

Political Control and the Forms of Agency Independence

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ABSTRACT

The legitimacy of the federal executive establishment's administrative policies hinges on the ability of democratically elected officials to hold federal agencies accountable. While both the President and Congress have a variety of tools they can employ to enhance control over the bureaucracy, elected officials have chosen to insulate some agencies from politics. Courts and legal scholars have focused a lot of attention on what constitutes an "independent" agency and what consequences this should have for jurisprudence. In this Article, we explore decisions to insulate agencies from political control by examining the statutory features of 321 agencies and bureaus in the federal executive establishment. Our analysis of a broad range of statutes suggests that there is substantial and underappreciated variation in the structural characteristics that influence the accountability of federal agencies to the President and Congress. These characteristics change over time, influence administrative policy, and have implications for judicial deference to federal regulations.

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INTRODUCTION

Voters and courts assume that federal agencies are accountable to elected officials. Indeed, campaign dynamics and jurisprudential ca-

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nons are tied to the idea that presidents, and to a lesser extent congresses, lead the executive branch. If a federal agency makes a blunder or some big social problem goes unaddressed, presidents and their parties in Congress are held accountable. For example, when the financial regulatory agencies failed to anticipate and prevent the financial crisis in 2008, voters naturally questioned why the Bush Administration had failed them.¹ And, deeper investigation led critics to question how policies endorsed by the President and Congress had been so shortsighted and contributed to overinflated housing markets and irresponsible market practices by financial titans.²

The democratic legitimacy of policymaking depends upon its connection to elected officials. If unelected administrative officials make policy decisions in such areas as economics, civil rights, or the environment, the democratic principles embedded in the Constitution require that those officials are responsive to the President and Congress. Courts historically have justified agency policymaking based upon its connection to policy decisions made by legislatures and the President's ability to ensure that the laws are faithfully executed.³ Federal judges give deference to administrative policies in part because the policies are presumed to reflect legitimate policy choices made by actors with a public constituency.⁴

Presidents are empowered with constitutional and statutory authority to direct the activities of the executive establishment.⁵ Presi-

¹ See Annie-Rose Strasser & Tara Culp-Ressler, *5 Reasons Americans Are Right to Blame Bush for the Economy*, THINKPROGRESS (June 14, 2012, 11:14 AM), <http://thinkprogress.org/economy/2012/06/14/499523/5-reasons-americans-are-right-to-blame-bush-for-the-bad-economy/>; see also Sean Sullivan, *The Public Still Blames Bush. and It Celebrates the Clintons.*, WASH. POST (Dec. 19, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/12/19/the-public-still-blames-bush-and-it-celebrates-the-clintons/>.

² See Mark Landler & Sheryl Gay Stolberg, *Bush Can Share the Blame for Financial Crisis*, N.Y. TIMES (Sept. 20, 2008), http://www.nytimes.com/2008/09/20/business/worldbusiness/20iht-prexy.4.16321064.html?pagewanted=all&_r=0.

³ See, e.g., *Field v. Clark*, 143 U.S. 649, 693–94 (1892). Congress may seek help from the executive branch in pursuing policy if Congress articulates intelligible principles to which the person or agency authorized to act may conform. See *id.* at 693–94; see also *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001); *Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁴ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010); *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984).

⁵ See, e.g., U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States”); U.S. CONST., art. II, § 3, cl. 5 (stating that the President “shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States”); *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (reaffirming the principle that the President has general administrative control over the executive branch).

dents have sought—and Congress has granted—explicit statutory control over areas ranging from budgets, reorganization, and the development of an expanded White House policymaking apparatus.⁶ Presidents also have unilaterally expanded their power in areas such as regulatory review and spending, and have discovered areas where there is a residuum of executive power that is difficult to proscribe in law.⁷ The latter category of control over administration includes the power to interpret statutes, determine enforcement priorities, and allocate agency time and resources to some activities and not others.

Congress also exerts significant control over agency activities, largely through the ability to create and fund federal programs and agencies. While Congress is less likely than it once was to dictate precisely the activities of agencies (e.g., the recipients of federal contracts and jobs), the legislature still directs agency activities in the form of new legislation, limitation riders in appropriations bills, extensive committee reports, and formal and informal communications between congressional committees and their staffs and agencies.⁸ Agencies depend upon the benevolence of Congress for funding, authority, and discretion. Agency executives that run afoul of Congress can be hauled before unfriendly committees, have their budgets cut, and be shackled with a variety of constraints on agency activities and spending.

The stakes for control have increased for elected officials because the policymaking authority of agencies has increased over time. As the activities of the national government have grown in number, scope, and complexity, Congress has delegated increasing amounts of policymaking authority to the executive branch. Agencies make decisions as varied and important as what drugs may come to market,

⁶ For budgets, see LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 31–32 (1975). For reorganization, see generally PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905–1996* (2d ed. 1998). For White House expansion, see JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY* (1992); MATTHEW J. DICKINSON, *BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH* (1997); JOHN HART, *THE PRESIDENTIAL BRANCH: FROM WASHINGTON TO CLINTON* 13–14 (2d ed. 1995).

⁷ See David E. Lewis & Terry M. Moe, *The Presidency and the Bureaucracy: The Levers of Presidential Control*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 374 (Michael Nelson ed., 10th ed. 2014); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, *LAW & CONTEMP. PROBS.*, Spring 1994, at 1.

⁸ See generally JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 *DUKE L.J.* 456; Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 *AM. POL. SCI. REV.* 766 (2010).

what firms may merge, the level of civil rights enforcement, and how to ensure safe products and workplaces.

Yet, Congress and the President have chosen at different times to design agencies that are insulated from political control. Scholars explain independent agencies as bodies of seasoned experts charged with administering the law in important policy areas.⁹ However, choices of insulation are not always based upon high-minded efforts associated with quasi-legislative or quasi-judicial activities. Indeed, sometimes the only way a legislative deal gets made to enact a new policy is when legislators agree to create a new insulated agency to implement the policy.¹⁰ In a less rosy version of the politics of agency design, opponents of a new proposed policy insist on provisions in the new law that privilege some interests over others and limit the ability of political actors to intervene.¹¹

While many aspects of these efforts are well understood, others remain relatively unrecognized. Political actors use a variety of underappreciated features of agency design to limit political influence over agencies.¹² These characteristics extend well beyond the widely appreciated “for cause” protections for presidential appointees that prevent appointee removal prior to the end of a specified term except for neglect of duty or malfeasance in office.¹³ Interestingly, “for cause” protections are widely used across the executive establishment in executive departments in single-headed administrative units as well as the normal “independent” agencies that are the subject of significant

⁹ E.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1130–33 (2000); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 171 (2006); Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 290.

¹⁰ See Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413, 424 (2004); see also McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432–33 (1989) (“[T]he choice of structure and process is guided by political concerns.”).

¹¹ See DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 30 (2003); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 274–75 (John E. Chubb & Paul E. Peterson eds., 1989); Moe & Wilson, *supra* note 7, at 6; B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176, 176–77 (2004).

¹² DAVID E. LEWIS & JENNIFER L. SELIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012); Jennifer L. Selin, *What Makes an Agency Independent?*, AM. J. POL. SCI. (forthcoming 2015) (on file with author and at the Wiley Online Library, <http://onlinelibrary.wiley.com/doi/10.1111/ajps.12161/abstract>).

¹³ See Selin, *supra* note 12, at 11–12.

legal and political science scholarship.¹⁴ Indeed, a comprehensive survey of the executive establishment reveals an amazing diversity of statutory devices designed to limit political influence and applied to a variety of different agencies. An evaluation of these traits over time reveals that existing agencies are becoming increasingly insulated from political control.¹⁵ These aspects of the executive establishment have important implications for our understanding of political control of federal agencies and for our understanding of administrative jurisprudence.

This Article relies on recent research surveying the structure of the entire executive establishment to shed light on the different means the elected branches employ to insulate policymaking. This Article also describes trends in the use of such devices and illustrates how the executive establishment has grown more difficult to control over time.¹⁶ It then discusses the implications of these findings for political control and jurisprudence.

