Presidential Control of Elections

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In recent decades, presidents of both political parties have asserted increasingly aggressive forms of influence over the administrative state. During this same period, Congress has expanded the role that the federal government plays in election administration. The convergence of these two trends leads to a troubling but underexamined phenomenon: presidential control of elections. Relying on their official powers, presidents have the ability to affect the rules that govern elections, including elections meant to check and legitimize presidential powers in the first place. This self-serving arrangement heightens the risk of harms from political entrenchment and subordination of expertise. These harms, in turn, threaten to compromise election outcomes. By extension, they also threaten the electoral connection purportedly underlying the administrative state and, therefore, the legitimacy of the work of the modern executive branch.

This Article identifies, defines, and examines this phenomenon—presidential control of elections—and explores its broader implications. It demonstrates that, across the executive branch, this phenomenon manifests differently, and sometimes counterintuitively, in ways that tend to track how Congress has structured the relevant grant of power. Three forms dominate, with presidents influencing election administration primarily through priority setting (for grants of power running through executive agencies), promotion of gridlock (for grants of power running through independent agencies), and idiosyncratic control (for grants of power running directly to the president). This

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analysis reveals that congressional efforts at insulation at times can backfire, with presidents able to exercise particularly problematic forms of control over agencies that Congress designed in blunt ways to resist presidential influence. To that end, this Article proposes that Congress and the courts avoid trying to eliminate or otherwise indiscriminately curb presidential control of elections—a quixotic endeavor that would give rise to its own constitutional challenges and normative harms. Instead, the legislative and judicial branches should identify specific areas where the president's control over election administration lacks an effective check and seek to empower other political actors in those spaces.

INTRODUCTION

Elections ensure accountability in the executive branch. Or, at least, that's the theory offered in support of the administrative state.[1]

1. *See, e.g.*, Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2483 (2011) ("A central argument for the legitimacy of the administrative state, including its priority-setting and resolution of value-laden questions, has been that agencies are accountable to the President, who is in turn accountable to the electorate."

The trouble comes in what this theory ignores: that the President of the United States is empowered by law to influence election administration.[2] By exercising his official powers, a president can affect the rules of the elections that purport to hold him accountable, even when the changes would benefit him personally. This exercise of authority is problematic. It threatens to undermine the democratic will and delegitimize the executive branch.[3]

This Article investigates this phenomenon, which it calls *presidential control of elections*.[4] It defines this phenomenon as a president's lawful exercise of power over the interpretation and implementation of election rules.[5] The process starts in the legislative branch, where Congress enacts statutes implicating election administration. The executive branch then works to implement these mandates. This arrangement ensures presidential control of some sort, with congressional design shaping the precise form it takes. As this

(footnote omitted)); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (offering this electoral connection as a necessary prerequisite to the administrative state and noting that "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders"); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (explaining that while "agencies are not directly accountable to the people," the president is accountable); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001) (congressional elections); Kagan, *supra*, at 2332 (presidential elections); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (discussing delegation to administrators). *But see* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) (criticizing these arguments while acknowledging their prominence in administrative theory, which is "fixated on . . . political accountability"); Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 992 (2018) (calling into question the empirical basis of these arguments while acknowledging that "the Court's accountability claims" serve as "pillars of some of the most consequential holdings in all of constitutional law").

2. *See infra* Part II (exploring how presidents exercise control in the context of election administration).

3. *See infra* Part III (discussing the normative implications of presidential control over elections and how, if at all, this phenomenon should be curbed).

4. When referring to "presidential control" in this context, this Article means to include not only control exercised by the president himself, but also control exercised by the president's high-level staff in the White House and the Executive Office of the President ("EOP"). *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1040 (2013) (relying on similar terminology); *id.* ("[The President's White House and EOP advisors] are not the President, and there may, at times, be space between their varying agendas and his. But, as political scientists have shown, the most senior level of the bureaucracy is relatively cabined and controlled." (footnote omitted)); *see also* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) ("Presidential control is a 'they,' not an 'it.' "). This Article alternates male and female pronouns when referring generically to the president.

5. This Article uses the term "election rules" in an expansive manner to include, for example, rules governing voter registration, structuring of the voting process, redistricting, voting rights, campaign finance, election crimes, and election security. It uses the term "election administration" in an analogously expansive way. *See infra* Part I (exploring the federal government's role in elections).

Article demonstrates, Congress predominantly relies on three basic legal structures when authorizing the executive branch to administer election laws. On the most basic level, these three structures operate through an executive agency, an independent agency, or the president himself.

The first structure employs executive agencies. When Congress has empowered these agencies to execute election-related mandates, it has done so primarily through limited grants of power that do not include rulemaking authority. In response, presidents have controlled election administration chiefly by influencing how agencies prioritize their work. Much of this influence manifests in enforcement practices.[6] As an example, consider the Department of Justice ("DOJ"). Among the many election-related statutes administered by DOJ is the National Voter Registration Act ("NVRA"). When enforcing the NVRA, administrations led by Republican presidents have tended to prioritize enforcement of one set of mandates: those requiring states to remove names from the voting rolls. Administrations led by Democratic presidents have tended to prioritize enforcement of the opposite set of mandates: those requiring states to retain names on the voting rolls. Despite perfunctory claims of neutrality, political appointees in both administrations understand this shift in enforcement prioritization to favor the electoral prospects of one political party over the other. Presidents perpetuate these patterns in part by using their nomination and removal powers to ensure that high-level DOJ officials prioritize their preferred approach.[7]

The second congressional structure employs independent agencies. In the context of elections, Congress tends to rely on agencies with a somewhat unusual leadership arrangement: an even-numbered, bipartisan commission protected from at-will removal by the president. In response to these insulated grants of authority, presidents have exercised meaningful control over election administration primarily through the promotion of gridlock—or not at all.[8] The Federal Election Commission ("FEC") provides a prominent example. The FEC plays an important role in election administration, as Congress has charged it with implementing federal campaign finance statutes. Yet the agency has been notorious for its inaction. At best, the Commission has been beset with stalemates; at worst, the agency has lacked the ability, under

6. *See infra* Section II.A (addressing how presidents exercise control of elections through executive agencies).

7. *See infra* notes 120–122 (discussing DOJ's implementation of the NVRA); *see also infra* notes 89–96 (addressing the role that nomination and removal powers play in presidential control).

8. *See infra* Section II.B (addressing how presidents exercise control of elections through independent agencies).

law, to take even the most basic of actions necessary to fulfill its statutory mandates. From the perspective of a president who prefers relaxed enforcement of the campaign-finance statutes, such dysfunction is a feature, not a bug. Presidents preferring a gridlocked agency can readily induce this dysfunction by, for example, simply refusing to nominate commissioners to fill open spots on the Commission. Presidents preferring a more vigorous enforcement regime, by contrast, generally have no effective mechanism to force the agency into action. This dynamic helps to explain why, heading into the 2020 elections, the FEC had before it an enormous backlog of work—including multiple, serious complaints concerning a sitting president's reelection campaign—but no legal means by which to tackle these tasks.[9]

The third congressional form relies on narrow grants of power running directly to the president. In response to these delegations, presidents have exercised powers in idiosyncratic ways.[10] Congress has empowered the president, for example, to unilaterally impose sanctions in response to foreign election interference, as Obama did; or to refuse to impose those sanctions, as Trump did.[11] The law also allows a president to create a bipartisan, blue-ribbon commission to investigate "[the] best practices . . . to promote the efficient administration of elections" (Obama); or a highly politicized, divisive commission to investigate the "integrity of the voting processes" (Trump).[12] When presidents exercise these unilateral, election-related powers, it is difficult to identify crosscutting patterns—except to recognize that the decisions tend to reflect the idiosyncratic preferences of each president.

Each of these examples reflects a different mechanism of presidential control. Yet in all these illustrations, the nation's most prominent elected official is seeking more than simply to influence how he and other candidates fare at the polls. Instead, each involves a president seeking to influence how the actual rules governing elections are interpreted and implemented. This exercise of authority therefore goes well beyond the bully pulpit.

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9. *See infra* notes 164–191 and accompanying text (exploring the phenomenon of controlling election administration through the promotion of gridlock).

10. *See infra* Section II.C (addressing how presidents exercise control of elections through direct grants of power).

11. *See infra* notes 220–227 and accompanying text (considering sanctions associated with foreign interference in elections).

12. Exec. Order No. 13,639, 78 Fed. Reg. 19,979 (Mar. 28, 2013) (Obama's executive order establishing the Presidential Commission on Election Administration); Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) (Trump's executive order establishing the Presidential Advisory Commission on Election Integrity); *see infra* notes 209–219 and accompanying text (discussing advisory commissions that address election administration).

Presidential control of this sort threatens democratic accountability.[13] Elections, after all, are supposed to be what legitimize and check the president's exercise of official powers in the first place. To the extent that the nation's elections—presidential, congressional, and otherwise—are suspect, so too is the allocation of presidential power they purport to authorize.[14] A central concern in this context relates to *entrenchment*, a term this Article uses to refer to officials "manipulating the ground rules of the democratic process in order to retain their hold on power."[15] Particularly at its extremes, entrenchment calls into question whether an election meaningfully reflects the will of the electorate and otherwise upholds basic democratic values.[16] To the extent that a president is able to influence the administration of election rules, he potentially is able to engage in the problematic practice of entrenchment.[17]

The normative implications of entrenchment are familiar in the world of election law, where scholars have long expressed concerns over incumbents controlling election administration. State legislators draw maps governing races in which they then run; state secretaries of state preside over the administration of their own elections.[18] Foxes, in short,

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13. *See infra* Section III.A (analyzing the normative implications of presidential control).

14. *See infra* Section III.A; *see also* sources cited *supra* note 1 (discussing the purported connection between elections and accountability in the executive branch); LISA MANHEIM & KATHRYN WATTS, THE LIMITS OF PRESIDENTIAL POWER: A CITIZEN'S GUIDE TO THE LAW (2018) (discussing how presidential power is checked and legitimized not only through presidential elections, but also through congressional as well as state and local elections).

15. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408 (2015); *cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2509–25 (2019) (Kagan, J., dissenting) (discussing politicians' attempts to use their legislative power over electoral lines "to entrench themselves in office as against voters' preferences"); Whitford v. Gill, 218 F. Supp. 3d 837, 886 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) ("The danger with *extreme* partisan gerrymanders is that they entrench a political party in power, making that party—and therefore the state government—impervious to the interests of citizens affiliated with other political parties."). *See generally* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502–09 (1997) (discussing legislative and cross-temporal entrenchment problems). This Article relies on this definition of entrenchment while recognizing that reasonable minds can, and do, disagree as to what type—and how much—of this manipulation is normatively acceptable.

16. *See infra* Section III.A.

17. *See infra* Section III.A.

18. *See also* Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 232–33, 249–52 (2018) (discussing restrictive voting measures and their perceived connection to incumbents' electoral prospects); David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 493 (2008) (criticizing election administrators' apparent efforts to construe election rules in their party's favor); Richard Fausset, *'Large-Scale Reforms' of Georgia Elections Sought in Federal Lawsuit*, N.Y. TIMES (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/us/georgia-elections-federal-lawsuit.html [https://perma.cc/JF6W-YSWV] (describing a lawsuit brought against Georgia by Stacey Abrams).

routinely guard the henhouse.[19] These self-serving arrangements lead to extraordinarily difficult questions relating to constitutional law, political theory, institutionalism, and beyond.[20] Accordingly, election law scholars have produced a rich and varied body of work exploring how these concerns unfold—at least, in the context of state governance. Yet very little of this vast literature explores how these concepts might apply, much less identifies the unique difficulties that arise, when the fox sits at the head of the federal executive branch.[21]

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19. *Cf.* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (offering a defense of political gerrymandering).

20. For a sampling of the many scholarly works of note that explore these questions, see, for example, Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007); Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139 (2013); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 517–18 (2004); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668–69 (2006); Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563 (2013); Persily, *supra* note 19; Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 643 (2012) ("In recent years, commentators and judges have displayed heightened concern about political actors making decisions about the electoral process on partisan or incumbent-protecting bases, and have called for greater policing of this dynamic."); Zipkin, *supra*, at 647–60 (summarizing many of these arguments).

21. The gap might be due in part to historical patterns. Presidential control of elections occurs at the intersection of two complicated phenomena: (1) presidential control over the administrative state, and (2) federal involvement in election administration. The first phenomenon has grown, in some respects considerably, over the last several decades. *See* Kagan, *supra* note 1 (exploring the nature of presidential control); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016) (same, with a focus on the administrations of Presidents George W. Bush and Barack Obama); Daniel A. Farber, Presidential Administration Under Trump (Aug. 8, 2017) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.3015591 [https://perma.cc/WWA9-839Z] (same, with a focus on the administration of President Trump). The second phenomenon also has grown over the last several decades. *See* R. SAM GARRETT, CONG. RSCH. SERV., R45302, FEDERAL ROLE IN U.S. CAMPAIGNS AND ELECTIONS: AN OVERVIEW (2018). The overlap of these two trends has become increasingly clear in recent years. Historically, presidents have tended to exercise election-related powers in relatively discreet and opaque ways. But the hyperpartisan nature of the Trump and late-Obama eras—particularly when coupled with the governing style and disregard for norms that dominated much of Trump's tenure—has stripped away much of this subtlety. *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (examining the loosening of relevant norms during these years); *see also infra* note 27 (discussing polarization). Another explanation for this gap in the literature may involve frustrations with the difficulties that legal scholars—and, even more so, courts—have encountered when attempting to reach any consensus at all in response to similar election-related issues in more familiar contexts. To take but one of many illustrations, half a century after the Supreme Court announced its willingness to consider the constitutionality of redistricting plans, it simply gave up on its efforts to identify a working standard for adjudicating even the most extreme forms of partisan gerrymandering. *See, e.g.*, Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86, 86 (2013) (arguing that "this debate in election law has run its course"); *see also* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are non-justiciable). The Court seems similarly disinterested in tackling other troubling attempts at entrenchment. *See, e.g.*, Manheim & Porter, *supra* note 18

This Article urges far greater attention. When the politician attempting to entrench herself is one of the most powerful officials in the world, warning bells should ring. The stakes are particularly high in light of the vast implications for policy, given that the law authorizes the President of the United States to wield a staggering amount of power both at home and abroad.[22] The stakes are similarly high with respect to legitimacy, given that the federal executive branch, staffed by millions, has but one elected official in its ranks.[23] A president's control over elections therefore threatens to undermine the legitimacy not only of his own work, but the work of the entire federal administrative state.[24] To add even further to these concerns, the law allows the president to act without the tempering force offered by other elected executive branch officials (as in state systems) or a multimember legislative body.[25] These stakes amplify concerns over entrenchment and legitimacy. These concerns exist even when the president acts in a manner that is at least plausibly consistent with the law—the class of activities explored in this Article. When a sitting president brazenly acts outside of the law to influence election administration, these concerns grow even more acute.[26]

(discussing the Court's unwillingness to push back on restrictive voting measures); *infra* notes 54–56 and accompanying text (discussing current scholarly landscape).

