196]

According to Devins and Lewis, the greater delay between a President's nomination and the Senate's confirmation corresponds with the rise in party polarization since Reagan's Presidency.[197] For

193. Devins & Lewis, *supra* note 77, at 469. The one exception was President Carter, who failed to appoint a majority to the Nuclear Regulatory Commission. *Id.* at 469 n.56. Note that Devins and Lewis excluded the Board of Governors of the Federal Reserve from their survey; neither the Kennedy nor the Nixon administrations were able to appoint a majority to the Board. *Id.*

194. *Id.* (noting that on average, Presidents were able to appoint party majorities on the independent regulatory commissions within nine or ten months of coming into office).

195. *Id.* at 473.

196. *Id.* at 487–88 ("'Nominees,' as an official of both Bush administrations put it, 'are now treated like pieces of legislation, facing the full array of parliamentary weapons such as delayed hearings or floor votes, filibusters and so-called 'holds.'").

197. Devins & Lewis, *supra* note 78, at 461–62 ("[W]e see the Reagan presidency as transformative—separating a period of modest party polarization from a period of ever-increasing polarization.").

instance, from the Coolidge Presidency to the Reagan Presidency, the average lag between a President's recommending a nominee to the Senate and the nominee's confirmation hovered around two months.[198] Since Reagan, the average delay has increased, topping out at six months of Senate-imposed delay during the George W. Bush Administration.[199] And as Devins and Lewis point out, these figures probably underestimate the actual delaying effect Senate confirmation has on presidential nominations, since a President who anticipates a confirmation battle with a hostile Senate will spend longer vetting potential nominees to make sure the ultimate appointment is politically feasible.[200] Thus a President faced with an agency official with whom he disagrees may prefer to live with the incumbent official (or otherwise diminish her influence[201]) rather than to spend the political capital required to dismiss the official[202] and make another appointment.

Modern confirmation politics have become highly controversial. The *New York Times* and *Washington Post* have repeatedly criticized the delayed confirmation of presidential nominees,[203] and Judge Kavanaugh of the D.C. Circuit has noted that "using the confirmation process as a backdoor way of impeding the President's direction and supervision of the executive branch—of gumming up the works—is constitutionally irresponsible and makes our government function less efficiently and effectively."[204] Various pieces of reform legislation have been proposed: in July of 2010, Senators Ron Wyden (D-Oregon), Chuck Grassley (R-Iowa), and Claire Mc-

198. *Id.* at 474 Figure 4.

199. *Id.*

200. *Id.*

201. *See supra* notes 172–80 and accompanying text (regarding the President's influence over agencies through the appointment and demotion of the Chair of independent regulatory commissions).

202. The political consequences of dismissing a high-ranking official—even one who serves at the pleasure of the President—should not be understated. For instance, George W. Bush's simultaneous firings of seven U.S. Attorneys was widely considered a public-relations disaster for his Administration. Even though Bush acted entirely within his legal authority, U.S. Attorneys were traditionally removed only for personal or professional misconduct and not for their political allegiances. *See generally* James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 259–63 (2008).

203. *See, e.g.*, Editorial, *Call It Obstructionism*, N.Y. TIMES (June 27, 2009), http://www.nytimes.com/2009/06/28/opinion/28sun2.html; Editorial, *The Senate's Broken Confirmation Process*, WASH. POST (June 10, 2011), http://www.washingtonpost.com/opinions/the-senates-broken-confirmation-process/2011/06/10/AGIdzKPH_story.html.

204. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1464 (2008).

Caskill (D-Missouri) introduced the Secret Holds Elimination Act to curtail one common delaying tactic,[205] and in April of 2011 the Senate Homeland Security and Intergovernmental Affairs Committee approved proposed legislation to decrease the number of executive positions requiring Senate confirmation.[206] Nonetheless it remains to be seen what, if any, effect these proposals will have on trends in modern confirmation politics, and all indications suggest that the Senate will continue to resist presidential appointments.