I. POLITICAL CONTROL OF THE ADMINISTRATIVE STATE

Modern presidents are strongly motivated to get control of the executive establishment.¹⁷ Presidents did not always feel this pressure so keenly, particularly in earlier eras when Congress conducted more policymaking and presidents were beholden to party figures in Congress.¹⁸ Agencies were embedded in networks of party and legislative interests that helped shape their choices. Indeed, for large portions of American history it was Congress that could more properly be characterized as dominating the actions of executive agencies.¹⁹

In the modern period, however, the flow of policymaking responsibility to administrative actors creates strong and consistent motivation for presidents to try to manage the government. While either

¹⁴ See, e.g., 13 U.S.C. § 21(b)(1) (2012) (fixed term for the Director of the Bureau of the Census); 25 U.S.C. § 1661(a)(2) (2012) (fixed term for the Director of the Indian Health Service); 49 U.S.C. § 106(b) (2012) (fixed term for the Administrator of the Federal Aviation Administration); see also LEWIS & SELIN, *supra* note 12, at 43.

¹⁵ See Selin, *supra* note 12, at 14–15.

¹⁶ See, e.g., ARNOLD, *supra* note 6, at 4; David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 401 (2004); Selin, *supra* note 12, 2–3.

¹⁷ See THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 8 (1985); THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994* 2 (1995); Moe, *supra* note 11, at 279.

¹⁸ See Lowi, *supra* note 17, at 9.

¹⁹ See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861*, at 553 (1954).

campaigning or governing, presidents encourage the idea that they are responsible for the management of the executive establishment. They more aggressively and consistently use the tools available to them in the Constitution and then use explicit or implied authority from Congress to augment their executive power. Modern presidents rely on broad classes of strategies to enhance their control over the executive establishment, identified loosely using the labels *centralization* and *politicization*.²⁰

A. *Centralization*

Modern presidents have increasingly pulled policymaking responsibility into the White House. The staff dedicated to advising the President has grown and become more bureaucratized over time. Visible efforts to add White House oversight to agency policymaking processes such as budgeting and rulemaking have contributed to this institutionalization of the presidency.²¹ The modern institutional presidency is a complex bureaucracy in its own right, set up to help the President perform constitutionally and statutorily mandated responsibilities. Presidential staff plays an important role, aiding the President in creating policy and facilitating policymaking and management in the executive establishment.

All presidents have relied on personal staff to help them conduct their affairs. However, it was not until the New Deal that a formal structure was created to help presidents perform their functions.²² Some of the impetus for this move was driven by the expansion of the executive establishment. Federal employment ballooned from 603,587 to 3,332,356 civilian employees between 1933 and 1944 as New Dealers created new agencies, many of them outside the existing executive departments.²³ The potential electoral ramifications of management failings in the New Deal were apparent relatively early in the Roosevelt presidency and led Roosevelt to create the President's Committee on Administrative Management (i.e., the Brownlow Com-

²⁰ See generally ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION* (2002); WEKO, *supra* note 17, at ix-x; Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985).

²¹ See Lyn Ragsdale & John J. Theis, III, *The Institutionalization of the American Presidency, 1924-92*, 41 *AM. J. POL. SCI.* 1280, 1285-303 (1997).

²² For good reviews of the creation and development of the Executive Office of the President, see BURKE, *supra* note 6; DICKINSON, *supra* note 6; HART, *supra* note 6.

²³ See 5 *HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT* 128 (Susan B. Carter et al. eds., 2006).

mittee) after the 1936 election.²⁴ The Committee recommended the creation of a permanent Executive Office of the President (“EOP”) to help the President carry out his responsibilities as Chief Executive.²⁵ The EOP originally included a small staff and a handful of agencies such as the White House Office, the Bureau of the Budget, and the Natural Resources Planning Board.²⁶ Over time, the number of presidential staff in the White House Office and the Executive Office of the President more generally has increased significantly.²⁷ The growth in the institutional presidency came partly through the addition of new units such as the Council of Economic Advisers, National Security Council, and Office of the U.S. Trade Representative. As of 2011, the White House Office employs about 450 people and the EOP employs about 1900 people housed in ten distinct units.²⁸

Notable among the additions to the EOP was the Bureau of the Budget (“BOB”). Historically, agencies went directly to congressional committees with requests for appropriations but the disjointed commitments committees made to agencies made budgeting difficult.²⁹ Reconciling revenues and committed expenditures was complicated, particularly during periods of uncontrollable expenditures like wartime.³⁰ Congress eventually acquiesced to the creation of a national budget, albeit in a limited way. The Budget and Accounting Act of 1921 created the BOB as a unit within the Department of the Treasury.³¹ The task of the original BOB was to take estimates from all federal agencies and compile them into one document to facilitate efficiency in administrative operations and congressional deliberation on appropriations more generally.³²

The Budget and Accounting Act is a landmark in the history of the presidency and the relations between the branches. The move of

²⁴ See THE PRESIDENT’S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* (1937).

²⁵ See *id.*

²⁶ See HAROLD C. RELYEA, *CONG. RESEARCH SERV.*, 98-606 *GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW* 8 (2008) (noting that the EOP organized by E.O. 8248 was to consist of the White House Office, the Bureau of the Budget, the National Resources Planning Board and the Office of Government Reports).

²⁷ See *id.* at 25–28 (providing a chronology of the principal units of the EOP, 1939–2008); HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 2013–2014, at 248 (2013).

²⁸ See STANLEY & NIEMI, *supra* note 27, at 248.

²⁹ See FISHER, *supra* note 6, at 19.

³⁰ See *id.* at 31–32.

³¹ Budget and Accounting Act, 1921, Pub. L. No. 67-13, 42 Stat. 20, 22.

³² See *id.*

the BOB in 1939 to the EOP was a symbolic recognition of the growing importance of the President in the budgeting process. Over time, budget estimates began to include details of proposed legislative programs and suggestions for cuts and ways to economize.³³ It was impossible to separate the formulation of a national budget from policy decisions. Presidents, through the BOB, began to use the budget as a policy tool, a statement of their general legislative program.³⁴ The President's power to receive all agency estimates, revise them, and suggest appropriation levels was an important tool of presidential control.³⁵

Over time, presidents have asserted even greater control over the BOB, adding new units and layers of political appointees to make it a more "presidential" operation.³⁶ For example, in 1960 the BOB had eleven appointees to manage 437 employees. Today it has close to forty appointees overseeing 441 employees.³⁷ The BOB not only reviews agency estimates and prepares the budget, but it also clears agency communications with Congress, reviews proposed legislation, sets government-wide procurement policies, and reviews (and prompts) proposed agency regulations.

In addition to centralized review of budgets, scholars justifiably have focused a significant amount of attention on regulatory review as a source of presidential power. Concerned with the influence of burgeoning agency regulations on economic growth and the coherence of administration policymaking, the first traces of systematic regulatory review appeared in the Nixon Administration.³⁸ Presidents Ford and

³³ See, e.g., LARRY BERMAN, *THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921–1979*, at 4–5 (1979).

³⁴ See, e.g., HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON 79–80* (1977) (“[S]ince 1971 the OMB [formerly BOB] has become more prominent in bargaining with Congress . . . in order to sell the administration’s policy.”).

³⁵ For good histories of the BOB, see BERMAN, *supra* note 33; SHELLEY LYNNE TOMKIN, *INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT’S BUDGET OFFICE* (1998).

³⁶ See, e.g., BERMAN, *supra* note 33, at 14–15; HECLLO, *supra* note 34, at 78–79; TOMKIN, *supra* note 35, at 51; Hugh Hecllo, *OMB and the Presidency—The Problem of “Neutral Competence,”* 38 *PUB. INT.* 80, 85 (1975).

³⁷ Data on 1960 comes from DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 85 (2008). Data on June 2012 employment comes from the Office of Personnel Management’s Fedscope web resource at <http://www.fedscope.opm.gov/employment.asp>. Appointee numbers from 2012 come from H. COMM. ON OVERSIGHT & GOV’T REFORM, 112TH CONG., *POLICY & SUPPORTING POSITIONS* (Comm. Print 2012), <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/pdf/GPO-PLUMBOOK-2012.pdf> [hereinafter PLUMBOOK].