22. *See generally* MANHEIM & WATTS, *supra* note 14 (providing an overview of presidential power).

23. There is, however, a notable exception: as Joshua Ulan Galperin has explained, the United States Department of Agriculture ("USDA") relies in part on elected administrators. *See* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1214–32 (2020) (exploring the USDA's unique "elected farmer committee system"—which is composed of nearly eight thousand elected farmer representatives across over two thousand county committees—and questioning whether it is constitutional). Despite this little-known exception in the USDA, the overarching observation—that the President of the United States is, with only nominal exceptions, the sole elected official within the federal executive branch—remains accurate and on point. *Cf. id.* at 1216 (describing the common understanding of the federal executive branch as "unelected" outside of the president). It is noteworthy that Galperin finds little to recommend in the narrow slice of electoral accountability that the federal executive branch incorporates outside of the Office of the President. *See id.* at 1252 ("[E]lectoral administration is not something to strive for. . . . [Elections in this context] give rise to obvious, undesirable majoritarian consequences and, unlike a constitutional system that checks raw majoritarianism, the administrative system has limited tools for that job."); *see also* Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. (forthcoming 2021).

24. *See infra* Section III.A (discussing the normative implications of presidential control).

25. *See infra* Section III.A (same).

26. Discussions exploring this latter sort of conduct—clearly unlawful attempts by a president to affect election administration—are of the utmost importance. Indeed, the significance of these discussions became increasingly clear as this Article entered the final stages of the publication process, which occurred during the 2020 presidential election and its aftermath. Even prior to this time, allegations of improper presidential interference had threatened the democratic process and toppled one presidency. *See, e.g.*, Eileen Shanahan, *An Explanation: The Allegations of Nixon's I.R.S. Interference*, N.Y. TIMES (June 14, 1974), https://www.nytimes.com/1974/06/14/archives/an-explanation-the-allegatoins-of-nixons-irs-interference-many.html [https://perma.cc/

All these anxieties exacerbate a ballooning crisis of legitimacy that the federal government has been straining to weather.[27] No panacea exists for this broader predicament. Still, as this Article seeks to explain, there may be ways to meaningfully temper some of the problems associated with presidential control over election rules.[28] Appropriate reforms would begin by identifying areas where presidents influence election administration with little meaningful check. Other actors—particularly those in the federal legislative and judicial branches—could then be enlisted to impose more of a counterweight in these spaces.

This Article explores these issues in three parts. Part I describes the role of the federal executive branch in the design and administration of elections. It begins with an overview of the interlocking set of federalist frameworks that govern how elections are run in the United States, before turning to how Congress has empowered the executive branch of the federal government to participate in this process. It concludes with the role of the chief

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36QD-TXTL] (describing why President Nixon's alleged interference with the IRS constituted an indictable criminal offense); *see also* I.R.C. § 7212.

In the lead-up to the 2020 elections, allegations of illegal election-related interference by the President proved all the more alarming. Multiple actions that President Trump was alleged to have taken, or had threatened to take, involved attempts at presidential control of elections that, if carried out, would be unlawful under well-established understandings of legal limits. For one illustration of many, consider Trump's threat to send "sheriffs" and other "law enforcement" to the polls to "cross check" and otherwise engage with voters. Justine Coleman, *Trump Says He Will Send Law Enforcement, US Attorneys to Polls in November to Prevent Fraud*, HILL (Aug. 20, 2020), https://thehill.com/homenews/administration/513048-trump-says-he-will-send-law-enforcement-us-attorneys-to-polls-in [https://perma.cc/F5JP-ASE6]; *cf.* Barton Gellman, *How Trump Could Attempt a Coup*, ATLANTIC (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/how-trump-could-attempt-coup/616954/ [https://perma.cc/U4L5-VYBL] (brainstorming ways in which a president could misuse his power to subvert election results).

After the election, additional allegations concerning President Trump's conduct raised even more trepidation over presidential attempts to subvert the election process through illegal action. *See* Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES, https://www.nytimes.com/2021/01/31/us/trump-election-lie.html (last updated Feb. 12, 2021) [https://perma.cc/2ZC9-3MFU] (describing, among other forms of malfeasance, attempts by Trump to convince high-level officials at DOJ to investigate bogus claims of election improprieties and pressure state election officials into subverting election results); *see also* sources cited *infra* note 265. Despite the significance of these developments, unlawful conduct by a president still remains one degree removed from the topic this Article examines: how lawful actions, taken by the president in his official capacity, can affect the administration of elections.

27. Trust and confidence in federal government is as low as it has been in decades, and political partisanship is as high. *See* Megan Brenan, *Americans' Trust in Government to Handle Problems at New Low*, GALLUP (Jan. 31, 2019), https://news.gallup.com/poll/246371/americans-trust-government-handle-problems-new-low.aspx [https://perma.cc/DF34-5SLW]; Alec Tyson, *America's Polarized Views of Trump Follow Years of Growing Political Partisanship*, PEW RSCH. CTR. (Nov. 14, 2018), https://www.pewresearch.org/fact-tank/2018/11/14/americas-polarized-views-of-trump-follow-years-of-growing-political-partisanship/ [https://perma.cc/N6VG-X5FV].

28. *See infra* Section III.B (offering prescriptive responses to presidential control of elections).

executive, explaining how presidents attempt to harness the legal powers that run to the executive branch through a complicated dynamic that continues to evolve.

Part II pulls these discussions together for the descriptive work at the heart of this Article: a discussion of the ways that modern U.S. presidents use their official powers to affect election rules across the country. As this Part reveals, the ways that presidents exercise power depend heavily on the structures imposed by Congress. To that end, Section II.A begins by analyzing presidential control of executive agencies, where presidents have exercised influence over elections primarily through priority setting. Section II.B turns to independent agencies, where control through gridlock has been the prominent means of White House influence over election administration. Section II.C explores direct grants of election-related power to the president. These grants of power have been exercised in ways that track presidents' own idiosyncratic preferences. Section II.D concludes with an explanation of why presidential control over elections, at least in some form, is inevitable, and it provides reasons why this phenomenon may be poised to expand in the future.

Part III pivots to the normative and prescriptive implications of presidential control of elections. It begins with an examination of the deep normative concerns raised by this phenomenon. It explores the possibility that presidential control of elections both undermines expertise in election administration and facilitates entrenchment. This dynamic has negative implications for elections, as it calls into question the extent to which affected elections reflect the democratic will. This dynamic also has negative implications for the administrative state, as presidential control in this context threatens to undermine two of the values most vital to the modern federal executive branch: technocratic expertise and political accountability. All these possible effects are troubling, though also difficult to measure empirically. Having identified these concerns, Part III turns to the question of how best to respond. In so doing, it resists the impulse to try to completely eliminate this problematic form of control. It demonstrates instead the value in more targeted reforms that allow the other branches—legislative and judicial—to more effectively check the chief executive in areas where, at present, there is little to offset presidential control over election administration.

Throughout, this Article directs its analysis toward presidential efforts that seek to influence *election rules*, as opposed to mere *voter preferences*. A president, of course, takes any number of actions to increase the likelihood of victory at the polls. This Article explores only

a subset of these presidential actions: those that affect how election rules are interpreted and implemented.[29]

This Article also focuses on presidential actions that are at least plausibly consistent with the law. It does not, in other words, explore a president's attempts to swing elections by brazenly flouting the Constitution or Congress's statutes.[30] To that end, this Article does not attempt to integrate into its analysis the unlawful actions that President Trump allegedly took after the 2020 elections. Such analysis would require a shift in attention—away from how a president is empowered by law to influence election rules, which is the focus of this Article, to concentrate instead on an important but distinct question: how a sitting president might attempt to control elections and their outcomes through unlawful means.[31] At times, of course, the law is too unsettled, or opaque, to draw a clear line between lawful and unlawful actions.[32] A line nevertheless exists.

Particularly on the margins, all these lines are rough. Still, they help to concentrate this Article's analysis in a way that more effectively brings to light the nature and implications of the phenomenon it seeks to expose: how presidents use the powers of their office to control elections.

I. THE FEDERAL GOVERNMENT'S ROLE IN ELECTIONS

The field of election law is founded on the insight that election rules affect election outcomes. Who runs, who votes, and—eventually—who wins depends, at least in part, on the legal decisions determining how a jurisdiction runs its elections. Though these causal relationships tend to be difficult to measure,[33] they nevertheless exist, and they confirm the importance of the legal structures that undergird elections.

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29. *See supra* notes 4–5 and accompanying text (further defining relevant terms).

30. *See supra* note 26 and accompanying text (discussing allegations of presidents acting unlawfully).

31. Congress has vested the president with vanishingly little control over the resolution of disputed elections. As a result, "to the extent that a President can exploit his office to influence a disputed presidential election, it is not through law-based means." *See* Lisa Marshall Manheim, *Presidential Control over Disputed Elections*, 81 OHIO ST. L.J. ONLINE 215, 218 (2020); *see also id*. ("The President has essentially no legal authority, by virtue of his office, to control the resolution of disputed presidential elections. He also has no legal authority to control the decisions of officials who will dictate the outcome of such disputes."); sources cited *infra* note 265 (identifying unsuccessful attempts by Trump to subvert the results of the 2020 presidential election).

32. An example comes in the nebulous legal lines emerging out of recent litigation over the Census. *See infra* notes 145–155 and accompanying text (discussing the attempt by the Census Bureau to add a citizenship question to the short form questionnaire).

33. *See* Manheim & Porter, *supra* note 18, at 214 (noting the difficulty of measuring the effect of voting restrictions); *see also infra* notes 313–314 and accompanying text (discussing the electoral connection between voters, the president, and the administrative state).

With these relationships in mind, this Part provides an overview of the legal regimes through which federal officials exercise control over U.S. elections.

A. Federalism in Election Administration

In the decentralized system adopted by the United States, the federal government does not itself conduct elections. Instead, elections are run by state and local governments, with limited but important oversight and regulation by the federal government. The Constitution sets this balance, at the outset, by recognizing the primary role that states play in administering elections, both state and federal.[34] It then imposes direct obligations and limitations on the states. These constitutional limitations include provisions requiring states to hold elections for congressional offices,[35] as well as provisions protecting voters' rights against discrimination on the basis of race, sex, and more.[36] The Constitution also assigns to Congress the authority to preempt state election-related regulation, particularly with respect to federal elections.[37] It further grants to Congress the power to enact legislation counteracting some forms of discrimination in voting.[38] In the context of elections, much has been written about this federalist balance of power.[39]

Empowered by the Constitution's grants of authority, Congress

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34. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts."). Exceptions come in requirements associated with the Census, which primarily impose obligations on the federal government, as well as with respect to elections occurring in the District of Columbia.

35. *See* U.S. CONST. art. I, § 4, cl. 1; *see also* U.S. CONST. art. I, § 2, cl. 1 (addressing elections for the House); *id.* art. I, § 3, cl. 1 (addressing elections for the Senate); *id.* amend. XVII (same); *cf. id.* art. II, § 1 (addressing election of the president); *id.* amend. XII (same).

36. *See id.* amends. XV, XIX, XXIV, XXVI (addressing the right to vote); *see also id.* amend. XIV, § 2. Some of the Constitution's protections of the right to vote are more textually grounded than others. *See* Manheim & Porter, *supra* note 18, at 240 (noting that a broadly applicable right to vote, which federal courts have for decades recognized as constitutionally grounded, is generally understood to reside in the Fourteenth Amendment but nevertheless lacks a clear textual hook).

37. *See* U.S. CONST. art. I, § 4, cl. 1 (granting Congress the power to create and alter regulations for congressional elections, except for rules concerning place).

38. *See id.* amend. XIV, § 5 (granting Congress enforcement power); *id.* amend. XV, § 2 (same); *id.* amend. XIX, § 2 (same); *id.* amend. XXIV, § 2 (same); *id.* amend. XXVI, § 2 (same).

39. *See, e.g.*, Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020) (arguing that the Fifteenth Amendment significantly expanded Congress's ability to regulate voting rights); Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

has enacted a number of election-related statutes.[40] The most important have addressed the design of elections themselves, including with respect to race and voting rights, as well as voting systems and voter access.[41] Beginning in the 1970s, Congress also began regulating heavily in the area of campaign finance.[42] More recently, due to concerns over election security, federal officials have taken steps to trigger statutory provisions that help to protect election infrastructure.[43] Other federal statutes implicate elections in other important ways.[44] Commentators have written extensively about these forms of congressional control.[45]

As a result of Congress's activity in this area, recent decades have seen an expansion in the role that the federal government plays

40. *See* GARRETT, *supra* note 21, at 1 ("Currently, no single agency or statute provides overarching coordination. As this report shows, at least 22 congressional committees; 17 federal departments or independent agencies (plus the Intelligence Community and the federal judiciary); 9 federal statutes; and several constitutional provisions can affect the federal role in campaigns and elections.").

41. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77; Help America Vote Act of 2003, Pub. L. No. 107-252, 116 Stat. 1666; Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986); Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

42. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

43. *See infra* notes 63–65, 101–103 (discussing developments at the Department of Homeland Security).