B. The Consequences of Confirmation Politics

The most immediate consequence of confirmation politics is an understaffed government. As of 2008, the administrative state contained 1141 Senate-confirmed positions and 314 non-Senate-confirmed positions, all to be appointed by the President.[207] Unsurprisingly, many of these positions go unfilled. According to a recent empirical study, at any given moment, one-quarter of Senate-confirmed positions are either empty or filled by acting officials.[208] In some cases vacancies are deliberate: for instance, Reagan delayed making appointments to agencies whose policies he disliked,[209] and Presidents tend to fill agency positions in order of their regulatory priorities.[210] However, Presidents from both sides of the aisle have criticized the Senate for impeding their appointments. George W. Bush called the confirmation process "a never ending political game, where everyone loses,"[211] and President Obama has complained publicly about the Senate's dragging its feet in confirming

205. *See* Alexandra Arney, *The Secret Holds Elimination Act*, 48 HARV. J. ON LEGIS. 271, 272 (2011).

206. *See* Carl Hulse, *Lawmakers Seek to Unclog Road to Confirmation*, N.Y. TIMES (Apr. 24, 2011), http://www.nytimes.com/2011/04/25/us/politics/25nominate.html.

207. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 926 (2009).

208. *Id.* at 921.

209. *Id.* at 944.

210. *Id.* at 969 ("Republican presidents may work to avoid long vacancies in the DOD, Treasury, and Departments of Commerce and Energy, for instance, because those agencies are considered to be more conservative. By contrast, Democratic presidents may pay more attention to the Departments of Education, Health and Human Services, and Labor and the EPA, which are more liberal agencies.").

211. Press Release, Office of the Press Sec'y, White House, President Bush Discusses Pending Presidential Nominations, Urges Senate Confirmation (Feb. 7, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-8.html.

his nominees.[212] And while the President is sometimes able to circumvent Senate nomination through the use of recess appointments, the use of recess appointments has always been controversial, and the Senate can always choose not to recess in order to block the nominee.[213]

There may be benefits to vacancies within the administrative state. Some have argued that frequent turnover in agency leadership positions fosters creative solutions to complex policy problems,[214] or that promoting long-term career servants to serve as interim officials will produce better policy outcomes than trusting regulation to political appointees who may be inexperienced in the regulated subject area.[215]

Yet the countervailing evidence is overwhelming, and examples abound of administrative-agency vacancies producing disastrous consequences. For instance, the National Commission on Terrorist Attacks Upon the United States, better known as the 9/11 Commission, cited turnover in agency positions and the resulting inexperience of intelligence-agency administrators as one of many factors leading to the government's failure to prevent the terrorist attacks of September 11, 2001.[216] The Federal Emergency Management

212. Press Release, Office of the Press Sec'y, White House, Remarks by the President at the Senate Democratic Policy Comm. Issues Conference (Feb. 3, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-senate-democratic-policy-committee-issues-conference (responding to a question from Senator Patrick Leahy concerning delayed confirmations of judicial nominees, President Obama answered "Look, it's not just judges, unfortunately, Pat, it's also all our federal appointees. We've got a huge backlog of folks who are unanimously viewed as well qualified, nobody has a specific objection to them, but end up having a hold on them because of some completely unrelated piece of business.").

213. O'Connell, *supra* note 207, at 930 n.84. One recent controversy came over the appointment of James Cordray to lead the Consumer Financial Protection Bureau. In order to prevent President Obama from using a recess appointment to name Cordray to the position, Congress refused to recess in December of 2011, instead holding *pro forma* sessions every third day. These sessions typically lasted only a minute or two, and were presided over by a single congressman; no official business was conducted. Despite the Senate's claim to remain in session, President Obama appointed Cordray on January 4, 2012. James Kennedy, *Obama's NLRB Recess Appointments are Constitutional*, JURIST (Feb. 11, 2012), http://jurist.org/sidebar/2012/02/james-kennedy-recess-appointments.php. For a defense of the constitutionality of President Obama's recess appointments, including that of Cordray, see Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. TIMES (Jan. 5, 2012), http://www.nytimes.com/2012/01/06/opinion/games-and-gimmicks-in-the-senate.html.