³⁸ Nixon mandated the Quality of Life Review Program. The administration required that different regulatory agencies submit its rules to OMB for review. See Robert V. Percival,

Carter extended Nixon's efforts,³⁹ and President Reagan's groundbreaking Executive Order 12,291 required that all agencies submit proposed rules to OMB's Office of Information and Regulatory Affairs ("OIRA") for review.⁴⁰ Agency submissions had to be accompanied by cost-benefit analyses and evaluations of alternative approaches.⁴¹ This was a huge assertion of presidential control over agencies and a watershed moment for the presidency and policymaking more generally. The review process gave presidents the right to stop rules where the benefits did not exceed the costs, choose among rules, and delay rules while review was pending.⁴² Subsequent presidents have revised and modified Reagan's executive order but have not discarded the practice.⁴³

Presidential efforts to centralize control over agency actions through budgetary and regulatory review are mirrored by their efforts to secure control over agencies by centralizing in other ways. Agency litigation generally is centralized through the Department of Justice in order to promote coherence and consistency across the executive establishment.⁴⁴ In cases where salient tasks and responsibilities are distributed across multiple agencies, presidents respond by creating White House czars, White House coordinating councils, and more formal agency reorganization. For example, the presidential response to the terrorist attacks on the World Trade Center and Pentagon led first to the creation of a Homeland Security czar and Council in the White House and then, ultimately, a dramatic reorganization in the Department of Homeland Security.⁴⁵ Recent concerns related to veterans'

Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency, LAW & CONTEMP. PROBS., Autumn 1991, at 129, 133.

³⁹ See *id.* at 138–47.

⁴⁰ Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

⁴¹ *Id.* at 129.

⁴² *Id.*

⁴³ President Clinton notably limited review to the most costly and significant rules. President Bush sought to centralize control over agency rulemaking via appointed regulatory policy officers in each agency and directives regarding the review of agency guidance. President Obama has been more aggressive using OMB to prompt agencies to prioritize some issues over others.

⁴⁴ See 28 U.S.C. § 516 (2012); see also Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 572 (2003); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 313 (1994); Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1084 (2009).

⁴⁵ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2142–45 (codified as amended at 6 U.S.C. §§ 111–113 (2012)); Exec. Order No. 13,228, 3 C.F.R. 796 (2001).

health care and Ebola have led President Obama to appoint visible White House-connected officials to direct the federal response.⁴⁶

B. Politicization

Modern presidents also politicize the federal executive establishment to enhance their control. Article II empowers the President to nominate the principal officers of government and stipulates that the Senate must give advice and consent on these nominations.⁴⁷ The Supreme Court has further clarified that Article II grants presidents the exclusive power to remove the principal officers of government except in agencies performing quasi-legislative or quasi-judicial functions.⁴⁸ There are currently between 1100 and 1200 Senate-confirmed positions, including Ambassadors, U.S. Attorneys, U.S. Marshals.⁴⁹ There are constitutional and statutory limitations on the types of persons that can be nominated for many of these positions as well as fixed terms limiting removal.⁵⁰ In addition, the rules for the selection and removal of chairs vary across the various multimember boards and commissions.

The means for selecting other federal employees is determined by Congress. Congress has created a number of methods for selecting federal personnel. The most prevalent form is civil service selection where aspirationally persons are selected, promoted, demoted, and removed on the basis of merit. This system was inaugurated by the Pen-

⁴⁶ See, e.g., Erin Dooley & Mary Bruce, *President Obama Names Ron Klain 'Ebola Czar,'* ABC NEWS (Oct. 17, 2014), <http://abcnews.go.com/Politics/ron-klain-meet-president-obamas-ebola-czar/story?id=26269061>; Justin Vaughn, *Can Rob Nabors Fix the VA? Here's What He Needs,* WASH. POST (May 20, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/20/can-nabors-fix-the-va-heres-what-he-needs/>.

⁴⁷ U.S. CONST. art. II, § 2, cl. 2.

⁴⁸ See *Bowsher v. Synar*, 478 U.S. 714, 726–32 (1986) (Congress cannot participate in the removal of executive officials, as Congress does not have a role in the supervision of offices charged with execution of the laws); *Buckley v. Valeo*, 424 U.S. 1, 135–37 (1976) (Congress does not have the power to appoint members of the Federal Election Commission); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 623–24 (1935) (limiting the President's removal power in certain agencies); *Myers v. United States*, 272 U.S. 52, 164 (1926) (reaffirming the principle that the President has general administrative control over the executive branch, including the power of appointment and removal of executive officers).

⁴⁹ See PLUMBOOK, *supra* note 37, at 197–200; see also Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012); CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 44–45 (2013).

⁵⁰ See, e.g., Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2071 (establishing the requirements for Senate confirmed nominees for the Foreign Service); see also LEWIS, *supra* note 11, at 47–48.

dleton Act (1883)⁵¹ and is defined in Title 5 of the U.S. Code. In addition, Congress has granted an increasing number of agencies authority to create their own personnel systems outside the system defined in Title 5.⁵² While these systems generally allow more flexibility than the Title 5 method, they still retain the flavor of the traditional civil service system through their rule-based focus on merit as the requirement for hiring, advancement, and removal.

Since mid-twentieth century, when civil service protections extended to the highest proportion of federal employees, Congress has created several new classes of political appointees that are appointed by presidents or their subordinates and can be removed without cause.⁵³ In 1953 President Eisenhower created Schedule C positions for persons serving in policy-determining or confidential positions.⁵⁴ Today, the number of persons appointed under this authority is usually between 1100 and 1500.⁵⁵ While their immediate supervisor must be a political appointee, Schedule C appointees can serve in roles as varied as speechwriter, confidential assistant, and director of media affairs. The 1978 Civil Service Reform Act (“CSRA”) created the Senior Executive Service (“SES”), a mezzo level of management below the Senate-confirmed appointees and above the traditional civil service.⁵⁶ The SES was formed from the top levels of the traditional civil service but also provided that ten percent of the SES could be politically appointed.⁵⁷ There are usually between 600 and 800 non-career members of the SES.⁵⁸ More recently, Congress has been willing to create other presidentially appointed positions that do not require Senate confirmation. For example, in the Presidential Appointment Efficiency and Streamlining Act of 2011, Congress removed the Senate confirmation requirements for 166 previously Senate-confirmed positions.⁵⁹

As this description suggests, the number of political appointees has increased significantly since the mid-twentieth century, almost doubling both in raw counts and as a percentage of federal employ-

51 Pendleton Act of 1883, ch. 27, 22 Stat. 403 (codified as amended at 5 U.S.C.).

52 See LEWIS & SELIN, *supra* note 12, at 74.

53 See LEWIS, *supra* note 37, at 11–26.

54 Exec. Order No. 10,440, 3 C.F.R., 1953 supp. 68 (1953); PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 495 (1958).

55 See PLUMBOOK, *supra* note 37.

56 Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

57 *Id.* § 402.

58 See LEWIS, *supra* note 37, at 99–100.

59 Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012); DAVIS & MANSFIELD, *supra* note 49, at 44–45.

ees.⁶⁰ Some natural growth in the number of Senate-confirmed appointees is to be expected as new agencies and programs are created and require new appointee positions to manage these new efforts.⁶¹ However, the creation of Schedule C positions and the SES were straightforward efforts by presidents to get control of the bureaucracy and satisfy patronage demands.⁶² The increasing depth and penetration of political appointees into agency hierarchies provide opportunities for presidents to secure control over the policymaking apparatus inside agencies and exert nonpartisan managerial control and oversight. Both are important to presidents.