44. Some of these relate to contested elections. *See* Federal Contested Elections Act of 1969, Pub. L. No. 91-138, 83 Stat. 284; *see also* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017) (discussing ambiguity in Article I, Section 5 of the Constitution regarding the role, if any, of the courts in adjudicating contested congressional elections). Congress also has enacted the Electoral Count Act of 1887, 3 U.S.C. § 5. *See* EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2016). A range of criminal statutes also involve elections. *See generally* U.S. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES (Richard C. Pilger ed., 8th ed. 2017), https://www.justice.gov/criminal/file/1029066/download [https://perma.cc/7YLU-QHY4]. Many other statutes affect elections in limited ways, or incidentally. *See* GARRETT, *supra* note 21, at 12; *see also* Jennifer Nou, *Sub-regulating Elections*, 2013 SUP. CT. REV. 135 (surveying federal election-related agencies in the course of offering broader critiques). Many of these statutes apply only to federal elections, and not to state elections—a distinction that reflects, among other considerations, the greater range of authority Congress has to regulate federal elections. Yet a number of these statutory provisions also govern state and local elections. And even when the terms of a congressional statute only reach federal elections, often the practical effect extends to state elections as well. This practical effect adheres, among other reasons, because most states administer state and federal elections concurrently. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 402 (2014) (discussing how, particularly with respect to issues of federalism, "congressional authority to regulate elections falls along a spectrum"). *But see* Michael Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Election*, 111 NW. U. L. REV. ONLINE 103 (2017) (distinguishing between federal elections, on the one hand, and state and local elections, on the other, and explaining how that connection relates to election-related policies adopted by the federal government).

45. *See, e.g.*, sources cited *supra* note 39 (discussing congressional control over elections).

in election administration.[46] Moreover, political pressure now appears to be mounting on the federal government to further increase its involvement, particularly with respect to election security and voting rights.[47]

Alongside the federal legislative branch, the federal judicial branch also exercises power under the Constitution in a manner that affects elections, including by helping to interpret relevant rules and restrictions.[48] Courts, for example, have developed a complicated set of legal frameworks to accompany the open-ended language of the Voting Rights Act of 1965 ("VRA"). They also have adjudicated the constitutionality of campaign finance restrictions in a way that has shaped the surviving legal regime in profound ways.[49] An enormous and ever-growing body of scholarship addresses the role of the federal courts in election law, including with respect to an ongoing debate over the courts' capacity to handle this field's most difficult problems.[50]

Subject to far less scholarly commentary, but at least as important, is the role in elections played by the remaining branch of the federal government: the executive branch.

B. The Role of the Federal Executive Branch

Through a patchwork combination of statutes, regulations, constitutional law, and more, the federal government reaches subtly, but strikingly, into the administration of elections. This arrangement necessarily empowers executive branch officials—including the president.

A very brief explanation of executive branch policymaking helps to set the stage. When Congress enacts a statute, it relies on the president or an agency to administer it—which, in turn, has the practical effect of granting to the executive branch a narrow, but

46. *See, e.g.*, GARRETT, *supra* note 21, at 1 ("Congress has expanded the federal role in campaigns and elections in the past 50 years . . . ."). *But cf.* Shelby County v. Holder, 570 U.S. 529 (2013) (holding section 4 of the Voting Rights Act ("VRA") unconstitutional). My use of the term "election administration" in this context is meant to be broad and, accordingly, to include statutes affecting redistricting, campaign finance, the Census, and more. *See supra* notes 4–5 (defining terms).

47. *See infra* notes 278–280 and accompanying text (citing election security proposals).

48. To this end, consider not only constitutional law, but also the large body of case law addressing statutory—and to a lesser extent regulatory—enforcement. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) (analyzing judges' varied interpretations of the VRA).

49. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (construing section 2 of the VRA); Buckley v. Valeo, 424 U.S. 1 (1976) (adjudicating the constitutionality of the Federal Election Campaign Act).

50. *See, e.g.*, sources cited *supra* notes 19–21 (identifying works illustrative in this field).

significant, degree of de facto policymaking authority in the relevant area of law. This policymaking can occur in different ways. For example, it can occur through interpretation of statutes in a manner that favors particular policy ends, including with respect to the promulgation of regulations and decisions made in agency adjudications. It also can occur through more subtle means, such as early agenda formulation, decisions regarding enforcement prioritization, and other forms of priority setting.[51]

The opportunity for executive branch policymaking accompanies almost any federal statute, including those that implicate elections. This broad scope, however, should not be mistaken for a lack of legal limits. To the contrary, the executive branch's policymaking powers are constrained by the same legal rules that empower the executive branch in the first place.[52] This arrangement nevertheless permits officials in the executive branch, to a limited but significant degree, to advance preferred policies in the field of elections.[53]

Despite its importance, only a handful of scholars have explored this role that the federal executive plays in election administration. This body of work includes insightful scholarship by Jennifer Nou and Daniel Tokaji.[54] It also includes a much larger body of work that at least touches on these issues as they relate to broader questions of institutionalism, including with respect to the administrative

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51. *See infra* note 100 (defining "priority setting"); *see also* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 97 (2016) (defining early agenda-setting as "the choices and opportunities that both agency officials and other participants in the regulatory process" face regarding what problems to emphasize and alternatives to consider); Andrias, *supra* note 4, at 1034 ("Though it has received little scholarly attention, presidential influence over agency enforcement activity has been a primary mechanism for effecting national regulatory policy. Nonenforcement in particular, which is subject to few judicial checks, has proved to be an important tool for advancing the presidential agenda.").

52. *See generally* MANHEIM & WATTS, *supra* note 14, at 37–38 (discussing this phenomenon and its legal limits).

53. *See* Mashaw, *supra* note 1, at 96 ("If congressional statutes were truly specific with respect to the actions that administrators were to take, presidential politics would be a mere beauty contest."); *see also* MANHEIM & WATTS, *supra* note 14, at 37–54 (discussing ways in which the law empowers executive branch actors to engage in policymaking).

54. *See, e.g.*, Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, *in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 173 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (discussing the role of the FEC in electoral regulation); Nou, *supra* note 44 (offering critiques of the Election Assistance Commission ("EAC") and explaining how this analysis informs federal election administration more broadly); *see also* Note, *A Federal Administrative Approach to Redistricting Reform*, 121 HARV. L. REV. 1842, 1843–44 (2008) (advocating for the creation of an independent federal agency to oversee congressional redistricting plans). This body of literature also includes a survey commissioned by the Congressional Research Service. *See* GARRETT, *supra* note 21. Tellingly, the analysis contained in this survey—which seeks to describe "Federal Government Roles" in elections (and, as such, includes sections dedicated to "Congress," "Federal Agencies," and the "Federal Judiciary")—nowhere explains the role, if any, played by the president.

preclearance procedure associated with the VRA.[55] It is rare to find scholarship discussing the role that the federal executive branch plays more broadly. Almost completely absent (that is, outside the area of VRA administrative preclearance) is any discussion of the role that the *president*, in particular, plays in election administration.[56]

To provide a framework for these discussions, the remainder of this Section provides a general overview of the involvement of the federal executive branch in election law. This overview is organized by the empowered actor (that is, by the actor formally empowered by law to exercise the relevant authority): (i) an executive agency; (ii) an independent agency; or (iii) the president herself. This organizational breakdown will prove helpful when identifying how the president draws on these myriad grants of power to influence elections.

1. Power Running to Executive Agencies

Congress has directed a range of election-related powers toward executive agencies, which are characterized by leadership subject to at-will removal by the president.[57] Perhaps the most important executive agency for purposes of election administration is DOJ, which helps to execute the VRA and other election-related statutes, such as the NVRA and the Help America Vote Act ("HAVA").[58] Until recently, DOJ played

55. *See, e.g.*, Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 832–35 (2006) (discussing how preclearance decisions at DOJ are subject to partisan manipulation); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113 (2010) (advocating for stronger private enforcement regimes for federal election statutes); Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 121–23 (2013) (proposing a disclosure model that might be more effective than the VRA's preclearance regime); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 135 (2009) [hereinafter Tokaji, *The Future of Election Reform*] (exploring the ineffectiveness of the EAC); Zipkin, *supra* note 20 (arguing that administrative law presents doctrinal resources for bolstering democratic legitimacy in the electoral process); Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 748 (2006) (proposing judicial review of section 5 preclearance grants in accordance with administrative law principles).

56. An exception comes in the scholarship of Jennifer Nou, who includes a discussion of the president in a work exploring pathologies in the EAC and explaining how the analysis sheds light on other federal agencies involved in election administration. Nou, *supra* note 44, at 178–79. Nou's discussion echoes some of the themes and concerns explored in this Article.

57. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462–65 (2008) (defining independent agencies, in contrast to executive agencies). *But see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (questioning the helpfulness of these categories and instead proposing that commentators identify relevant traits).

58. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77; Help America Vote Act of 2003, Pub. L. No. 107-252, 116 Stat. 1666. In addition, DOJ administers the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986),

a particularly consequential role in helping to police preclearance associated with section 5 of the VRA.[59] Within DOJ, it is the Civil Rights Division, and in particular the Voting Section, that engages in this civil enforcement work.[60] In addition, DOJ wields prosecutorial power in response to violations of the criminal code, including with respect to election-related crimes such as voter fraud and voter intimidation.[61]

The Department of Commerce also executes mandates that deeply affect elections. Housed within this agency is the Census Bureau, which is responsible for gathering the data that are used for congressional apportionment, as well as for redistricting within states.[62] In addition, the Department of Commerce houses the National Institute of Standards and Technology, which provides election-related technical assistance to other agencies involved in elections.

Recently, the Department of Homeland Security ("DHS") also became integrally involved in elections. As discussed above, in 2017, the Secretary of Homeland Security designated election infrastructure as "critical." This infrastructure includes physical locations—such as storage facilities, polling places, and centralized vote tabulation locations—as well as physical items such as voting machines. It also includes intangible items such as information and communications technology.[63] Pursuant to statutes enacted in the wake of the terrorist attacks of 2001,[64] this designation tasks DHS, as the "sector-specific agenc[y]" to which election infrastructure has been assigned, with coordinating collaborative efforts to help protect this infrastructure.[65]

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and the Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984), as well as a number of criminal statutes that implicate elections.

59. This ended in 2013, when the Supreme Court functionally invalidated the section 5 preclearance mechanism. *See* Shelby County v. Holder, 570 U.S. 529 (2013) (holding section 4 of the VRA, which set forth the coverage formula for the preclearance requirement, unconstitutional).

60. *See* C.R. Div., *Statutes Enforced*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/page/file/962196/download (last visited Dec. 18, 2020) [https://perma.cc/R2G5-JHAA].

61. *See* GARRETT, *supra* note 21, at 12–14.

62. *See* JENNIFER D. WILLIAMS, CONG. RSCH. SERV, R44788, THE DECENNIAL CENSUS: ISSUES FOR 2020, at 1 (2017), https://fas.org/sgp/crs/misc/R44788.pdf [https://perma.cc/5J55-6MBT].

63. *See* OFF. OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., PROGRESS MADE, BUT ADDITIONAL EFFORTS ARE NEEDED TO SECURE THE ELECTION INFRASTRUCTURE 11 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-24-Feb19.pdf [https://perma.cc/CW6P-WV3D].

64. *See, e.g.*, Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c.

65. *See* BRIAN E. HUMPHREYS, CONG. RSCH. SERV., IF10677, THE DESIGNATION OF ELECTION SYSTEMS AS CRITICAL INFRASTRUCTURE, https://fas.org/sgp/crs/misc/IF10677.pdf (last updated Sept. 18, 2019) [https://perma.cc/9GTN-H6S7]; *Election Security*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/topic/election-security (last updated July 14, 2020) [https://perma.cc/JCX2-78SX] ("[To secure election infrastructure,] DHS collaborates with federal departments and agencies, state and local government, election officials, and other valued partners . . . ."). It does not, however, empower DHS to exercise regulatory authority associated with election infrastructure. HUMPHREYS, *supra*.

The agency within DHS that is primarily responsible for this work is the Cybersecurity and Infrastructure Security Agency.[66]

A number of other executive agencies also exercise limited forms of authority over elections. The Treasury Department oversees the public financing of presidential candidates and, through the Internal Revenue Service ("IRS"), executes the Internal Revenue Code, which governs political activities of certain tax-exempt organizations.[67] The Department of Defense administers rules associated with military and overseas voters.[68] The Department of State engages in work responsive to the threat of foreign interference in elections.[69] The Federal Communications Commission plays a minor role relating to broadcast access time for candidates.[70] The list goes on, with the remaining agencies tending to exercise incidental or nominal power over elections.[71]

2. Power Running to Independent Agencies

Independent agencies exist outside the control of the cabinet agencies as well as the Executive Office of the President, and their leadership is not subject to at-will removal by the president.[72] This legal structure is intended to insulate the agencies from presidential control.[73] Congress has vested significant election-related power in independent agencies. The two most important are the FEC and the Election Assistance Commission ("EAC"). The FEC is responsible for execution of the federal government's campaign finance laws. It has

66. *See About CISA*, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/about-cisa (last visited Dec. 18, 2020) [https://perma.cc/S9JA-4PV2]; *see also Election Infrastructure Security*, CYBERSEC. & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/election-security (last visited Dec. 18, 2020) [https://perma.cc/35PP-ZN8A].

67. GARRETT, *supra* note 21, at 18, 23–24.

68. Nou, *supra* note 44, at 151.

69. GARRETT, *supra* note 21, at 23. Almost any agency has powers incidentally touching on elections. An agency charged with administering wage laws, for example, might encounter a dispute over campaign workers. The Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147, which prohibits employees from engaging in certain kinds of political campaign activities, applies broadly across many agencies. A somewhat whimsical example of incidental election-law authority emerges from the National Aeronautics and Space Administration, which facilitates voting from space. GARRETT, *supra* note 21, at 2 n.7. None of these agencies, however, exercise the same concentrated and potential consequential grants of election-related power as DOJ, the Commerce Department, and others discussed above.