214. O'Connell, *supra* note 207, at 947.

215. *Id.* at 950.

216. *Id.* at 938–39.

Agency (FEMA) is another example. Only one of eight Senate-confirmed FEMA positions had been filled in September of 1989 when Hurricane Hugo struck South Carolina and killed eighty-two people,[217] and a year before Hurricane Katrina made landfall in 2005, more than one-third of FEMA's high-ranking policy positions were vacant.[218] More recently, the number of empty or interim-filled positions at a number of financial regulatory agencies, as well as the ensuing leadership vacuum, have hobbled implementation of the Dodd-Frank reforms.[219] According to one commentator:

> If you told people on Wall Street that every four years or eight years, you were going to lop off the top of a Fortune 500 company and say the company would operate normally, you'd be called crazy. There is no question that [understaffing] matters. Turnover and vacancies in politically appointed positions hurts performance.[220]

One can only speculate as to the role unfilled leadership positions have played in these and other regulatory failures. Still, the fact that understaffed agencies have been implicated in the biggest natural-security and environmental disasters since the rise of the administrative state should certainly be cause for concern.

C. *The Ineffectiveness of Confirmation Politics*

Political polarization has thus transformed Senate confirmation into the chief impediment to presidential control of the administrative state, and the concomitant understaffing can produce deleterious results. The more surprising result of political politicization, however, is that, at the same time that it frustrates the President's ability to staff the agencies with people of his choosing, it might also centralize the President's control over the administrative state. After describing the effects of polarization on the increasingly time-consuming appointments process, Devins and Lewis offer a

217. *Id.* at 939.

218. *Id.* at 939–40.

219. *See, e.g.*, Binyamin Appelbaum, *Uncertain Leadership Strains Financial Overhaul*, N.Y. TIMES (May 12, 2011), http://www.nytimes.com/2011/05/13/business/economy/13bank.html. One critic observed that interim appointments "have roughly the same authority as substitute high school teachers." *See* Jesse Eisinger, *At a Time of Needed Financial Overhaul, a Leadership Vacuum*, DEALBOOK (May 18, 2011), http://dealbook.nytimes.com/2011/05/18/at-a-time-of-needed-financial-overhaul-a-leadership-vacuum/.

220. *See* O'Connell, *supra* note 207, at 940 (citing Dan Eggen & Christopher Lee, *Late in the Term, an Exodus of Senior Officials: Scores of High-Level Political Positions Are Vacant or Are Being Filled By Temporary Appointees*, WASH. POST, May 28, 2008, at A11 (quoting political scientist David Lewis)).

second conclusion: once the President is able to secure a majority of commissioners from his party on an independent commission (which often happens within the first year of office), party polarization gives the President greater control over the independent agencies, making them more likely to implement policies of the President's choosing.[221]

Divided government has become the norm in Washington.[222] "[F]rom 1969 to 2000, government was divided for twenty-six of thirty-two years, or eighty-one percent of the time."[223] During periods of divided government, Democrats and Republicans are less able to agree on legislation,[224] and the absence of a block of centrist legislators willing to cross party lines makes competition between the executive and legislative branches more intense.[225] Hence, with a deadlocked Congress, the locus of lawmaking moves away from Congress and toward the executive and the independent administrative agencies.[226] The numbers bear this out: in 2007, Congress enacted 138 public laws; by contrast, federal agencies finalized 2926 final rules, of which sixty-one were labeled as major regulations, defined as having an effect of over $100 million on the economy.[227]

With so much policymaking being done at the administrative level, Presidents since Reagan have placed greater emphasis on political ideology when making agency appointments.[228] Presidents also increasingly have taken advantage of non-legislative policymaking tools—executive orders, directives, and appropriation, among others—to bring the agencies in line with their policy preferences.[229] In addition to circumventing Congress on the front end, unilateral presidential action has the advantage of seldom being challenged by Congress after the fact. Between 1973 and 1998, Presidents issued nearly one thousand executive orders.[230] Only thirty-seven of these orders were challenged by Congress, and only three

221. Devins & Lewis, *supra* note 77, at 462.

222. *Id.* at 486.

223. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2331 (2006).

224. *See, e.g.*, Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 71 (2007).

225. Levinson & Pildes, *supra* note 223, at 2337–38.

226. Devins & Lewis, *supra* note 77, at 485.

227. O'Connell, *supra* note 207, at 936.

228. Devins & Lewis, *supra* note 77, at 492.

229. *Id.* at 486; *see also* Kagan, *supra* note 73, at 2299–300.

230. Devins, *supra* note 77, at 67–68.

resulted in legislation.[231] James F. Blumstein aptly summarized the degree to which the President has taken charge of the regulatory process: "[a]fter [nearly decades] of political and intellectual *Sturm und Drang* on the issue of centralized presidential regulatory review . . . it appears that we are all (or nearly all) Unitarians now."[232]

The practices of the Obama Administration support Devins and Lewis's hypothesis that congressional obstructionism leads to unilateral presidential action. Indeed, President Obama has often circumvented the confirmation process by creating a number of non-Senate-confirmed high-level administrative positions,[233] known colloquially as "czars."[234] The practice has received criticism from both sides of the aisle for upsetting the constitutional balance of

231. *Id.* at 68.

232. James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851–52 (2001) (citations omitted). Of course, Blumstein refers generally to the "unitary executive" model of the Presidency, which emphasizes the President's strong influence over the federal government. *See, e.g.*, Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 251 (2010); Pierce, *supra* note 72.

233. In some instances, President Obama created these positions via executive order. *See, e.g.*, Exec. Order No. 13,507, 74 Fed. Reg. 17071 (Apr. 8, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-04-13/pdf/E9-8572.pdf (creating the White House Office of Health Reform, to be headed by a non-Senate-confirmed Director charged with "provid[ing] leadership for and [coordinating] the development of the Administration's policy agenda across executive departments and agencies concerning the provision of high-quality, affordable, and accessible health care . . . ."). Other "czars" were named as ad hoc special advisors to existing advisory bodies. *See, e.g.*, Jesse Lee, *Van Jones to CEQ*, WHITE HOUSE BLOG (Mar. 10, 2009, 12:37 PM), http://www.whitehouse.gov/blog/09/03/10/Van-Jones-to-CEQ/; Scott Wilson & Garance Franke-Ruta, *White House Adviser Van Jones Resigns Amid Controversy Over Past Activism*, WASH. POST (Sept. 6, 2009), http://voices.washingtonpost.com/44/2009/09/06/van_jones_resigns.html (noting that because "Green Jobs Czar" Van Jones was not confirmed by the Senate, he did not undergo the same degree of vetting usually undertaken with Senate nominees). Or consider the case of Elizabeth Warren: Warren initially proposed the Consumer Financial Protection Bureau, lobbied hard for its creation, and was a natural choice to serve as its first Director, but she was seen as politically risky. Rather than name Warren as the Director for the entire five-year term, President Obama nominated her to oversee the Bureau until a Senate-confirmed Director could be named, setting mid-2011 as his target. *See* Sewell Chan, *Warren to Unofficially Lead Consumer Agency*, N.Y. TIMES (Sep. 15, 2010), http://www.nytimes.com/2010/09/16/business/16consumer.html.