The increase in the number of appointed positions is made more consequential for presidential policymaking because of presidential efforts to develop the White House's capacity to review and select appointees. Historically, presidents relied heavily on party officials to help in filling vacant positions and selected national party officials to fill posts such as Postmaster General.⁶³ The national parties regularly opened up offices close to the White House to provide the personnel necessary to select persons for all of the vacant positions. Since the mid-century, presidents have increasingly separated themselves from the national party organizations and built up a White House-based apparatus for selecting and vetting prospective appointees.⁶⁴ President Truman was the first president with an aide fully dedicated to personnel issues and the Kennedy Administration employed three persons dedicated to presidential personnel operations.⁶⁵ Today, personnel operations swell to over 100 persons during the transition, and presidents employ professional recruiters to lead or aid in this operation. Presidents also have systematized the process of filling vacant positions and finding jobs for key personnel. The White House appa-

⁶⁰ See LEWIS, *supra* note 37, at 98.

⁶¹ See *id.* at 86 (discussing how the number of political appointees increases as agencies are elevated to cabinet status and the number of ambassadors increases).

⁶² See *id.*

⁶³ See WEKO, *supra* note 17, at 1.

⁶⁴ See G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* xvi (1981); JOHN W. MACY, BRUCE ADAMS & J. JACKSON WALTER, *AMERICA'S UNELECTED GOVERNMENT: APPOINTING THE PRESIDENT'S TEAM* 33 (1983); WEKO, *supra* note 17, at 5; Dom Bonafede, *The White House Personnel Office from Roosevelt to Reagan*, in *THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON* 30, 30, 32 (G. Calvin Mackenzie ed., 1987); Carolyn R. Thompson & Roger G. Brown, *The Transfer of Political Functions from the National Party Committees to the White House: From Eisenhower to Nixon*, 25 SE. POL. REV. 27, 30 (1997).

⁶⁵ See Bonafede, *supra* note 64, at 35, 36.

ratus is institutionally distinct from the party, has clear procedures, and information technology systems to organize its efforts.⁶⁶

The increasing sophistication of the White House personnel apparatus provides presidents greater control over the selection of appointees. Presidential personnel offices have become increasingly involved in the selection of personnel down to the lowest levels and presidents are better equipped to select appointees according to the criteria presidents prefer.⁶⁷ While presidents prefer appointees that address a number of goals such as satisfying party factions, adding to diversity, building relationships with Congress, and so forth, most of the evidence suggests that in the last forty years presidents have used their augmented personnel authority to select more carefully appointees that are loyal to the President.⁶⁸ Given federal agencies' increasing role in policymaking, a big public failure such as the response to Hurricane Katrina or the Veterans Administration scandal can harm an administration.⁶⁹ Presidents need to select persons in key positions who are always on the lookout for the President's interests.

Presidents have used the increasing number of appointees and their enhanced White House capacity for personnel selection to "implant their DNA throughout the government" (to borrow a phrase from a George W. Bush aide).⁷⁰ This is the essence of the politicization strategy. Presidents strategically politicize the agencies that control budgets, regulation, communication with Congress, and personnel. For example, presidents have pushed for and received major reorganizations to enhance presidential control over the BOB and OMB, as well as the Civil Service Commission and Office of Personnel Management.⁷¹ Each reorganization dramatically enhanced presidential control over the executive establishment by facilitating the

⁶⁶ See Clay Johnson, *Recommendations for an Effective 2008 Transition*, 68 PUB. ADMIN. REV. 624, 624–25 (2008).

⁶⁷ See LEWIS, *supra* note 37, at 11, 19–27; JAMES P. PFIFFNER, *THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING* 61–68 (2d ed., 1996); WEKO, *supra* note 17, *passim*.

⁶⁸ See George C. Edwards III, *Why Not the Best? The Loyalty-Competence Trade-Off in Presidential Appointments*, BROOKINGS REV., Spring 2001, at 12, 13–14. See generally Dean E. Mann, *The Selection of Federal Political Executives*, 58 AM. POL. SCI. REV. 81, 82–87 (1964) (emphasizing the importance of loyalty to presidents and describing the beginnings of the expansion of presidents' power to control appointments with the Kennedy Administration); Moe, *supra* note 20, at 257–58, 260–61.

⁶⁹ See LEWIS, *supra* note 37, at 165–71.

⁷⁰ Mike Allen, *Bush to Change Economic Team*, WASH. POST, Nov. 29, 2004, at A5 (internal quotation marks omitted).

⁷¹ See Lewis & Moe, *supra* note 7, at 388–89, 393.

role of increased numbers of presidential personnel loyal to the administration.

C. Congressional Control

Of course, Congress is not without its own system of rules, procedures, and practices that influence policy. Arguably the most important congressional tool for controlling administrative agencies is the ability to appropriate funds, as no federal agency may spend revenues or funds unless Congress has appropriated them.⁷² Congress uses funding levels (and threats to withhold or restrict appropriations) as an instrument to reward or punish agencies in order to exert influence over agency decisions.⁷³ Some statutes, however, authorize agencies to collect and spend funds outside of appropriations.⁷⁴ These forms of funding include the ability to use gifts and donations, collect administrative fees, deal or invest in property, have access to a working capital fund, or participate in business or banking activities. The more sources of self-funding an agency has, the less influence Congress—and to a lesser extent the President—can exert over agency policy.⁷⁵

Congressional influence over agencies is linked closely to the committees and subcommittees actively involved in overseeing an agency and confirming presidential appointees.⁷⁶ The structure of congressional oversight matters for monitoring agency policy. Committees in both the House and Senate monitor agency actions through hearings and investigations. These committees also review and use information provided by organized interests to evaluate agency policy.⁷⁷ Senate committees confirm most of the presidential appointees who head agencies or important bureaus within agencies.⁷⁸ In some cases, more committees actively involved in oversight are helpful be-

⁷² See U.S. CONST. art I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); see also The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)–(B) (2012).

⁷³ See Devins, *supra* note 8, at 456; Macdonald, *supra* note 8, at 766; Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1345, 1350 (1988).

⁷⁴ See Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822 (2012).

⁷⁵ See *id.* at 1824.

⁷⁶ See ABERBACH, *supra* note 8, at 5.

⁷⁷ See *id.* at Table 6-1; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–67 (1984).

⁷⁸ See ELIZABETH RYBICKI, CONG. RESEARCH SERV., RL31980, SENATE CONSIDERATION OF PRESIDENTIAL NOMINATIONS: COMMITTEE AND FLOOR PROCEDURE 1 (2013).

cause committees have expertise in different policy areas.⁷⁹ In other cases, too many committees may harm congressional influence because efforts to direct policy must be agreed upon by multiple actors and there is a greater chance that the agency will receive mixed policy messages from Congress.⁸⁰

Congress frequently requires agencies to provide regular reports to specific congressional committees or to the chambers as a whole. As with other aspects of agency design, these reporting requirements vary from agency to agency with some agencies having few reporting requirements to few committees and some agencies having many reporting requirements to many committees. While a larger number of reporting requirements means that Congress as a whole receives information on agency actions, there is an increased possibility of coordination problems if a large number of committees receive the reports.⁸¹

Finally, Congress has enacted a number of management and transparency laws that influence government performance and facilitate political control of federal agencies.⁸² Some statutes provide for specific management positions in government agencies, some allow Congress to remain informed about problems relating to the administration of agency programs and operations, and others impose requirements on agency policymaking.⁸³ For example, Congress enacted

⁷⁹ See ABERBACH, *supra* note 8, at 53; DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION (1997); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1691 (2006).

⁸⁰ See Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 389, 397 (2014); Lawrence C. Dodd & Richard L. Schott, *Congress and the Administrative State*, in VIEWPOINTS ON AMERICAN POLITICS 1, 173 (Samuel Krislov ed., 1979); Sean Gailmard, *Multiple Principals and Oversight of Bureaucratic Policy-Making*, 21 J. THEORETICAL POL. 161, 182 (2009); Thomas H. Hammond & Jack H. Knott, *Political Institutions, Public Management, and Policy Choice*, 9 J. PUB. ADMIN. RES. & THEORY 33, 42 (1999) [hereinafter Hammond & Knott, *Political Institutions*]; Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 124 (1996) [hereinafter Hammond & Knott, *Who Controls*]; Gary J. Miller & Thomas H. Hammond, *Committees and the Core of the Constitution*, 66 PUB. CHOICE 201, 213–17 (1990).