70. GARRETT, *supra* note 21, at 24.

71. *See id.* at app. (table outlining the roles agencies play in elections).

72. *See* Devins & Lewis, *supra* note 57, at 462 (defining independent agencies).

73. *See id.* at 459–61 (concluding that, while "statutory limits on the President's appointment and removal powers are effective" at ensuring a president cannot appoint a commission full of loyalists, the independence of agencies nevertheless is compromised by party politicization).

rulemaking power as part of this charge.[74] It also provides compliance guidance, and it is responsible for civil enforcement proceedings.

The EAC was created in 2002 in the aftermath of *Bush v. Gore*.[75] Congress charged it with assisting states with election administration. It plays a particularly important role in executing parts of HAVA.[76] It also performs some auditing, accreditation, and certification functions for voting systems and federal fund distribution. While the EAC generally is prohibited from engaging in rulemaking, it does have regulatory authority associated with federal voter registration forms.[77] In addition to the FEC and EAC, the U.S. Commission on Civil Rights investigates and reports on various forms of discrimination, including with respect to voting.

Outside of these agencies, the election-related powers running to independent agencies tend to be incidental or indirect. Still, the powers are at times significant. The United States Postal Service ("USPS"), for example, is an independent agency that provides mail processing and delivery services. It plays no direct role in regulating elections. It nevertheless provides a service so integral to modern election administration that the service itself, in a sense, constitutes a form of election administration: the delivery of absentee ballots and other election-related mail.[78] Some of the USPS's work in this area is coterminous with the USPS's other mail-delivery services. (For example, the USPS makes stamps, which can be used to mail ballots or any other form of mail.) But some of the USPS's work in this area is specially directed at elections. For example, the USPS designates some of its staff as "election mail coordinators" who help to coordinate with state and local election officials as they work to administer elections. The USPS also has special designations that jurisdictions can use for ballots as well as for other forms of election mail, and it has adopted policies that, in limited ways, prioritize election mail.[79] As the USPS

74. GARRETT, *supra* note 21, at 20.

75. 531 U.S. 98 (2000).

76. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21145).

77. *See* 52 U.S.C. § 20508; *see also* Arizona v. Inter Tribal Council of Ariz, Inc., 570 U.S. 1, 5 (2013) ("The Election Assistance Commission is invested with rulemaking authority to prescribe the contents of that Federal Form.").

78. *See* Letter from Thomas J. Marshall, Gen. Couns. & Exec. Vice President, U.S. Postal Serv., to Election Officials (May 29, 2020), https://about.usps.com/newsroom/national-releases/2020/2020-05-29-marshall-to-election-officials-re-election-mail.pdf [https://perma.cc/GEK9-EQ5K] (describing USPS's requirements and services in the context of election-related mail).

79. *Id.*; *see also* Washington v. Trump, No. 1:20-CV-03127-SAB, 2020 WL 5568557, at *1–2 (E.D. Wash. Sept. 17, 2020) (describing USPS policy of treating election mail as first class mail regardless of the paid class of service).

example helps to confirm, election-related administration can reach across agencies in subtle ways.[80]

As noted above, for three independent agencies—the FEC, the EAC, and, to a lesser but still important extent, the U.S. Commission on Civil Rights—election-related work remains central to their missions. To this end, it is noteworthy that Congress has designed all three with an unusual leadership structure. Each has a multimembered commission with a requirement of bipartisanship. Alone, these qualities are not unusual for an independent agency. What is unusual, however, is that each commission is even-numbered. Especially when evenly split by party, an even-numbered leadership team can be particularly prone to deadlock.

3. Power Running Directly to the President

Congress, finally, has vested some election-related authority directly in the president. The president, in other words, enjoys some election-related powers that she can exercise unilaterally. She can do so through legally binding orders—orders that carry the force and effect of law.[81]

The list of these powers is short, and many involve generally applicable powers that implicate elections only in particular circumstances. The president can, for example, impose sanctions in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[82] This threat might include foreign interference in U.S. elections—as reflected in presidents' recent executive orders.[83] Congress has also facilitated presidents' ability to create advisory commissions, including

80. Congress, of course, can take steps to counteract such intrusions. An agency that plays a lesser role than the law might otherwise allow is the U.S. Securities and Exchange Commission ("SEC"). Congress has barred the SEC, through appropriations bills, from spending money associated with required disclosure of political contributions. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 3029–30 (2015); *see also* Jacob Rund, *Senate Democrats Press GOP to Scrap Political Spending Disclosure Ban*, CQ ROLL CALL (Sept. 15, 2016), https://today.westlaw.com/Document/I58c7f9ae7b7c11e698dc8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/7YUA-658R].

81. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1764–65 (2019).

82. International Emergency Economic Powers Act of 1977 § 202(a), 50 U.S.C. § 1701(a).

83. *See, e.g.*, Ed Stein, *What's in the Executive Order on Election Interference?*, LAWFARE (Sept. 19, 2018, 11:26 AM), https://www.lawfareblog.com/whats-executive-order-election-interference [https://perma.cc/JEP4-NDXQ] (discussing a 2018 executive order addressing sanctions for foreign interference in U.S. elections).

toward election-related ends.[84] For illustrations of the latter, consider the election-related commission set up by President Obama, and then, four years later, the election-related commission set up by President Trump.[85] Occasionally, a grant of power more narrowly affecting election administration runs directly to the president. One of the rare examples comes via statutes governing the Census. In at least one notable respect, these census-related statutes empower the president, acting alone, to influence the rules governing elections in a technical but potentially consequential manner.[86] Outside the field of election law, Congress often permits more power to run unilaterally to the president.[87] This contrast may reflect congressional concerns over presidents exercising untrammeled control over matters relating to elections.[88]

In sum, Congress has empowered the federal executive branch to play a nuanced but important role in setting the policies that help to dictate how elections are run in the United States. This dynamic provides insight into the topic that this Article now seeks to explore: the role that the president herself plays in how election rules are interpreted and implemented.

II. PRESIDENTIAL CONTROL OF ELECTIONS

Using the legal power of his office, the President of the United States routinely exercises control over elections. These forms of control often are subtle and indirect. Presidential control over elections nevertheless is a pervasive phenomenon, reaching into races across the country, and it has potentially meaningful effects on election outcomes. The result is concerning: a sitting president exercising control over the very same elections that are intended to justify, and check, his continuing authority. This Part explores the phenomenon. It begins by analyzing how presidents control election rules by exercising their legal authority in various ways. This Part then turns to the question of why presidential control of elections, in some form, may be inevitable. It also

84. *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994).

85. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) (Trump); Exec. Order No. 13,639, 70 Fed. Reg. 19,979 (Apr. 3, 2013) (Obama).

86. *See infra* notes 228–238 and accompanying text (unpacking this grant of power and explaining how it affects election administration).

87. *See* Manheim & Watts, *supra* note 81, at 1764–65, 1771 (discussing presidential orders that are "legally binding"); *see also infra* note 208 and accompanying text.

88. *See infra* notes 239–243 and accompanying text (noting limited constraints on presidents exercising unilateral power).

asks whether, in the near future, the phenomenon may be poised to expand in significant ways.

Before jumping into the analysis, it is important to explain briefly how, exactly, a president is able to influence executive branch policymaking. As is well known in administrative law circles, the answer depends on how Congress structured the grant of power. When Congress's delegation runs to an *executive agency*, the president can employ a range of law-based tools to exercise control. One of the most important tools comes in the form of nomination decisions, as the president exercises his constitutionally protected power to select the leaders of these agencies.[89] The president also enjoys the ability to remove, at will, high-ranking officials.[90] In addition, presidents have insisted that many of these executive agencies' actions be subject to White House review,[91] and, on occasion, will formally issue additional directives to executive agency officials to exert further influence.[92] Less formal forms of centralized review also help presidents to consolidate power over executive agencies.[93] Although, as a matter of custom,

89. The Constitution protects the president's ability to nominate principal officers, subject to confirmation by the Senate. U.S. CONST. art. II, § 2, cl. 2; *see also, e.g.*, Buckley v. Valeo, 424 U.S. 1, 125 (1976) (addressing the appointment process). Though Congress has somewhat more flexibility with respect to the rules governing the appointment of inferior officers, see U.S. CONST. art. II, § 2, cl. 2, the president still tends to play an important role. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that appointment of administrative law judges by SEC staff violated the Appointments Clause). It is correct that the Senate often serves as a countervailing check with respect to presidential nominations. *See* U.S. CONST. art. II, § 2, cl. 2 (allowing the president to appoint principal officers "by and with the Advice and Consent" of the Senate). But that check is not as effective as one might assume given presidents' increasingly common reliance on temporary leaders—that is, "Actings"—who have not received Senate confirmation. *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 617–25 (2020).

90. *See*, *e.g.*, Seila L., LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (holding unconstitutional for-cause restrictions on the president's authority to remove the Consumer Financial Protection Bureau's director); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding unconstitutional dual for-cause limitations on removal of the Public Company Accounting Oversight Board's members).

91. The Trump Administration has taken additional actions in an attempt to increase formal White House oversight of rulemaking. These include changes at the Treasury Department, which houses the Internal Revenue Service. *See* Press Release, U.S. Dep't of the Treasury, Treasury, OMB Update Tax Regulatory Review Process (Apr. 12, 2018), https://home.treasury.gov/news/press-releases/sm0345 [https://perma.cc/LG93-95K5].

92. Typically, these directives (often labeled an "Executive Order" or "Presidential Memorandum") are not legally binding. Nevertheless, they tend to achieve their desired ends: subordinates normally spring into action. This pattern of compliance presumably reflects norms, the threat of removal, or some combination thereof. *See* Tara Leigh Grove, *Presidential Laws and the Missing Interpretative Theory*, 168 U. PA. L. REV. 877, 925–29 (2020) (describing the role that the presidents' subordinates play in drafting executive orders); *see also* Manheim & Watts, *supra* note 81, at 1765–66 (noting that, because of the threat of removal, executive orders have a strong influence on agency heads even if the orders are not legally binding).

93. *See generally, e.g.*, Bressman & Vandenbergh, *supra* note 4, at 99 (examining the ways in which the White House sets regulatory policy, using the Environmental Protection Agency ("EPA")

presidents historically have exercised less influence over some executive agencies—such as DOJ and the IRS—these norms are not law. Moreover, they may be breaking down.[94]

When a congressional grant of authority runs to an *independent agency*, by contrast, the president's toolbox is much more limited. Job protection helps to explain this limitation in the president's powers. Once a head of an independent agency is nominated by the president and confirmed by the Senate, she enjoys legal safeguards against removal. As a result, the president has relatively few law-based means by which to exercise control over that leader's decisionmaking.[95] Still, in addition to whatever informal means the president might use to influence an independent agency's decisions, he also retains significant policymaking influence through the initial nomination decision.[96]

The final form of authority is a *direct grant of power* running to the president. When Congress (or the Constitution) has conferred such authority on the president, rather than an agency, the president can exercise this power all on his own. While many of the legal rules governing these unilateral presidential actions are unsettled,[97] well-established case law confirms that, at a minimum, the president must

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as a case study); *id*. at 49–50, 54–55 (evaluating the "presidential control" model of understanding administrative law).

94. *See* Renan, *supra* note 21, at 2189–94.

95. Presidents nevertheless have tried to exercise some additional forms of control. While independent agencies' rules historically have not been subject to review by the Office of Management and Budget ("OMB") or the Office of Information and Regulatory Affairs ("OIRA"), for example, Executive Order 12,866 indicated that independent agencies should submit their "regulatory plans" for this form of review. Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993). In addition, the OMB under President Trump issued an order purporting to increase OIRA review of major actions taken by independent agencies. *See* Bridget C.E. Dooling, *OMB's "Major" Move on Regs & Guidance*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 15, 2019), https://www.yalejreg.com/nc/ombs-major-move-on-regs-guidance/ [https://perma.cc/8R9F-G6CW]; Hal S. Scott, *OMB's Guidance Memorandum to Independent Agencies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 26, 2019), https://corpgov.law.harvard.edu/2019/06/26/ombs-guidance-memorandum-to-independent-agencies/ [https://perma.cc/X4MK-LHTH].

96. *See* Devins & Lewis, *supra* note 57, at 491 (concluding that political polarization may help the president exercise control over independent agencies once he has appointed a majority of commissioners from his own party); Datla & Revesz, *supra* note 57, at 819–24 (noting that the president can appoint a chair of a multimember agency when there is a vacancy, which are relatively frequent); *see also supra* note 89 (discussing presidential appointments).

97. A relatively well-established set of legal rules (including, often, those contained in the Administrative Procedure Act ("APA")) governs actions taken by agency officials. But when a president takes an action, the same set of rules does not apply and the form of judicial review is different. *See* Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 64–70 (2020) (noting that when a president acts pursuant to statutory authority, he is subject to a different standard of judicial review than an agency); Manheim & Watts, *supra* note 81, at 1769–74 (discussing the unsettled nature of judicial review for presidential orders).

act on the basis of some legal authority and cannot violate either constitutional or statutory restrictions.[98]

In the world of administrative law, these sorts of policymaking tools—tools that allow the president to exercise control over executive branch decisionmaking—are well known and well studied. Debates over their nature and legality nevertheless continue to evolve; so do the practices themselves.[99] It is in this context that this Part explores a phenomenon that, despite its troubling pervasiveness and normative implications, has largely escaped scholarly attention: how presidents use these tools to influence the administration of elections.

A. Executive Agencies: Control Through Priority Setting

Much of the federal government's control over election administration runs through executive agencies. As explained in Part I, these grants of power include those associated with the VRA and other landmark voting-rights statutes. It also includes grants of power associated with the administration of the Census, as well as the taxation of political entities, the protection of election infrastructure, and the coordination of election-related activities. The use of executive agencies to administer these election-related mandates presents the president with a tempting opportunity: the chance to leverage his considerable control over agency leaders in a way that might push election rules in her favor.