234. Noelle Straub, *Sen. Byrd Questions Obama's Use of Policy 'Czars,'* N.Y. TIMES (Feb. 25, 2009), http://www.nytimes.com/gwire/2009/02/25/25greenwire-byrd-questions-obamas-use-of-policy-czars-9865.html.

power between the branches,[235] and in February of 2011 the Republican-controlled House voted to strip the salaries of several of President Obama's non-Senate-confirmed positions.[236] President Obama has reaffirmed his commitment to his unofficial policy advisors, however. In his signing statement for the 2011 appropriations bill, which purported to strip funding for several of President Obama's czars, President Obama cited "well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority," and he stated his intention to construe the bill "not to abrogate these Presidential prerogatives."[237] While the debate over President Obama's czars continues, so long as the confirmation process impedes the President's authority to implement his policy preferences, it seems likely that future Presidents will find other ways to avoid it.

Thus the strange consequence of our current confirmation politics is that while existing agency positions are left empty, the Obama Administration has created a number of new informal advisory positions in order to go about the business of government.[238] Congress has leaned so heavily on its advice-and-consent power[239] as a method of resisting expanding presidential influence that, in many cases, the President simply circumvents Capitol Hill. There is nothing wrong, and much right, with the President's seeking advice; indeed, the Constitution explicitly authorizes the President to ask for written opinions from his subordinates.[240] Nor are our principles of the separation of powers offended by the President's efforts to coordinate independent-agency regulation in order to implement his preferred policy initiatives.

But appointing informal advisors on an ad hoc basis does not address the more endemic problems with the administrative state as it exists today. The danger of modern confirmation politics is that

235. *Id.*; *see also* Manu Raju, *Democrats Join GOP Czar Wars*, POLITICO (Sept. 17, 2009, 5:05 AM), http://www.politico.com/news/stories/0909/27265.html.

236. Evan Lehmann, Lisa Friedman, Lauren Morello & Saquib Rahim, *House Republicans Fire White House Climate Advisers as Frenzied Budget Debate Continues*, N.Y. TIMES (Feb. 18, 2011), http://www.nytimes.com/cwire/2011/02/18/18climatewire-house-republicans-fire-white-house-climate-a-41808.html.

237. Press Release, Office of the Press Sec'y, White House, Statement by the President on H.R. 1473 (Apr. 15, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473.

238. *See supra* notes 233–34 and accompanying text (discussing President Obama's various czar appointments).

239. U.S. CONST. art. II § 2, cl. 2.

240. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices . . . .").

understaffed administrative agencies cannot adequately police their areas of expertise. For every recent national crisis—9/11, Hurricane Katrina, the financial crisis of 2008—there has been an understaffed regulator struggling to respond.[241] Vacancies in the administrative agencies, especially when combined with czar-type presidential appointments operating without a clear legislative grant of authority, produce regulatory turf wars, muddled chains of command, and a general diffusion of accountability. There is nothing wrong with the President's drawing on the expertise of informal, czar-type policy advisors. There is something wrong with understaffed agencies being unable to discharge their statutory duties.

CONCLUSION

In 1937, President Roosevelt's Brownlow Committee on Administrative Management derisively referred to the independent agencies as "the fourth branch" and criticized the manner in which the independent agencies intruded on the President's direction of the burgeoning administrative state.[242] Despite the Supreme Court's recent reassertion of the President's authority over the independent agencies in *Free Enterprise Fund*, the Brownlow Committee's concerns seem outlandish today. Today, independent agencies seldom disregard the President's input, and when they do it is at their own peril.

The *Free Enterprise Fund* opinion thus misses the mark: removal restrictions bear little consequence to the President's direction of the administrative state. Rather, the primary restraint on the President's influence over the agencies is the Senate's power to advise and consent to the President's appointees. Senate obstructionism makes little sense as a political matter, as the President possesses ample tools to implement his policies at the administrative level. It makes even less sense as a policy matter, as prolonged confirmation battles only sap the energy of a government that could better use its time by governing. The President bears the costs of ineffective regulation at the ballot box. The American public pays for it every day.

241. *See supra* notes 216–20 and accompanying text.
242. *See* Ginsburg & Menashi, *supra* note 232, at 266.