⁸¹ See Dodd & Schott, *supra* note 80, at 179; see also David A. Fahrenthold, *Unrequired Reading*, WASH. POST (May 3, 2014), <http://www.washingtonpost.com/sf/national/2014/05/03/unrequired-reading/?hpid=z4> (discussing the difficulty of using congressional reports to conduct oversight).

⁸² See CLINTON T. BRASS, CONG. RESEARCH SERV., RL32388, GENERAL MANAGEMENT LAWS: MAJOR THEMES AND MANAGEMENT POLICY OPTIONS 7 (2004).

⁸³ See, e.g., Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2012)); Government in the Sunshine Act, 5 U.S.C. § 552b (2012); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101; Chief

the Congressional Review Act⁸⁴ in 1996 to create a mechanism for legislators to review new rules issued by federal agencies and enable Congress to monitor federal agencies' implementation of legislation.⁸⁵

To summarize, there is tremendous diversity in the structural features that make agencies responsive to democratically elected officials. While presidents have worked aggressively to influence agencies, presidents and Congresses have also seen fit in some cases to limit political influence by creating independent agencies.⁸⁶ The statutory features that define "independence" are the subject of some debate. The traditional focus of independence has been either on whether agencies are part of an executive department or whether agency heads have for cause protections against removal.⁸⁷ Yet, as the above discussion suggests, presidents and Congress have a number of tools for influencing federal agencies and these tools likely affect the independence of federal agencies.

II. WHAT IS AN INDEPENDENT AGENCY?

It is unclear precisely what qualifies as an independent federal agency. Disagreement exists among statutes, the law, and academics about what constitutes independence. First, it is worth noting that cataloging administrative agencies is difficult in part because Congress defines "agency" in relation to particular laws and courts adjudicate what constitutes an agency on a case-by-case basis.⁸⁸ However, the most commonly cited statutory definition of independence comes from the Administrative Procedure Act ("APA").⁸⁹ The APA defines a federal independent agency as either the Government Accountability Office or any "establishment in the executive branch (other than

Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (codified as amended in scattered sections of 5 U.S.C., 31 U.S.C., & 42 U.S.C.); Clinger-Cohen Act of 1996, 40 U.S.C. §§ 11101-704 (2012).

⁸⁴ 5 U.S.C. §§ 801-808 (2012).

⁸⁵ *Id.* §§ 801-802.

⁸⁶ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

⁸⁷ See *id.*

⁸⁸ *E.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("The President is not an 'agency' within the meaning of the [APA]."); *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009) (holding that the Office of Administration within the Executive Office of the President is not an agency covered by the Freedom of Information Act.); *Nicholson v. Brown*, 599 F.2d 639, 648 n.10 (5th Cir. 1979) (the definition of "agency" for the purposes of the Freedom of Information Act is broad enough to encompass military authority); *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (recognizing that the Administrative Procedure Act's definition of agency is not entirely clear).

⁸⁹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 551-559, 701-706 (2012)).

the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”⁹⁰ There are at least seventy-seven federal agencies that fall within this broad definition. Scholars in political science tend to categorize administrative agencies in the same way as the APA, classifying independent agencies as those that are located outside of the cabinet and considering independent regulatory commissions as a subset of independent agencies.⁹¹

In contrast, federal courts and legal scholars adhere to a stricter definition of autonomy and consider an agency independent if it serves more than an executive function. As defined by *Humphrey’s Executor v. United States*,⁹² a truly independent agency is “non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”⁹³ In *Humphrey’s Executor*, the Supreme Court identified a sharp difference between agencies that are part of the executive establishment and those whose tasks require absolute freedom from executive interference.⁹⁴ However, there is no hard rule as to what qualifies as an agency designed to be free from executive influence and it is unclear which agencies fall into this category.⁹⁵ Legal scholars tend to agree that agencies

⁹⁰ 5 U.S.C. § 104 (2012).

⁹¹ See generally, LEWIS, *supra* note 11 (proposing that understanding agency design gives insight into degree to which political actors may create and implement public policy); Hammond & Knott, *Who Controls*, *supra* note 80 (discussing the autonomy of members of regulatory commissions and finding that control of agencies largely depends on the interactions of the president and Congress); Jason A. MacDonald, *Agency Design and Postlegislative Influence over the Bureaucracy*, 60 POL. RES. Q. 683, 692 (2007) (“[T]he ability of committees, congressional chambers, and the president to influence agencies depends on the distribution of these actors’ policy priorities.” (internal citation omitted)); Wood & Bohte, *supra* note 11, at 199 (“The diverse politics of administrative design results in a hodgepodge of efficiency, effectiveness, responsiveness, and democratic accountability across bureaucracies, but this may be necessary to adapt administrative design to the diverse political environments facing American public bureaucracies.”); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991) (stating that agencies most responsive to executive influence were those outside executive departments and agencies least responsive to executive influence were independent regulatory commissions).

⁹² *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935).

⁹³ *Id.*

⁹⁴ See *Wiener v. United States*, 357 U.S. 349, 353 (1958).

⁹⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (recognizing Congress’s decision to create the Sentencing Commission as an independent rulemaking body); *Chabal v. Reagan*, 841 F.2d 1216, 1219–20 (3d Cir. 1988) (rejecting the claim that United States Marshals

headed by a multimember board or commission whose members serve fixed terms and are protected from removal by the President except for cause qualify under the standard established by *Humphrey's Executor*.⁹⁶ These structural features suggest an attempt by Congress to insulate agency decisions from presidential influence.⁹⁷

Regardless of the precise definition of agency independence, scholars and courts focus on independent regulatory commissions as distinctive because their structure arguably allows for more autonomous policymaking.⁹⁸ Yet, given the hundreds of agencies that exist in the federal executive establishment, a narrow focus on the approximately thirty agencies headed by multiple members serving fixed terms with for cause removal protections may limit one's understanding of political influence over the bureaucracy. There is significant diversity among agencies that share these characteristics and some agencies normally classified as "independent" lack one of these features.⁹⁹

Ultimately, structural features define the independence of agencies. Because so many features affect responsiveness, agency indepen-

are not members of the executive branch); *SEC v. Blinder, Robinson, & Co., Inc.*, 855 F.2d 677, 681–82 (10th Cir. 1988) (holding that the Securities and Exchange Commission qualifies under *Humphrey's Executor* because it is an administrative body created by Congress to carry into effect legislative policies); *Morgan v. Tenn. Valley Auth.*, 115 F.2d 990, 993–94 (6th Cir. 1940) (holding the Tennessee Valley Authority does not qualify as an independent agency under *Humphrey's Executor*).

⁹⁶ *E.g.*, Breger & Edles, *supra* note 9, at 1138; Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 617 (2010); Kagan, *supra* note 86, at 2322; Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 276–77.

⁹⁷ *See* Kagan, *supra* note 86, at 2327; *see also* Morrison v. Olson, 487 U.S. 654, 691–93 (1988) (suggesting that a "good cause" standard for removal is essential to establish independence from presidential control).

⁹⁸ *See* LEWIS, *supra* note 11, at 3–4; Breger & Edles, *supra* note 9, at 1137, 1188–89, 1200, 1234–35; Bressman & Thompson, *supra* note 96, at 609–10, 619; Kagan, *supra* note 86, at 2250, 2327; Kenneth W. Shotts & Alan E. Wiseman, *The Politics of Investigations and Regulatory Enforcement by Independent Agents and Cabinet Appointees*, 72 J. POL. 209, 221 (2010); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1766–67 (1985); Verkuil, *supra* note 96, at 258, 260, 263; Wood & Waterman, *supra* note 91, at 498, 500, 524.

⁹⁹ *See, e.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878–79 (2013) (Roberts, J., dissenting); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 72–73; Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 468–78 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168 (2013).

dence should be thought of as a scale, ranging from less to more insulated from political influence. Most independent agencies have many structural features that insulate them from political control and are located on one end of this scale. The most political agencies have few structural features that limit control. A more nuanced, less categorical approach allows a consideration of the wide variety of structural features that affect political influence and can incorporate changes in structural features over time.