This Section explores how, exactly, presidents influence election administration when they seek to control elections through executive agencies. It does so by identifying several examples across agencies that, together, illustrate the overarching pattern in this context: namely, that presidents tend to exercise such control by influencing agencies' priority setting.[100] This reliance on priority setting tracks

98. *See* Manheim & Watts, *supra* note 81, at 1774–81 (describing the limited legal precedents for judicial review of presidential orders); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *id.* at 635–38 (Jackson, J., concurring) (establishing a three-tier framework for analyzing presidential acts).

99. The basic history also is well known. Viewed as an overarching trend, presidential influence over agencies—executive as well as independent—appears to have become more aggressive over the last few decades, with today's presidents openly seeking to exercise control over executive branch policymaking. *See* Manheim & Watts, *supra* note 81, at 1763–69 (describing presidential reliance on executive orders to exercise control over agency policy); *see also* Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 559–61 (2018); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 550 (2005). This more aggressive approach can be traced back to the presidency of Ronald Reagan, with important foundations also set by Bill Clinton. *See* Kovacs, *supra*, at 559–61.

100. By "priority setting," this Article means to refer to top-down decisions regarding which mandates an agency will prioritize and which it will deprioritize. This category includes decisions

congressional design and, more specifically, the limited nature of Congress's delegations in this area. After describing this pattern, this Section complicates its observations by identifying ways in which presidents may be attempting to expand their control over executive agencies. This Section then explains how presidential control of executive agencies, in the context of election administration, might affect election outcomes. Finally, it concludes with a brief discussion of what checks, if any, may exist to temper these forms of control.

Turning first to how, exactly, presidents exercise control in the context of executive agencies, a particularly vivid example emerged recently from DHS. In January 2017, the outgoing DHS Secretary (an Obama appointee) officially designated election infrastructure as "critical."[101] This designation triggered a range of obligations,[102] which the Secretary triggered for the purpose of ensuring that, at DHS, election infrastructure would be, "on a more formal and enduring basis, . . . a priority for cybersecurity assistance and protections."[103]

Well into the subsequent administration, however, DHS had fallen drastically behind where its mandates required it to be.[104] The agency had not so much as started much of the relevant work, including

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regarding enforcement policies as well as, at an extreme, individual enforcement actions. For a sophisticated analysis of agency enforcement practices and how presidents influence them, see Andrias, *supra* note 4, at 1042 (explaining that the president's enforcement powers include "shaping regulatory outcomes through decisions about enforcement policy and through attention to problems of regulatory compliance" and providing details on what this activity looks like). *See also supra* note 51 and accompanying text (discussing "priority setting" and presidential influence over agency enforcement activity).

101. Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical [https://perma.cc/7EAY-BSMP]; *see also* Mark Landler & David E. Sanger, *Obama Says He Told Putin: 'Cut It Out' on Hacking*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/us/politics/obama-putin-hacking-news-conference.html [https://perma.cc/7UV7-8UT8] (describing President Obama's approach for addressing foreign interference).

102. DHS's new responsibilities included coordinating information sharing among federal, state, and local governments and outside stakeholders; providing specialized expertise and other services to these same groups; and, more generally, serving as the "the primary federal interface" with respect to election security. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-267, DHS PLANS ARE URGENTLY NEEDED TO ADDRESS IDENTIFIED CHALLENGES BEFORE THE 2020 ELECTIONS 12 (2020), https://www.hsdl.org/?view&did=834127 [https://perma.cc/X69D-PV57]. At present, the DHS subagency responsible for this work is the Cybersecurity and Infrastructure Security Agency. *See supra* notes 63–65 and accompanying text (providing background on this agency).

103. U.S. Dep't of Homeland Sec., *supra* note 101.

104. In 2019, for example, an outside audit commissioned by DHS criticized the agency's inadequate staffing, lack of initiative, and deficient election-security operations during the November 2018 midterm elections. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 102, at 25–30. *See generally supra* note 63 and accompanying text (discussing these deficiencies).

with respect to basic planning documents, and this inertia held even as threats to election security continued to mount.[105]

The sluggishness was by design. After DHS's January 2017 designation, a newly inaugurated President Trump announced his resistance to this brand of security work.[106] On this point, Trump diverged from his own DHS appointees, who shared the outgoing Secretary's commitment to election security.[107] Nevertheless, Trump preferred a moribund implementation of DHS's obligations to protect election infrastructure—in part to bolster the "legitimacy" of his 2016 election victory and, in part, in anticipation of his 2020 presidential reelection campaign. As a direct response to the President's preference, the White House insisted that DHS focus its energies elsewhere. Chief of Staff Mick Mulvaney, for example, told the DHS Secretary not to raise the issue with the President. The Secretary—and agency—complied.[108]

At DHS, the role played by presidential pressure was clear. Rarely, however, is presidential involvement in election-related administration quite so obvious (at least, to the public).[109] Investigations into other executive agencies nevertheless reveal a similar pattern.

To this end, perhaps the most important federal agency responsible for election-related administration is DOJ. Beginning with the VRA, Congress has charged this agency with some of the federal government's most sweeping and consequential electoral mandates. DOJ's docket now includes protection of voting rights pursuant to the

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105. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 63, at 7 ("[D]espite Federal requirements, DHS has not completed the plans and strategies critical to identifying emerging threats and mitigation activities, or established metrics to measure progress in securing the election infrastructure.").

106. Eric Schmitt, David E. Sanger & Maggie Haberman, *In Push for 2020 Election Security, Top Official Was Warned: Don't Tell Trump*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/russia-2020-election-trump.html [https://perma.cc/5PDR-ZPDV].

107. *See, e.g.*, Morgan Chalfant, *Trump Official: Election Infrastructure Should Be Protected*, HILL (Feb. 7, 2017, 2:16 PM EST), https://thehill.com/policy/cybersecurity/318320-trump-official-election-infrastructure-should-be-protected [https://perma.cc/2VHG-JAH2]; *see also* Schmitt et al., *supra* note 106 (describing desire within DHS's leadership to prioritize election security).

108. *See* Schmitt et al., *supra* note 106.

109. *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 62 (2013) (discussing the White House's "lack of transparency" when it seeks to control agency action); Bressman & Vandenbergh, *supra* note 4, at 82 (concluding, through its empirical study of the EPA, that "White House involvement" is seldom transparent to the public); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1755 (2009) (discussing the possibility of a president "secretly [steering agency] decisions" while publicly distancing himself from them); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1159 (2010) (["The presidential] supervision process is largely opaque."); *see also infra* notes 146–154 (discussing recent efforts by the Census Department to obfuscate White House involvement in its decisionmaking).

VRA, regulation of voter registration pursuant to the NVRA and HAVA, prosecution of election-related crimes, and more.[110]

Faced with such responsibility, DOJ has fielded a steady stream of accusations regarding whether political influence has affected its implementation of election-related mandates. In 2005, for example, the *New York Times* published an editorial lambasting what it construed as DOJ's partisan enforcement of the VRA. The paper went so far as to suggest that President Bush was using his "powers" to "rig the election process."[111] This rhetoric was inflammatory. On the substance, however, the claims are familiar. Similar allegations of partisanship affecting election administration in the Bush-era DOJ routinely appear in the scholarly literature.[112]

Further allegations emerged under Obama. In 2009, for example, Republican members of Congress accused the Obama-era DOJ of administering election-related criminal laws in a partisan manner to protect "political all[ies]."[113] In response to these allegations, DOJ Office of the Inspector General conducted an investigation into the alleged politicization of the Voting Section of DOJ's Civil Rights Division and, in 2013, issued a lengthy report.[114] According to this report, a moderate degree of politicization had indeed affected the agency in its implementation of voting rights laws. On the one hand, the Inspector General could not identify adequate evidence to conclude that Division leadership had exercised "improper" political influence over how DOJ was enforcing these laws.[115] On the other hand, the investigators did express "concerns about particular decisions in a few cases"; acknowledged "changes in enforcement priorities over time"; and

110. *See Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/statutes-enforced-voting-section (last updated Sept. 11, 2020) [https://perma.cc/XKB8-PW6R].

111. Editorial, *Fixing the Game*, N.Y. TIMES (Dec. 5, 2005), https://www.nytimes.com/2005/12/05/opinion/fixing-the-game.html [https://perma.cc/H4YC-PC7W].

112. *See*, *e.g.*, Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 77 (2009) ("The record of the Bush Administration reveals a shift away from traditional enforcement priorities and, more significantly, a worrisome erosion of institutional norms of impartiality, professionalism, and nonpartisanship in civil rights enforcement."); *see also id.* at 79 (discussing section 2 of the VRA); Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL'Y 17, 19 (2009) ("[W]e saw an administration transform the Department of Justice, and particularly the Civil Rights Division's Voting Section, from a nonpartisan protector of voting rights into a political actor.").

113. Charlie Savage, *Report Examines Civil Rights During Bush Years*, N.Y. TIMES (Dec. 2, 2009), https://www.nytimes.com/2009/12/03/us/politics/03rights.html [https://perma.cc/C2GB-EDEK].

114. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION (2013), https://oig.justice.gov/reports/2013/s1303.pdf [https://perma.cc/V5AS-HXJX].

115. *Id.* at 251.

lamented "deep ideological polarization fuel[ing] disputes and mistrust that [has] harmed the functioning of the Voting Section."[116]

Since the issuance of this 2013 report and subsequent inauguration of President Trump, allegations of politicization at DOJ only have intensified—including with respect to its implementation of election laws.[117] Among the most troubling developments, prior to the 2020 elections, were signs of White House pressure regarding which individual criminal prosecutions DOJ should pursue, including with respect to election-related crimes; allegations of politically motivated, retaliatory investigations of DOJ personnel previously charged with investigating election-related criminal activity; and the threatened deployment of federal agents (including some in DOJ) to polling places allegedly for the purpose of monitoring voter fraud.[118] In the aftermath of the 2020 elections, President Trump allegedly kept up his interference with DOJ's election-related decisionmaking.[119]

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116. *Id.*

117. *See, e.g.*, Michael Wines, *Voting Rights Advocates Used to Have an Ally in the Government. That's Changing.*, N.Y. TIMES (Aug. 12, 2018), https://www.nytimes.com/2018/08/12/us/voting-rights-voter-id-suppression.html [https://perma.cc/QKQ4-BB4T] (comparing the work of DOJ under the Trump Administration to that of prior administrations). *Cf. infra* notes 132–134 and accompanying text (discussing potential for presidential politicization at the IRS); R. Robin McDonald, *Sally Yates: White House Has Violated 'Important Norms,'* LAW.COM: DAILY REP. (Oct. 13, 2017), https://www.law.com/dailyreportonline/sites/dailyreportonline/2017/10/13/sally-yates-white-house-has-violated-important-norms/ [https://perma.cc/QME9-ZVCB] (quoting former Acting Attorney General Sally Yates as claiming that, under the Trump Administration, "[t]he wall between the Department of Justice and the White House" has been breached).

118. *See, e.g.*, @realDonaldTrump, TWITTER (Sept. 3, 2018, 1:25 PM), https://mobile.twitter.com/realDonaldTrump/status/1036681588573130752 [https://perma.cc/6PCG-4G9C] (criticizing DOJ for proceeding against two sitting Republican congressmen because of potential electoral ramifications); Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry into Its Own Russia Investigation*, N.Y. TIMES (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html [https://perma.cc/U54X-GDGV]; Maggie Haberman & Michael S. Schmidt, *Trump Gives Attorney General Sweeping Power in Review of 2016 Campaign Inquiry*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/politics/trump-barr-intelligence.html [https://perma.cc/YP76-U3SY]; Memorandum on Agency Cooperation with Attorney General's Review of Intelligence Activities Relating to the 2016 Presidential Campaigns, 84 Fed. Reg. 24,971 (May 23, 2019); Kathleen Gray, *On Fox News, the President Floats Sending Law Enforcement Officials to the Polls*, N.Y. TIMES (Aug. 21, 2020), https://www.nytimes.com/2020/08/21/us/elections/on-fox-news-the-president-floats-sending-law-enforcement-officials-to-the-polls.html [https://perma.cc/JBL4-MMFX].

119. *See, e.g.*, Jess Bravin & Sadie Gurman, *Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results*, WALL ST. J. (Jan 24, 2021, 11:07 PM ET), https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369 [https://perma.cc/L674-RLHV]; Katie Benner, *The Justice Dept.'s Inspector General Opens an Investigation into Any Efforts to Overturn the Election.*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/politics/justice-dept-investigation-election-trump.html [https://perma.cc/Q3EV-S9R2]; *see also* Katie Benner & Charlie Savage, *Jeffrey Clark Was Considered Unassuming. Then He Plotted With Trump.*, N.Y. TIMES (Jan. 24, 2021), https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html [https://perma.cc/Q8CW-3THZ] (recounting allegations that the Acting Head of the Justice Department's Civil Division was "plot[ting] with the president to wield the department's power to try to alter the

Allegations of politicization, of course, are not conclusive evidence of politicization. And the existence of politicization at an executive agency does not necessarily implicate a sitting president. Nevertheless, the patterns that have emerged over time at DOJ suggest that recent presidents indeed have put a thumb on the scale. More specifically, these patterns suggest that White House involvement—at a minimum, through nomination decisions and, particularly in recent years, through what appears to be behind-the-scenes pressure from the White House—indeed has affected DOJ's administration of election mandates, primarily through how the agency sets its priorities.

A closer look at DOJ's administration of the NVRA—as discussed briefly in this Article's introduction—helps to demonstrate. Under different presidential administrations, DOJ not only has altered how it prioritizes enforcement of the NVRA; it has done so in ways that generally appear to track the electoral interests of the political party occupying the White House. More specifically, when deciding which registration-related claims to prioritize and pursue, administrations led by Republicans have tended to prioritize enforcement of NVRA mandates that require states to cull voter registration rolls.[120] Administrations led by Democrats, by contrast, have tended to prioritize enforcement of NVRA mandates that require jurisdictions to retain eligible voters on the rolls.[121] According to the conventional wisdom, at least, this shift in enforcement prioritization predictably favors the electoral prospects of one political party over the other.[122]

Georgia election outcome"). It is worth noting that it is not clear how, if at all, DOJ could have possibly affected the outcome of the 2020 elections at that point. *See generally* Manheim, *supra* note 31.

120. One striking example came when, citing the recent "change in Administrations," the Trump-era DOJ reversed its longstanding interpretation of section 8 of the NVRA in a filing before the Supreme Court. Brief for Respondents at 19 n.11, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4161967, at *19 n.11; *see also* Michael T. Morley, *Republicans and the Voting Rights Act*, 54 TULSA L. REV. 281, 291 (2019) (reviewing JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT (2017)):

> [T]he Bush Justice Department brought several suits to enforce Section 8 of the National Voter Registration Act ("NVRA"), which requires jurisdictions to update voter registration lists to eliminate outdated records to reduce the possibility of mistake, double voting, or absentee ballot fraud. Under the Obama Administration, in contrast, Deputy Assistant Attorney General Fernandez announced to Voting Section staff attorneys she " 'did not care about' or 'was not interested' in pursuing Section 8 cases."

(footnotes omitted); Manheim & Porter, *supra* note 18, at 220–21 (describing how Republican-aligned actors have cast the NVRA as an "anti-voter-fraud-law"); Wines, *supra* note 117 (explaining how the Trump-era DOJ could have used the NVRA to pressure states to aggressively remove names from voting rolls).

121. *See* sources cited *supra* note 120 (comparing the Republican and Democratic approaches to enforcing the NVRA).

122. The conventional wisdom holds, to put it bluntly, that Republican candidates benefit when the federal government pressures a jurisdiction into removing voters from the rolls, while

A similar pattern has emerged from DOJ's administration of the VRA. The VRA empowers DOJ in a range of ways. It empowers DOJ to enforce federal protections against race-based discrimination in voting; to ensure that jurisdictions provide appropriate assistance to voters who are members of minority language groups; in limited circumstances, to monitor polling places on election day; and more.[123] In recent years, much of this work has centered around section 2, which prohibits jurisdictions from implementing any election-related law that "results in a denial or abridgement of the [right to vote] on account of [a protected classification, such as race.]"[124] At times, section 2's mandate requires that jurisdictions change their voting systems to allow minority voters more opportunity to elect representatives of their choice.[125] Stated otherwise, section 2 at times requires jurisdictions to change their laws in ways that are—by design—likely to lead to different electoral outcomes.

It is not easy to parse out how, exactly, changes in section 2 enforcement will affect the electoral prospects of various candidates, particularly when it implicates complicated areas such as redistricting. What is clear, however, is that a causal relationship does exist between the practices governed by section 2—practices like redistricting—and likely election outcomes. (As noted above, this shift in electoral prospects is in a sense the very point of the provision.) For its part, DOJ is aware of the opportunity it has to benefit a particular political party or political candidates, including those allied with the president, through strategic enforcement of section 2.[126] While commentators do

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Democratic candidates tend to benefit from the opposite. *See* Manheim & Porter, *supra* note 18, at 252–53. Assuming this correlation is correct, when DOJ has decided which NVRA-related mandates to prioritize, its decisions across several administrations indeed have tracked the electoral prospects of the president in office and his political allies. *See id.* at 220–21.

123. *See generally* U.S. DEP'T OF JUST., *supra* note 110 (describing the statutes administered by the Voting Section of the Civil Rights Division); *see also About Federal Observers and Election Monitoring*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-federal-observers-and-election-monitoring (last updated Sept. 11, 2020) [https://perma.cc/3QLX-ZZNG] (addressing DOJ's authority to monitor polling places).

124. 52 U.S.C. § 10301(a). This deprivation occurs whenever members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

125. *See id.*

126. Strategic enforcement of section 2 can make a significant difference in how jurisdictions run their elections because state and local governments do not always adhere to section 2's requirements. A jurisdiction might, for example, prefer to use a traditional at-large method of election for its legislative branch, and it might insist on keeping this system even when section 2 requires it to increase minority representation by fundamentally changing its voting structure. In response, DOJ can bring a lawsuit to force the jurisdiction's hand. Other recalcitrant jurisdictions, by contrast, never wind up on the receiving end of an enforcement proceeding by DOJ; instead, they continue to run elections in ways that violate federal law. (In referring to a jurisdiction "run[ning] elections in ways that violate federal law," this Article means to refer to jurisdictions

not agree on the extent to which DOJ in fact has availed itself of this opportunity—much less on the degree to which the White House has affirmatively tried to achieve this result through top-down control—virtually all commentators have acknowledged the shifting enforcement priorities across administrations.[127] In addition, circumstantial evidence of top-down partisan influence is strong, particularly under the Trump Administration.[128]

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whose conduct could be legally actionable, were an enforcement action brought—not to wade into debates over what, exactly, constitutes a violation of the relevant law.) This dynamic empowers DOJ—and, by extension, the White House—to set enforcement priorities in strategic ways. It is true that private litigants might be able to bring section 2 lawsuits to offset some of these strategic decisions. *See* Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 592–95 (2017) (discussing section 2 private plaintiffs). Nevertheless, the resources of the federal government help to ensure that its enforcement-related decisions make a difference.

127. *See, e.g.*, Morley, *supra* note 120, at 283 (pushing back against conclusion that the Bush-era DOJ improperly politicized the VRA, while acknowledging the shifting priorities between presidential administrations); Karlan, *supra* note 112, at 19 (explaining how the Voting Section of DOJ transformed procedurally and substantively during the Bush Administration); Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 81–82 (2006); *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary*, 110th Cong. 117–18 (2007) (testimony of Roger Clegg, President & Gen. Couns., Ctr. for Equal Opportunity, on the politicization of hiring in the voting section of DOJ during the Bush Administration); Charlie Savage, *Racial Motive Alleged in a Justice Dept. Decision*, N.Y. TIMES (July 6, 2010), https://www.nytimes.com/2010/07/07/us/07rights.html [https://perma.cc/CNM9-GLTV] (describing a "case that has been used as political ammunition against the Obama administration" in response to portrayals of the Bush Administration as having "politicized" DOJ); Josh Gerstein, *Prosecutor: DOJ Bias Against Whites*, POLITICO (Sept. 24, 2010, 10:52 AM EDT), https://www.politico.com/story/2010/09/prosecutor-doj-bias-against-whites-042676 [https://perma.cc/ED6J-ZVHC] (discussing testimony from a DOJ prosecutor that the Obama-era DOJ discouraged prosecutions of minority perpetrators when the alleged victims were white); Mark A. Posner, *The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?*, AM. CONST. SOC'Y 2 (2006), https://web.archive.org/web/20060208041158/http:/www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf [https://perma.cc/K5PF-NXMS] (acknowledging concern that political consideration drove DOJ's enforcement of section 5); Nou, *supra* note 44, at 170 (acknowledging the perception that DOJ's enforcement of the VRA varies depending on the political party of the administration); Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL'Y REV. 415, 418 (2012) ("Where . . . judicial review is available, my claim is that partisan use of the VRA by DOJ (and, indeed, other actors) is not the cause for concern it is often made out to be and instead often has beneficial consequences."). *See generally* RHODES, *supra* note 120.

128. *See infra* note 129 and accompanying text (providing circumstantial evidence of partisan influence in the Trump-era DOJ); *see also* Tierney Sneed, *Trump's DOJ Has Not Filed a Single New Voting Rights Act Case*, TALKING POINTS MEMO (Mar. 5, 2020, 9:32 AM), https://talkingpointsmemo.com/muckraker/trumps-doj-has-not-filed-a-single-new-voting-rights-act-case [https://perma.cc/W8FR-53CR] ("The DOJ has not filed a single new Voting Rights Act case since the Trump administration took over — setting it apart from the last several administrations, Republican and Democratic."); Justin Levitt, *The Civil Rights Division Bails Out of Bail-In in Texas*, TAKE CARE BLOG (Feb. 8, 2019), https://takecareblog.com/blog/the-civil-rights-division-bails-out-of-bail-in-in-texas [https://perma.cc/HX95-H5YG] (discussing indicia of strong

In short, while it remains difficult to draw clear lines between presidential control, administration of section 2, and the actual effects on elections, the potential for top-down presidential influence certainly exists in this area of the law. Moreover, the bulk of the evidence suggests that presidential control has indeed made a difference in how DOJ administers its mandates. Particularly in recent years, analogous patterns have emerged with respect to other election-related statutes—including criminal statutes—that DOJ is charged with administering.[129]

A similar potential for presidential influence exists at the IRS. Congress has charged this executive agency with administering the tax laws, including those associated with the tax status of political organizations. During Obama's presidency, a high-profile dispute over enforcement practices emanated from this arrangement. More specifically, critics aligned with conservative causes began accusing the IRS of politically motivated treatment of organizations applying for tax-exempt status, such as so-called section 501(c)(4) organizations. For these sorts of entities, tax law interacts with campaign finance rules in a way that—perhaps unwittingly—puts the IRS in the position of interpreting and enforcing election-related rules.[130]

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partisan influence in litigation related to section 2); McDonald, *supra* note 117 ("The wall between the Department of Justice and the White House has been breached.").

129. To consider one prominent example, Trump-era federal prosecutors have aggressively prosecuted alleged voter fraud by non-citizens—"a deliberate choice that demonstrates where the administration's priorities stand"—while ignoring more widespread allegations of electoral fraud involving U.S. citizens aligned with the Republican party. Amy Gardner, Beth Reinhard & Alice Crites, *Trump-Appointed Prosecutor Focused on Allegations of Voting Fraud by Immigrants amid Warnings About Separate Ballot Scheme*, WASH. POST (Feb. 3, 2019), https://www.washingtonpost.com/politics/trump-appointed-prosecutor-focused-on-allegations-of-voting-fraud-by-immigrants-amid-warnings-about-separate-ballot-scheme/2019/02/03/989851c2-19de-11e9-8813-cb9dec761e73_story.html [https://perma.cc/MP5P-8UL8]. At an extreme, DOJ has in its arsenal generally applicable statutes that might be repurposed to deter those who would seek greater enforcement of other election-related laws, such as laws prohibiting foreign interference in elections. According to some concerned observers, this extreme scenario describes the 2019 decision of Attorney General William Barr to initiate a criminal probe into earlier, Russia-related investigations at DOJ. *See* Benner & Goldman, *supra* note 118. This decision by Barr—to criminally investigate the investigators of election crimes—presumably has chilling effects on enforcement efforts going forward, and it appears to have been taken in direct response to pressure by President Trump. *See, e.g.*, Peter Stone, *Barr's 'Investigation of Investigators' Sparks Fears for Efforts to Thwart Russia*, GUARDIAN (June 16, 2019), https://www.theguardian.com/us-news/2019/jun/16/william-barr-meller-report-investigation-2020-election [https://perma.cc/U8DN-UCZK] ("Attorney general William Barr's controversial decision to launch a new inquiry into the origins of the FBI's 2016 Russia investigation has fueled concerns about the politicization of the justice department and could hamper attempts to combat Kremlin meddling in the 2020 election, say ex-top [DOJ] and CIA officials . . . .").

130. The tax code allows section 501(c)(4) organizations to participate in political campaign intervention—but only insofar as such activities do not constitute their "primary activity." *Social Welfare Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (last updated Apr. 20, 2020) [https://perma.cc/VG57-

Throughout this long-unfolding IRS scandal, the Obama Administration denied White House involvement. Yet even it acknowledged that the IRS had indeed mishandled some of these matters, including by targeting for additional scrutiny a number of applications submitted by groups with names that include conservative-sounding phrases (such as "Tea Party"). While some critics alleged that President Obama had personally directed the IRS to take these politically motivated steps,[131] defenders of the White House responded by pointing to a combination of politically neutral challenges to explain the IRS's errors and the appearance of impropriety. Ultimately, an Inspector General's report indicated that the latter description was likely a more accurate representation of what occurred. At no point did persuasive evidence materialize of overt partisan motivations or of direct White House involvement.[132]

Still, the controversy took hold of the public imagination, particularly in conservative media circles.[133] And it revealed the

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W9Q3]. Among the advantages of holding this status is that, by law, section 501(c)(4) organizations do not need to disclose donor-related information. *See* Juliet Eilperin, *The Real Reason Outside Groups Want Tax-Exempt Status*, WASH. POST (May 14, 2013, 11:42 AM CDT), https://www.washingtonpost.com/news/the-fix/wp/2013/05/14/why-do-conservative-groups-want-to-be-tax-exempt-one-word-anonymity/?arc404=true [https://perma.cc/ZLB5-E3KL]. This anonymity can be particularly desirable to donors in the political context, where so-called "dark money" can have advantages in influencing elections. *See* Michael Beckel, *Nonprofits Outspent Super PACs in 2010*, OPENSECRETS (June 18, 2012), https://www.opensecrets.org/news/2012/06/nonprofits-outspent-super-pacs-in-2/ [https://perma.cc/A99W-GNKV] ("While super PACs were cast as the big, bad wolves during the last election, the groups were outspent by 'social welfare' organizations by a 3-2 margin, a trend that may continue amid reports that major donors are giving tens of millions of dollars to the secretive nonprofit groups.").

131. *See, e.g.*, Colby Itkowitz, *Ted Cruz Beats Up on IRS, Obama White House, Comparing It to Watergate*, WASH. POST (July 29, 2015, 3:16 PM CDT), https://www.washingtonpost.com/news/powerpost/wp/2015/07/29/ted-cruz-beats-up-on-irs-obama-white-house-comparing-it-to-watergate/ [https://perma.cc/A7J3-CCH4].

132. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5–11 (2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf [https://perma.cc/MMV7-ANUB] (finding problems with the IRS's identification criteria, but not for reasons of partisan influence).