A. Data Collection

In order to characterize the federal executive establishment, this Article examined the structure of each entity in the federal executive branch headed by one or more political appointees nominated by the President and confirmed by the Senate.¹⁰⁰ In addition to looking at the top leadership and activities of these 107 agencies, we also studied the bureaus and offices within the agencies that are politically relevant to Congress and the President. We included the 214 bureaus that either (1) promulgated a rule covered by the Congressional Review Act from between 1996 and 2012;¹⁰¹ or (2) are listed in both the September 2012 Employment Cube in the Office of Personnel Management's FedScope¹⁰² website and in an agency's organizational chart in the 2012 Government Manual;¹⁰³ or (3) are excluded from the first two categories for security reasons.¹⁰⁴ In total, we examined the structure of seven agencies and one bureau in the Executive Office of the President, fifteen executive departments and 205 bureaus within those departments, and eighty-five agencies and eight bureaus located outside of the executive department and the EOP.

We identify broad patterns in the structure of these 321 agencies and bureaus by collecting and analyzing data on the statutory features of the agencies as outlined in the 2013 United States Code.¹⁰⁵ This

¹⁰⁰ See LEWIS & SELIN, *supra* note 12, at 138 app. A-1.

¹⁰¹ 5 U.S.C. § 801(a)(1)(A) (2012).

¹⁰² FedScope—*Employment Cubes*, U.S. OFFICE PERS. MGMT. <http://www.fedscope.opm.gov/employment.asp> (last visited Sept. 5, 2012).

¹⁰³ OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL (2012) [hereinafter GOVERNMENT MANUAL]. A bureau must have been listed in the organization chart as directly reporting to an undersecretary of its equivalent. We exclude administrative offices that are common across all agencies, such as Offices of Public Affairs, General Counsel Offices, and the like.

¹⁰⁴ Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency.

¹⁰⁵ For each agency or bureau, we identified the original public law that established the agency and that law's corresponding citation in the U.S. Code.

data includes information on the location of each agency within the executive establishment, features of agency governance, agency powers, and aspects of political oversight.¹⁰⁶ However, not all bureaus are established in the U.S. Code. Some bureaus are statutorily permitted (but not mandated), and still others are established by executive order or departmental action. We accounted for these differences in the coding of our data.¹⁰⁷

One of the benefits of exploring the structure of both agencies and bureaus is that this Article can compare and contrast the statutory provisions of a larger group of entities than traditionally considered by scholars. Systematic differences between bureaus of federal agencies have been understudied and, because of this, scholars have been unable to compare meaningfully the independence of hundreds of agencies in the federal executive establishment. Typically, bureaus within larger agencies are thought of as being less independent than the agencies themselves because they receive direction not only from the President and Congress, but also from a department secretary.¹⁰⁸ However, some bureaus, like the Federal Reserve System's Consumer Financial Protection Bureau ("CFPB"), are recognized for their independence.¹⁰⁹ Because of the traditional focus on agencies, as opposed

¹⁰⁶ For a few variables (OMB review, congressional oversight, and agency administrative law practices) we referenced materials outside of the U.S. Code. See *Data*, JENNIFER SELIN, <http://publish.illinois.edu/jselin/data/> for a full list of sources, the codebook describing the variables and their coding, and the statutory provisions justifying the coding. Where possible, we validated our data using a variety of different sources. See generally *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010) (Breyer, J., dissenting); Breger & Edles, *supra* note 9; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

¹⁰⁷ Our reliance on the provisions of the U.S. Code that authorize an agency does place some limitations on our data. First, not all provisions relating to structure are located in one place. Statutory provisions outside of the current authorizing statute may impose additional requirements on an agency. For example, thirty titles of the U.S. Code contain provisions relating to the General Services Administration ("GSA"). While our dataset focuses on the GSA's structure as identified in Title 40, it is likely that other titles impose additional requirements and procedures to facilitate political control of the agency. Second, not all structural features are provided by statutes—regulations detail some agency characteristics that influence democratic accountability, and administrative law clarifies others. Yet these features are imposed over the structural agreement that currently exists between Congress and the President. We rely exclusively on statutory law to capture this agreement and for the sake of consistent coding across all agencies and bureaus.

¹⁰⁸ See, e.g., GOVERNMENT MANUAL, *supra* note 103, at 100 (demonstrating the hierarchical structure of a typical executive agency).

¹⁰⁹ See, e.g., Andrew Martin & Sewell Chan, *Autonomy of Consumer Watchdog Is in Dispute*, N.Y. TIMES, Mar. 6, 2010, at B1–B2 (discussing the degree of independence the CFPB should be afforded); Edward Wyatt, *Decorum Breaks Down at House Hearing*, N. Y. TIMES (May 24, 2011), http://www.nytimes.com/2011/05/25/business/25consume.html?_r=0 (addressing

to bureaus, scholars have little understanding of how the CFPB compares to other agencies. For example, is a bureau like the CFPB more or less independent than an agency like the Equal Employment Opportunity Commission? Our data analysis allows for a more complete comparison of agency structure across the federal executive establishment.

B. *Measuring Independence*

In addition to data limitations, one of the problems confronting scholars who seek to compare the autonomy of agencies across the bureaucracy is that they cannot directly observe independence. Instead, they must rely on widely shared knowledge of an agency's structural features when making conclusions about the agency's accountability to democratically elected officials.¹¹⁰ For example, legal and political science scholars theorize that structural features like exemption from the congressional appropriations process influence agency independence, but it is difficult to evaluate systematically how congressional appropriations exemptions compare to other structural features that affect agency autonomy.

In order to account for these differences, this paper estimates a statistical measurement model to generate numerical estimates of agency independence that capture the relationship between independence and the structural variables found in agency and bureau statutes.¹¹¹ Congress tends to organize the statutes that authorize agencies in very similar ways. When Congress establishes an agency, it describes the agency's key leadership structure and then explains how the agency should implement policy.¹¹² Thus, the extent to which an agency is responsive to elected officials likely depends both on the

the amount of congressional oversight to which the CFPB is subject); *see also Free Enter. Fund*, 561 U.S. at 495 (analyzing how the President has minimal removal power when an officer can only be removed for cause by another agency officer).

¹¹⁰ This is a common problem in the social sciences. *See, e.g.*, Joshua Clinton, Simon Jackman & Douglas Rivers, *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355, 355 (2004) (using roll call data to estimate legislative behavior); Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 3 (2008) (using subjective ratings and objective data on agency characteristics to model agency policy preferences); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135 (2002) (using case votes to estimate the ideal points of U.S. Supreme Court justices); Daniel Pemstein, Stephen A. Meserve & James Melton, *Democratic Compromise: A Latent Variable Analysis of Ten Measures of Regime Type*, 18 POL. ANALYSIS 426 (2010) (analyzing the advantages of using various metrics in measuring democracy).

¹¹¹ Selin, *supra* note 12, at 3.

¹¹² *Id.*

leadership structure as statutorily mandated and on statutory provisions that restrict political principals' ability to review agency policy.¹¹³ Our measurement model accounts for both of these types of provisions by estimating independence on two dimensions.

First, there are statutory provisions that limit influence of the selection and removal of individuals in an agency's key leadership positions (Decision Makers Dimension).¹¹⁴ Examples of these types of provisions include limitations relating to the expertise, party, and other characteristics of appointed individuals, fixed terms for political appointees, and protections from removal from office for political reasons. Second, there are statutory provisions that place limits on political principals' ability to review agency policy (Policy Decisions Dimension).¹¹⁵ Procedures like OMB review of agency budgets, legislative materials, and economically significant rules allow democratically elected officials to remain informed about agency policy and examine policy for consistency with the preferences of elected officials and their constituents.¹¹⁶ Efforts to omit agencies from this type of review are a way that political actors shield agencies from political influence. Table 1 includes a list of structural characteristics designed to insulate agencies from political control and groups them according to the different ways they provide independence.

It is noteworthy that there are so many different features that insulate agencies and that they map so closely to the tools of presidential and congressional control. For each tool of control employed by elected officials (e.g., appointment and removal, regulatory review, budgets and spending) there is often a corresponding structural feature that blunts the power of that tool. For example, to limit the President's control over appointments, Congress has created agencies as multimember bodies with partisan limitation on appointments and differing rules for the selection of chairs.¹¹⁷ Congress blunts the president's power to remove members and chairs by giving appointees fixed and staggered terms and for cause protections.¹¹⁸ Similarly, the

¹¹³ *Id.* at 7–9.

¹¹⁴ *Id.* at 3–4.

¹¹⁵ *Id.* at 4–5.

¹¹⁶ See, e.g., Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799 (2001); Devins, *supra* note 8; Devins, *supra* note 99; MacDonald, *supra* note 8; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Note, *supra* note 74; Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Stith, *supra* note 73.

¹¹⁷ See Breger & Edles, *supra* note 9, at 1288–91 (discussing Surface Transportation Board and International Trade Commission).

¹¹⁸ See *id.* at 1138 n.131.

TABLE 1. STATUTORY FEATURES RELATED TO AGENCY INDEPENDENCE

Independence of Decision Makers		Independence of Policy Decisions	
Location	Executive Office Executive Department Bureau Outside executive department	Insulation from Political Review	OMB Budget Bypass OMB Rule Bypass OMB Communication Bypass Independent Litigating Authority Independent Funding Outside Approval Advisory Committees Inspector General
Permanence	Mandated by Statute Permitted by Statute Not established by Statute	Policymaking Authority	Adjudication Administrative Law Judges
Leadership Structure	Number of Members Term Length Staggered Terms For Cause Protections Serve President Quorum Rules		
Agency Head	President Appointed, Senate Confirmed President Selected		
Limitation on Appointments	Party Balancing Expertise Conflict of Interest		
Agency Employees	Exempt from Title 5		

influence Congress exerts through appropriations is blunted by various modes of self-funding provided to agencies such as the Federal Reserve and Securities and Exchange Commission.¹¹⁹

This Article's model of independence on two dimensions provides the ability to account for the fact that different structural features may influence agency independence in different ways. For example, we find that the presence of long and staggered terms have a stronger relationship to the independence of an agency's key decisionmakers than statutory provisions that prevent officials in the agency's leadership from having conflicts of interest with key constituencies regulated by the agency. In addition, the model allows for the distinguishing among agencies that would otherwise look similar. The estimates suggest that even accounting for traditional considerations of independence relating to fixed terms and for cause protections,

¹¹⁹ See LEWIS & SELIN, *supra* note 12, at 118, 120.

there is substantial variation due to other forms of structural independence.

Table 2 identifies the ten agencies or bureaus that are most insulated on each dimension and indicates whether those agencies' statutes establish them with fixed terms and for cause protections (traditional considerations of agency independence). Several agencies that do have fixed terms and for cause protections are not among the most insulated in terms of either leadership structure or political review of agency policy. In fact, only eight agencies traditionally considered by scholars as independent appear in the list and only two rank among the top ten insulated agencies both in terms of leadership structure and political review.¹²⁰

This suggests that there is substantial variation in the structural features that influence how accountable agencies are to elected officials. A definition of independence based on only a few characteristics may limit the understanding of agency independence because it ignores these differences. While Congress may design the leadership structure of some agencies to be insulated, Congress may insulate other agencies' policies from political review.

¹²⁰ Those two (Consumer Product Safety Commission and Federal Reserve Board) have many other features that limit their accountability to elected officials. With respect to leadership structure, the statutes for both agencies place qualifications on who can serve on the board (party, expertise, etc.), require staggered terms, and mandate a quorum for the conduct of business. The policy decisions of the agencies are protected from political review, as both agencies can bypass OMB review and have independent litigating authority. The Federal Reserve Board does not rely on the appropriations process and the Consumer Product Safety Board makes policy through the use of adjudication or Administrative Law Judges. See Breger & Edles, *supra* note 9, at 1236–38, 1243–45.

TABLE 2. STATUTORY FEATURES OF INDEPENDENT AGENCIES

Agency	Fix Terms, For Cause	Leadership Structure	Political Review
Commodity Futures Trading Commission			✓
Consumer Financial Protection Bureau			✓
Consumer Product Safety Commission	✓	✓	✓
Farm Credit Administration		✓	
Federal Housing Finance Agency	✓		✓
Federal Reserve Board	✓	✓	✓
Inter-American Foundation		✓	
Merit Systems Protection Board	✓		✓
Metropolitan Washington Airport Authority	✓	✓	
National Credit Union Administration		✓	
National Transportation Safety Board	✓		✓
Railroad Retirement Board			✓
Securities and Exchange Commission ¹²¹	✓		✓
Social Security Advisory Board		✓	
U.S. African Development Foundation		✓	
U.S. International Trade Commission		✓	✓
U.S. Postal Service	✓	✓	

Of course, agencies can operate with functional autonomy from the President and Congress for a variety of reasons unrelated to their formal structures. For example, agencies with effective political strategies, monopolies over their policy jurisdictions, reputations for expertise, sympathetic interest group environments, and important symbolic value can operate with significant political independence.¹²² Yet, these are rarely features that are judicially cognizable. It is important to remember that virtually all executive departments have quasi-legislative and quasi-judicial power in some form, and so what distinguishes “independent” agencies is structure, not fluid political environments or agency functions.

¹²¹ While the U.S. Code does not provide for cause protections for the members of the Securities and Exchange Commission, federal courts recognize the existence of such protections. See *SEC v. Blinder, Robinson & Co., Inc.*, 855 F.2d 677, 682 (10th Cir. 1988).

¹²² See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* 353, 355 (2001); GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY* 236–37 (2007); J. LEIPER FREEMAN, *THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS* 10–11 (1955). See generally WILSON, *supra* note 8.

C. Independence over Time

When describing agency structure, most scholars treat statutory design features as static.¹²³ Yet, because Congress regularly amends agency-authorizing statutes, few agencies operate under the same rules as initially designed. For example, the authorizing statute for the Department of Commerce has changed at least sixty-one times since initially passed in 1903.¹²⁴ While some of these changes have minimal impact on agency function, others are quite substantial. The Department functioned as the Department of Commerce and Labor until 1913, when it was split and the Department of Labor was established.¹²⁵ Subsequent changes include the addition of the Patent and Trademark Office and the National Oceanic and Atmospheric Administration.¹²⁶

What effect do these sorts of changes have on the accountability of agencies to democratically elected officials? In order to explore changes in agency structure and describe historical trends in independence, this Article compares the initial structure of a random sample of agencies as established in public law to the current structure of those agencies as outlined in the U.S. Code. In general, while statutory provisions relating to the leadership structure of agencies (e.g., length of terms or number of commissioners) have not changed much over time, the policy decisions of agencies have become more insulated from political review. For example, as a result of *Humphrey's Executor*,¹²⁷ the Federal Trade Commission is commonly recognized as an independent agency based on limitations placed on the President's

¹²³ See, e.g., LEWIS, *supra* note 11, at 40 (coding the structural characteristics of each agency at the time it was created); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 32, 43–49 (2010) (treating OIRA review, appropriates exemptions, and employment restrictions as fixed aspects of agency structure); Datla & Revesz, *supra* note 106, at 784–812 (evaluating independence as structured in the 2006 U.S. Code); Stéphane Lavertu, *Issue-Specific Political Uncertainty and Policy Insulation in US Federal Agencies*, 29 J.L. ECON. & ORG. 145, 153–68 (2012) (modeling the decision to insulate based on one moment in time); Wood & Bohte, *supra* note 11, at 185–88 (examining agencies based on their initial design attributes).

¹²⁴ See Selin, *supra* note 12, at 6.

¹²⁵ See An Act To create a Department of Labor, Pub. L. No. 62-426, 37 Stat. 736 (1913); Robert B. Shepherd, Jr., *What Roosevelt Thought: A Rough Rider's Guide to the USTEPA*, 23 QUINNIPIAC PROB. L.J. 311, 328 (2010).