133. *See, e.g.*, Monica Langley, *Anger at IRS Powers Tea-Party Comeback*, WALL ST. J., https://www.wsj.com/articles/anger-at-irs-powers-teaparty-comeback-1377657095 (last updated Aug. 28, 2013, 1:36 AM ET) [https://perma.cc/PL89-T67Q] (describing the Tea Party's "revival of interest sparked by controversy over the IRS's much-publicized targeting of conservative groups" in 2012); Michael Scherer, *New IRS Scandal Echoes a Long History of Political Harassment*, TIME (May 14, 2013), http://swampland.time.com/2013/05/14/anger-over-irs-audits-of-conservatives-anchored-in-long-history-of-abuse/ [https://perma.cc/55J7-ZMRY] (describing history of IRS-related controversies). It also conjured memories of another president accused of exploiting the IRS for political ends: Richard Nixon, whose use of the IRS to help friends and harm political opponents, including in anticipation of his own reelection efforts, contributed to the flood of controversies that eventually ended his presidency. David Dykes, *Former IRS Chief Recalls Defying Nixon*, USA TODAY (May 26, 2013, 12:06 AM ET), https://www.usatoday.com/story/news/nation/2013/05/26/irs-chief-defied-nixon/2360951/ [https://perma.cc/RG96-5QEQ]. Of course, what Nixon did was illegal. The legal lines would be fuzzier if a future president were to do some

potential for presidents to try to exercise such control in the future. The modern IRS very well may be headed in that direction. President Trump, for example, indicated a desire while in office for the White House to play a more aggressive role in IRS decisionmaking.[134] Such a maneuver would break with recent norms: ever since controversies over politicized IRS enforcement helped to take down the Nixon Administration, presidents have tended to not exert the same control over the IRS as they have over other executive agencies. Instead, presidents have tended to treat the IRS, in a sense, as though it were independent, including by declining to take policy ownership of IRS administrative decisions.[135] Yet the IRS is not, as a legal matter, independent. Therefore, the potential for top-down involvement remains.

Still, notably absent from these descriptions of the IRS and other executive agencies are widespread efforts by presidents to influence election administration in a more prominent way: through influence over rulemaking. In other contexts, influence over rulemaking is understood to be a particularly effective tactic for presidents seeking to harness the power of executive agencies.[136]

The explanation for this absence almost certainly goes to congressional design. Congress has granted executive agencies markedly few opportunities to promulgate legally binding rules relating to elections. This distinction very well may reflect congressional

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variation of what critics accused Obama of doing: for example, if the White House were to pressure the IRS to take regulatory steps or adopt enforcement policies that, as an election approached, were likely to have a disproportionate effect on those aligned with the president's political party. *See* Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 483–84 (2018) (discussing possible politicization of tax regulations and why presidential administrations generally prefer to avoid being involved). *Compare id.*, *with* Shanahan, *supra* note 26 (detailing allegations of Nixon's IRS interference); *see also* I.R.C. § 7212.

134. *See* Wallace, *supra* note 133, at 478–82 ("The Trump Administration, from the outset, adopted a more heavy-handed approach to directing tax regulatory actions, with OMB including tax regulations in its early anti-regulatory directives.").

135. As a telling illustration, when President Obama responded to the campaign finance related controversy discussed above, he referred to the IRS as an "independent agency." *See* Teresa Tritch, *Is the I.R.S. an Independent Agency?*, N.Y. TIMES: TAKING NOTE (May 14, 2013 6:28 PM), https://takingnote.blogs.nytimes.com/2013/05/14/is-the-i-r-s-an-independent-agency/ [https://perma.cc/5NJ8-SC7E]. This characterization was incorrect; the president can remove the Commissioner of the IRS at will. *Id*. The explanation may involve norms developed after Watergate, as well as laws making it more difficult for the White House to interfere. *See id.* ("Federal law does include special provisions to ban presidential meddling in the I.R.S. It also gives the I.R.S. commissioner a 5-year term, which helps insulate the agency from the politics of the four-year presidential cycle."). It also may be due to a more practical desire: to steer clear of unpopular tax measures.

136. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1392–93 (2004) ("A final aspect of the procedures followed for policymaking forms is the review mechanisms internal to the executive branch.").

distrust of executive branch involvement in the election context.[137] DOJ, for example, lacks power to promulgate binding regulations in its execution of the VRA; DHS cannot issue regulations addressing election infrastructure.[138] Even when an agency does have some regulatory authority related to elections, the scope of this authority is quite limited, as discussed above with respect to the IRS.[139] It is true that agencies without regulatory authority still can issue nonbinding guidance. These agencies can, for example, offer interpretations of the relevant statutory mandates through agency manuals, letters to regulated entities, published procedures, and more.[140] As Jennifer Nou has explained, in the context of DOJ's administration of the VRA, this guidance has indeed appeared to "track the shifting views of the administration in power."[141] Still, this guidance is not legally binding, and courts have hesitated to accord it much deference in litigation.

Across multiple executive agencies, then, presidential influence over election administration has centered around a fairly subtle means: through an agency deciding how to set its priorities, including its enforcement priorities. This pattern tracks congressional design by reflecting Congress's choice to grant agencies limited tools (including very little rulemaking power) to administer election-related statutes.

Having described this general pattern with respect to executive agencies, this Section now seeks to complicate these observations. To this end, it acknowledges that exceptions to this general pattern may

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137. One indication of this congressional awareness and intent is the specific carveout, contained in appropriations bills, disallowing the SEC from spending money associated with required disclosure of political contributions. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 3029–30 (2015).

138. While DOJ has some generally applicable regulatory power that, in theory, could touch on election-related matters, it does not have targeted authority to issue binding legal rules regarding election administration. *See, e.g.*, 5 U.S.C. § 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."); *see also, e.g.*, Revision of Voting Rights Procedures, 76 Fed. Reg 21,239-01, 21,242 (Apr. 15, 2011) (to be codified at C.F.R. pt. 0, 28) ("This rule amends interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice and therefore the notice requirement of 5 U.S.C. 553(b) is not mandatory.").

139. *See supra* note 130 and accompanying text (noting the IRS's narrow latitude in interpreting tax exemption laws). *See also infra* note 155 and accompanying text (discussing how norms historically have insulated the IRS from presidential influence).

140. *See* Mary Whisner, *Some Guidance About Federal Agencies and Guidance*, 105 LAW LIBR. J. 385, 392 (2013).

141. Nou, *supra* note 44, at 169. *See also, e.g.*, *supra* note 120 and accompanying text (citing the "recent change in Administrations" as an explanation for why the Trump-era DOJ reversed its longstanding interpretation of section 8 of the NVRA, both in a filing before the Supreme Court and in its own online guidance); Zoe Tillman, *The Justice Department Deleted Language About Press Freedom and Racial Gerrymandering from Its Internal Manual*, BUZZFEED NEWS (Apr. 29, 2018, 3:10 PM ET), https://www.buzzfeednews.com/article/zoetillman/the-justice-department-deleted-language-about-press-freedom [https://perma.cc/3X5P-V7NK].

be emerging—at least, in the narrow areas where Congress has granted a broader range of powers to executive agencies administering election-related mandates. In these contexts, in response to increasingly brazen attempts by the White House—in particular, under President Trump—to shape election administration, the influence of the president has begun to manifest in more striking ways.

The Census Bureau provides the lead illustration. Housed within the Department of Commerce, the Census Bureau implicates elections because the Constitution requires, every ten years, that the federal government count the number of people residing in the United States.[142] These tallies then dictate high-level election rules, including the number of representatives each state has in the U.S. House of Representatives, as well as the number of votes each state has in the Electoral College.[143] In addition, these tallies determine many restrictions on how electoral districts lines may be drawn throughout the country.[144] Such high stakes help to explain why controversy tends to accompany the administration of the Census. Administrative decisions can promote—or undermine—the accuracy of the Census tallies.

Criticism came quickly, therefore, on March 26, 2018, when the Secretary of Commerce, Wilbur Ross, announced that the 2020 census short form would include a question, posed to every person in the country, about citizenship status.[145] For decades, administrations had resisted adding such a question to the short form. In part, this resistance stemmed from concerns that the question would depress response rates, particularly in more vulnerable populations (for example, in Latino populations) and therefore skew the ultimate tallies.[146] This statistical distortion, in turn, likely would affect election rules in a predictable way: "Those who live in the areas of an undercount [would] see their political power wane."[147] Of course, if an

142. U.S. CONST. art. I, § 2, cl. 3.

143. *See* Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1358 (2019) ("This enumeration remains the basis for apportioning seats in the House of Representatives—and, consequently, in the Electoral College as well.").

144. *Id.* at 1390–94. It is difficult to overstate the importance of each of these election-related rules; they can dictate which constituencies are able to elect their candidates of choice. *See id.* at 1377.

145. Letter from Wilbur Ross, Sec'y of Com., U.S. Dep't of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affs., U.S. Dep't of Com. (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [https://perma.cc/X56R-JKLD].

146. *See, e.g.*, Fed'n for Am. Immigr. Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980) ("Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.").

147. *See* Levitt, *supra* note 143, at 1390 ("The intrastate deprivation of political power, in particular, will likely have predictable partisan impact depending on the local political

administration actually wanted such a result—if an administration *wanted* a change in the election rules that would reduce the voting power of Latino voters—this relationship would produce, perversely, a desired effect. Capturing citizenship also could have another election-related consequence: it could help to facilitate a technical change to state redistricting practices in future elections that would, in the words of one Republican strategist, be "advantageous to Republicans and Non-Hispanic Whites."[148]

According to critics, these partisan, election-related explanations help to capture Secretary Ross's motivation in reaching his March 2018 decision. Moreover, these critics argued, the decision ultimately could be traced back to the White House, which had been imposing pressure on Secretary Ross, an appointee of President Trump serving at his pleasure.[149] In this way, critics argued, the President was exercising control over census administration in an effort to affect the legal rules governing elections. Evidence suggests that these characterizations of motive likely were correct.[150]

Ultimately, the central dispute over the short form ended without a definitive ruling as to the lawfulness of the agency's decision. While the U.S. Supreme Court ruled in June 2019 that that the administrative record could not support Secretary Ross's decision to include the citizenship question, it did so on narrow grounds. Importantly, the Supreme Court did not conclude that the Secretary's decision was improper due to suspected political influence. To the contrary, "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to

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demography . . . ."). *But see id.* ("But to acknowledge that the local partisan ramifications of an under-count are predictable is not to say that they will always match conventional wisdom.").

148. Hansi Lo Wang, *Trump Wants Citizenship Data Released but States Haven't Asked Census for That*, NPR (Sept. 11, 2019, 2:57 PM ET), https://www.npr.org/2019/09/11/759510775/trump-wants-citizenship-data-released-but-states-havent-asked-census-for-it [https://perma.cc/U7KX-3D3P] (quoting GOP redistricting strategist Thomas Hofeller).

149. *See, e.g.*, New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 548 (S.D.N.Y. 2019) (describing White House chief strategist Steve Bannon directing the Secretary of Commerce to speak with White House allies about a citizenship question); *see also id.* at 552 (indicating that one such conversation acknowledged that the lack of a citizenship question on the census "leads to the problem that aliens . . . are still counted for congressional apportionment"); Hansi Lo Wang, *Commerce Secretary Now Recalls Discussing Citizenship Question with Steve Bannon*, NPR (Oct. 11, 2018, 4:12 PM ET), https://www.npr.org/2018/10/11/656570447/commerce-secretary-now-recalls-discussing-citizenship-question-with-steve-bannon [https://perma.cc/BB6X-Y93J].

150. *See, e.g.*, Hansi Lo Wang, *Trump Officials Face Cover-Up Allegations After Failed Citizenship Question Push*, NPR (July 16, 2019, 7:19 PM ET), https://www.npr.org/2019/07/16/742259233/trump-officials-face-cover-up-allegations-after-failed-citizenship-question-push [https://perma.cc/SE83-2CCS] (describing evidence of election influence motives, including a letter found in a GOP redistricting strategist's documents identified "as an early draft of the administration's formal request for a citizenship question").

substantiate the legal basis for a preferred policy."[151] Nor did the Court conclude that the decision was impermissible simply because it might affect the rules of future elections, including in ways that could benefit the sitting president.[152] As a result, the extent to which the law allows the White House to manipulate the Census for partisan purposes—with an eye toward future electoral prospects—remains unclear.[153] This ruling left in place the possibility that the White House would continue to pressure the Census Bureau into administering its election-related rules in ways that favor the electoral prospects of the president's allies. And, indeed, that appears to be what then happened in the final stages of Trump's term.[154]

The role that White House influence has played at the Census Bureau—at least, with respect to the Secretary's 2018 decision regarding the census short form—is unusual in the context of election administration. It extends beyond presidential influence over priority setting, and into White House influence over an agency's issuance of a legal rule. Still, this influence is consistent with the broader pattern emerging from executive agencies, where presidents have tended to exercise control over the agencies' election-related administration in the ways that Congress's designs allow.[155] Particularly when considered in

151. Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019).

152. Instead, the Court concluded that the decision failed to comply with the APA for a narrow, politically neutral reason: because the Secretary's stated rationale for including the question—a transparently implausible interest in enforcing the VRA—was pretextual. *Id.* at 2576; *see also* Leah Litman, *Trump Lied to the Supreme Court. His New Census Order Proves It.*, WASH. POST (July 22, 2020, 12:07 PM CDT), https://www.washingtonpost.com/outlook/2020/07/22/executive-order-census-immigrants-undocumented/ [https://perma.cc/6EJK-LEH2].

153. There are persuasive arguments that important limits stand. At the same time, the Supreme Court might have been signaling its willingness to accept a similar decision if Commerce simply had returned with a more facially plausible administrative record. *See, e.g.*, Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSBLOG (June 28, 2019, 12:54 PM), https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/ [https://perma.cc/BM8E-5972].

154. *See, e.g.*, William H. Frey, *Trump's New Plan to Hijack the Census Will Imperil America's Future*, BROOKINGS (Aug. 7, 2020), https://www.brookings.edu/blog/the-avenue/2020/08/07/trumps-new-plan-to-hijack-the-census-will-imperil-americas-future/ [https://perma.cc/52EK-GB5A] (advancing this theory); *see also* Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019) (detailing alternative plans to compile citizenship data in connection with the Census, as the Supreme Court's ruling "made it impossible, as a practical matter, to include a citizenship question"); Hansi Lo Wang, *Census Door Knocking Cut a Month Short Amid Pressure to Finish Count*, NPR (July 30, 2020, 12:29 PM ET), https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals [https://perma.cc/X8KQ-JC4R].