¹²⁶ Act of July 19, 1952, Pub. L. No. 82-593, § 1, 66 Stat. 792, 792 (Patent and Trademark Office); Reorganization Plan No. 4 of 1970, § 2, 84 Stat. 2090, 2091 (National Oceanic and Atmospheric Administration); *Milestones*, DEP'T OF COMMERCE (July 20, 2010), http://2001-2009.commerce.gov/About_Us/Milestones/ (discussing significant changes to the organization of the Department of Commerce).

¹²⁷ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

ability to remove key decisionmakers.¹²⁸ Since the Supreme Court's decision in *Humphrey's Executor*, the leadership structure of the FTC has remained largely the same.¹²⁹ Yet, the addition of structural features that limit political review of the agency's policy decisions has allowed the FTC to become increasingly more independent over time.¹³⁰ Like the FTC, agencies such as the Chemical Safety Hazard and Investigation Board, the Consumer Product Safety Commission, Federal Deposit Insurance Corporation, Federal Reserve Board, and the Securities and Exchange Commission have remained largely the same in terms of the structural independence of key agency decisionmakers, but the agencies' authorizing statutes have been amended to place more limits on presidential and congressional review of agency policy.

Ironically, this growing independence is in part a result of the President and Congress developing new ways of reviewing agency policy and exerting political influence. For example, agency submission of budgets, legislative materials, and economically significant administrative rules to the White House's OMB for centralized coordination has provided the President with information about agency programs and activities and has helped the White House influence regulatory policy.¹³¹ Yet, over time several agencies have gained either statutory or customary exemptions from OMB review.¹³² These exemptions have allowed agencies to develop policy without worry of a centralized review of agency operations. Similarly, as the congressional appropriations process has grown increasingly complex, Congress has increased several agencies' financial independence.¹³³ This suggests

¹²⁸ See George F. Fraley, III, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215, 1239 n.113 (1996).

¹²⁹ The only change since Congress established the agency in 1933 has been to allow the President to choose the agency's chairman (as opposed to the Commission's membership selecting the chairman). See Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 25, 1950), reprinted in 5 U.S.C. app. at 112 (2006).

¹³⁰ For example, the agency now regularly implements policy through adjudication and uses administrative law judges. These practices protect certain policy decisions from political interference. See *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last updated July 2008).

¹³¹ See *supra* notes 38–43 and accompanying text.

¹³² See Breger & Edles, *supra* note 9, at 1236–38, 1243–45.

¹³³ See 12 U.S.C. § 1817 (2012) (funding Federal Deposit Insurance Corporation by insurance assessments); 15 U.S.C. § 78d(e) (2012) (funding Securities and Exchange Commission by means of fees); see also § 78u-6(g)(2)(B) (authorizing diversion of funds from Investor Protection Fund to fund activities of Inspector General of the Commission).

that as elected officials develop new instruments of control, these tools are important not only when the President and Congress use them, but also when our elected officials do not. Differences in the application of methods of influence can result in varied levels of responsiveness across the bureaucracy.

III. IMPLICATIONS

It is well established that the President and Congress seek to structure the bureaucracy in a way that enhances their capacity for control and tailors agency performance to the principals' specific needs.¹³⁴ However, since the creation of the Interstate Commerce Commission in 1887, Congress has insulated certain agencies from politics in the hope of promoting policy expertise and efficient regulation.¹³⁵ Where legislators are uncertain about policy outcomes and lack the collective expertise or incentives to produce complex regulation, independent agencies are attractive because their structure arguably allows for more autonomous policymaking.¹³⁶ Statutory provisions that place limitations on political officials' ability to appoint or remove individuals in an agency's key leadership positions promote impartiality and policy continuity¹³⁷ and may increase agency performance.¹³⁸ Statutory provisions that place limits on political principals' ability to review agency policy are a way for politicians to credibly commit not to intervene in an agency's policy and can influence

¹³⁴ See, e.g., LEWIS, *supra* note 11, at 1; Moe, *supra* note 11, at 282–85; Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 105 (1997); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995) [hereinafter Bawn, *Political Control*]; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 94 (1992); McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987); McNollgast, *supra* note 10, at 444; Moe & Wilson, *supra* note 7.

¹³⁵ See Breger & Edles, *supra* note 9, at 1115–16, 1132.

¹³⁶ See Bawn, *Political Control*, *supra* note 134, at 62 (discussing the trade-off between the benefits of collective agency expertise and the risk of agency drift); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 722–23 (1985) (explaining that popular explanations for legislative delegation include complexity of issues and avoidance of costs embedded in regulation itself).

¹³⁷ See generally Barkow, *supra* note 123; Keith S. Brown & Adam Candeub, *Partisans and Partisan Commissions*, 17 GEO. MASON L. REV. 789 (2010); Wood & Waterman, *supra* note 91.

¹³⁸ When an agency's leadership is highly politicized, that politicization can hurt program and agency performance. See generally LEWIS, *supra* note 37; Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 884 (2007); John B. Gilmour & David E. Lewis, *Political Appointees and the Competence of Federal Program Management*, 34 AM. POL. RES. 22, 42 (2006).

agency performance.¹³⁹ However, independence raises questions about accountability. Political control over the bureaucracy establishes a key link between the public and unelected administrators, and citizen control over government is an important constitutional principle.¹⁴⁰ Yet when federal agencies are removed from both presidential and congressional influence, administrative policies are not subject to review by any actor with a public constituency.¹⁴¹ This tension between independence and accountability to citizens has important implications for considerations of agency design, delegation, and political control.¹⁴²

There is a wealth of scholarship on the consequences of independent agencies for separation of powers and, in particular, the meaning of and limitations on executive power.¹⁴³ Yet, there are still aspects of agency independence that remain largely unexplored. First, any consideration of agency independence should account for more than just a handful of structural features. The extent to which federal agencies are responsive to elected officials when implementing policy depends on the statutory limitations on appointment and removal of key agency decisionmakers *and* on the features insulating agency decisions from political review. Agencies with many structural features that insulate them on both dimensions pose different problems for democratic accountability than the traditionally considered agencies with leaders who serve with for cause protections.

¹³⁹ See Barkow, *supra* note 123, at 19, 24; Bressman & Thompson, *supra* note 96, at 613; George A. Krause, David E. Lewis & James W. Douglas, *Politics Can Limit Policy Opportunism in Fiscal Institutions: Evidence from Official General Fund Revenue Forecasts in the American States*, 32 J. POL'Y ANALYSIS & MGMT. 271, 271 (2013); Lewis, *supra* note 16, at 381.

¹⁴⁰ See *Chevron, U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 865–66 (1984); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–501 (2010); THE FEDERALIST No. 51 (James Madison); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499 (2003); Robert G. Dixon Jr., *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1, 3 (1975); Kagan, *supra* note 86, at 2332; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 94–97 (1994).

¹⁴¹ See Bressman, *supra* note 140, at 482.

¹⁴² See *id.* at 499.

¹⁴³ See generally Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990); Miller, *supra* note 99; Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009); Strauss, *supra* note 99; Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

In addition, there is a need to explore changes in democratic accountability over time, both across the executive establishment and within each agency. Scholarship tends to evaluate the reasons that particular agencies are created or focus on changes in the organization of government, but fails to establish broad trends with respect to independence. Changes in independence are important not only because of their effect on how to interpret executive (and, to a lesser extent, legislative) power but also because they may have real consequences for regulatory policy. Because structural features influence the choices made within an organization, changes in an agency's design features have the potential to modify agency culture and alter the policy choices made by the agency.

Finally, the fact that some agencies are insulated from politics both in their leadership structure and in their policy decisions has important consequences for judicial review of agency policy. Courts give deference to regulatory policy in part out of respect for choices made by officials with a public constituency. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"¹⁴⁴ Yet if agencies are designed in ways to limit their accountability to both political branches of government, one could question whether such deference is warranted.

¹⁴⁴ *Chevron*, 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).