155. An exception that proves the rule, in this context, is at the IRS, where the White House appears to have exercised an unusually light touch with respect to campaign-related regulations, among others. As discussed, an eroding set of norms may help to explain why this discrepancy has historically existed. *See supra* notes 133–135 and accompanying text. *But cf.* Toby Eckert, *'Dark Money' Groups Dodge Reporting Requirement in New Regulations*, POLITICO (May 26, 2020, 7:38 PM EDT), https://www.politico.com/news/2020/05/26/dark-money-tax-283044 [https://perma.cc/8985-V4MS] (discussing new, politically charged IRS regulations promulgated under the Trump

sum, these precedents suggest that a president may be willing to push this influence even further in the future, particularly if Congress were to accord the president greater opportunity to do so.

These precedents also suggest that this top-down influence may make a difference not only in election *rules*, but also in election *outcomes*. Stated otherwise, presidential control over executive agencies affects election rules in ways that, particularly in the aggregate, very well may affect who ultimately wins an election. Proving up such a claim is beyond the scope of this Article. Moreover, it may be practically impossible to do so; extraordinary difficulties often arise when one tries to produce definitive answers to empirical questions in the context of election administration.[156] Nevertheless, at least one prominent anecdote may help to connect, causally, presidential influence with election outcomes.

This illustration emerged from DOJ's historical administration of section 5 of the VRA. Even though section 5 is now effectively defunct,[157] it is worth looking back to its implementation because of the unique window these precedents offer into the effects of top-down politicization in federal election administration. Section 5 has an unusual mechanism ("preclearance") that cuts through many of the confounding variables that normally make measurement of this phenomenon so difficult.

As relevant, the preclearance mechanism empowers DOJ to determine whether a jurisdiction has complied with section 5's restrictive mandates.[158] If DOJ concludes that the jurisdiction has complied, that jurisdiction is in the clear: no one can challenge the determination, in court or otherwise. Prior to the Supreme Court's functional invalidation of section 5, this preclearance mechanism granted DOJ unusually clear-cut control over how, and against whom, section 5 was enforced. In one proceeding, for example, the Bush-era DOJ precleared a redistricting map out of Texas that, by many assessments, violated section 5—and almost certainly would not have been approved by DOJ appointees advancing the agenda of a

Administration, without indicating whether or how the White House was involved); Kenneth P. Doyle, *IRS Rule Change Could Aid Foreign Election Meddling, Critics Say*, BLOOMBERG GOV'T (May 27, 2020, 4:19 PM), https://about.bgov.com/news/irs-rule-change-could-aid-foreign-election-meddling-critics-say/ [https://perma.cc/7SBK-BHML] (same).

156. *See infra* notes 309–314 and accompanying text.

157. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013).

158. The mechanism requires that covered jurisdictions receive preclearance prior to making certain changes to their election processes and provides the jurisdictions with two options for seeking this preclearance: approval by DOJ or approval by the federal courts. Prior to the Supreme Court's functional invalidation of section 5 in *Shelby County*, 570 U.S. at 557, jurisdictions overwhelmingly chose to seek preclearance from DOJ.

Democratic president. The U.S. Supreme Court later deemed this DOJ-approved map to be illegal on other grounds. In the meantime, however, the 2004 elections proceeded with the maps that were later held to be unlawful. In those elections, candidates associated with the map-drawing party—here, the Republicans—gained multiple seats in Congress.[159]

At least in broad brushstrokes, this story out of Texas paints a vivid picture: one in which a president seems to have succeeded in using his official powers over elections to achieve some measure of entrenchment. President Bush appeared to do so through three broad steps: (1) he appointed DOJ officials who would reliably advance his electoral interests; (2) those officials altered DOJ practices in ways that helped to ensure favorable electoral lines for allied candidates; and (3) those candidates, once in office, presumably served as less of a political check on the President than would have their alternatives.

Rarely is it possible to connect these complicated sets of dots in such a straightforward way. Other election rules—such as those associated with voter registration, or section 2, or election-security measures—may also be affecting election outcomes; certainly, that is the intention of some of those seeking to influence their implementation.[160] Nevertheless, the connections (between the rules and the likely election outcomes) are more attenuated. This attenuation compounds even further the challenges associated with measurement, though not in a way that necessarily undermines the intuition that these connections exist.[161]

In short, Congress has assigned a range of election-related powers to executive agencies. Yet it has given these agencies little ability to engage in election-related rulemaking. As a result, presidential control over these grants of power has manifested in other important but limited ways: primarily through priority setting, including as it relates to enforcement practices.

In response to these manifestations of presidential control, there are at least two prominent checks. First, courts serve as a partial check. An agency's enforcement proceedings, for example, must comply with all relevant rules and statutes, and the targets of the proceeding are

159. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 399–400 (2006) (concluding that one district in the 2003 Texas maps violated section 2 of the VRA); Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST (Dec. 2, 2005), https://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927_pf.html [https://perma.cc/SDA5-TU9P]. *See generally* Justin Levitt, LULAC v. Perry*: The Frumious Gerry-Mander, Rampant*, *in* ELECTION LAW STORIES 233 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

160. *See* Manheim & Porter, *supra* note 18, at 214–15 (discussing the phenomenon of intentional voter suppression).

161. *See infra* notes 309–314 and accompanying text.

generally able to enforce these limits through judicial review.[162] (Decisions not to enforce the law, by contrast, tend to evade judicial review.[163]) Elections also, in a sense, serve as a second type of check. A sitting president has limited ability to dictate how a future president will influence an agency's priorities. As a result, it tends to be straightforward for a future president to reject and replace the priority setting of his predecessor.

Despite these checks, presidents still exercise meaningful control over executive agencies charged with election administration. Moreover, as the next Section will reveal, presidential influence is not limited to executive agencies. Presidents also can find ways to influence even the most insulated agencies—that is, even independent agencies—charged with election administration.

B. Independent Agencies: Control Through Gridlock

This Section explores how presidents influence election administration through independent agencies. It begins by analyzing the two most prominent agencies in this context—the FEC and the EAC—and observes how presidents have sought to influence the work of these agencies by pushing them toward gridlock. It further observes that this method of control empowers presidents in uneven ways. When the White House must rely on gridlock to advance its agenda, a president committed to vigorous enforcement of the relevant laws tends to be out of luck. By contrast, gridlock tends to work well for a president preferring less rigorous implementation of those same laws. This Section concludes with a discussion of what checks, if any, may exist to temper presidential control in this context.

Of the hundreds of federal agencies Congress has created, it has dedicated only two exclusively to election administration: the FEC and the EAC.[164] The leadership structures of these agencies are similar—and striking, as Congress chose to adopt arrangements that, at least in theory, provide exceptional insulation against presidential control. Both agencies are independent, ensuring that, as a formal matter, once the confirmation process is over, a president will have "only limited and

162. *See* Andrias, *supra* note 4, at 1039.

163. *Id.* at 1043–44.

164. Congress also created a third agency, the U.S. Commission on Civil Rights, to investigate a range of civil-rights-related issues—including, centrally, those associated with voting rights. *See Mission*, U.S. COMM'N ON C.R., https://www.usccr.gov/about/ (last visited Dec. 20, 2020) [https://perma.cc/X7B3-RXWL]. Like the FEC and the EAC, the U.S. Commission on Civil Rights is led by a bipartisan, even-numbered commission.

tenuous control" over agency leadership.[165] In addition, Congress designed each agency to be led by a bipartisan, even-numbered set of commissioners, with a majority vote required for most agency actions of significance. As a result of this leadership structure, opportunities for presidential control differ quite markedly from those available to presidents with respect to executive agencies. A president hoping to pressure affirmatively the FEC or the EAC into action is generally out of luck; he has few tools at his disposal. Importantly, however, presidents *skeptical* of the agencies' work may, by contrast, be able to constrain the agencies' regulatory efforts through strategic nomination decisions. More specifically, the president may be able to make nomination decisions that will help to produce stalemates—stalemates that necessarily affect how these independent agencies regulate federal elections, including elections directly affecting the president himself.

The FEC is the more influential of the two agencies, as it bears responsibility for the administration and civil enforcement of federal campaign finance law.[166] This charge ensures that the FEC exerts control over a range of regulatory issues that matter enormously to presidents and others subject to electoral control. To take one of many examples, the FEC is the agency tasked with clarifying and enforcing the disclosure obligations of the multitude of "outside groups" that have relied on the Supreme Court's decision in *Citizens United v. FEC* to become more involved in elections.[167]

Importantly, Congress tried to structure the FEC to resist presidential control.[168] Initially, Congress allowed only two of its six commissioners to be nominated by the president and confirmed by both Houses of Congress. The remainder were to be selected by congressional leadership. After the Supreme Court struck down this arrangement as

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165. Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 685 (2020).

166. *Mission and History*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ (last visited Dec. 20, 2020) [https://perma.cc/F4BQ-654D].

167. 558 U.S. 310 (2010); *see* Tokaji, *supra* note 54, at 173 n.7 (defining "outside groups" and "outside spending" as referring to "entities engaging in federal campaign activities that are not formally affiliated with federal candidates or political parties"). Criminal enforcement of federal campaign finance law remains with DOJ.

168. From its outset, the agency has been subject to jostling between the executive and legislative branches. The proximate cause of its creation was the 1972 presidential campaign, which culminated in the prosecution of over a dozen corporations for illegal campaign contributions and, eventually, the resignation of the election's winner, President Nixon. *See* Tokaji, *supra* note 54, at 176; *see also* Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 793–97 (2016). Congress responded to these election-related abuses by the President by imposing new substantive restrictions on federal campaign activities, along with a Commission to enforce those restrictions. Among other things, the new prohibitions set complicated limits on how much money can be donated, and spent, to influence federal elections. The new provisions also required public disclosures associated with some of these same funds. FED. ELECTION COMM'N, *supra* note 166.

unconstitutional,[169] Congress vested the power of all nominations back with the president, with confirmation by the Senate. Despite this setback, Congress attempted in other ways to curtail the president's influence. As a matter of custom, it insisted on playing a central role in the nomination process by sending its preferred candidates to the president, with the expectation they would be nominated.[170] It also baked protections into the law, including the requirement that each commissioner be appointed for a staggered term of six years. This arrangement insulates the Commission in at least two ways. First, it removes the possibility of at-will removal by the president. Second, absent extenuating circumstances, it prevents a president from appointing a majority of the Commission all at once.[171] And Congress went still further. By statute, no more than three FEC commissioners can be members of the same political party. Moreover, the Commission must have at least four affirmative votes to approve official actions.[172] In this way, the FEC's statutory arrangement requires bipartisan decisionmaking—assuming, that is, that decisionmaking is occurring at all.[173]

By congressional design, therefore, the president lacks a clear means by which to pressure previously appointed FEC leadership into action. At the nomination stage, the president does have some power to select preferred commissioners—though even here, he must select half his commissioners from a different political party and receive Senate confirmation for all. After the nomination process ends, the president has little remaining leverage. As a result, presidents preferring a robust FEC enforcement agenda have not been able to push the FEC meaningfully in that direction.

The same is not true, however, for presidents *disapproving* of robust enforcement of federal campaign finance laws—and, by extension, preferring nonenforcement of the FEC's mandates. To the contrary, presidents preferring nonenforcement can seek to exploit the

169. *See* Buckley v. Valeo, 424 U.S. 1, 143 (1976).

170. *See* Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 664 (2009) (explaining that FEC members are "chosen through negotiations between the relevant party's congressional leadership and the President").

171. Occasionally, the appointment process is not staggered—if, for example, Commissioners' terms expire without timely appointment of new Commissioners. *See* Dave Levinthal, *At the Bedraggled FEC, a Clean Slate of Leaders? The First African-American Commissioner?*, CTR. FOR PUB. INTEGRITY (Sept. 11, 2019), https://publicintegrity.org/federal-politics/fec-federal-election-commission-trump-mcconnell-schumer/ [https://perma.cc/835J-S9VK].

172. Tokaji, *supra* note 54, at 177–78 (describing process for enforcement); *id.* at 182–83 (referring to advisory opinions, auditing, and rulemaking).

173.*See* FED. ELECTION COMM'N, AGENCY FINANCIAL REPORT 2 (2017), https://www.fec.gov/resources/cms-content/documents/FY2017.FEC.AgencyFinancialReportAFR.pdf [https://perma.cc/FD75-M4VP].

FEC's leadership structure to promote agency stalemates. More obviously, these presidents can nominate commissioners who also prefer nonenforcement. For such a strategy, Senate confirmation still remains a check, but the requirement of a bipartisan Commission no longer poses a significant bar: the FEC only needs three skeptical commissioners to achieve gridlock. Moreover, a president set on hamstringing the agency can simply refuse to nominate a candidate for an open (or expired) commissioner slot. As a consequence of this inaction, it is possible for the Commission to drop below four commissioners, thereby depriving it of a quorum—and ensuring that the Commission, as a matter of law, cannot "make decisions in many areas, including regulations, advisory opinions, audit matters and enforcement."[174]

This pattern loosely describes the plight that has befallen the FEC, where recent Republican presidents, working with likeminded congressional leadership, have successfully paralyzed the agency.[175] By late 2013—the middle of President Obama's tenure in office—the FEC had six commissioners. By a 3-3 split, these officials represented two opposing visions for federal campaign finance regulation. Three, advancing the Democratic Party's vision, tended to prefer more robust enforcement of the federal campaign finance laws.[176] Three, advancing the Republican Party's vision, preferred a much more deregulatory approach, going so far as to question the constitutionality and value of enforcing many of Congress's statutory mandates.[177] Though the FEC during this time had a full slate of commissioners, it nevertheless had

174. Press Release, Fed. Election Comm'n, FEC Remains Open for Business, Despite Lack of Quorum (Sept. 11, 2019), https://www.fec.gov/updates/fec-remains-open-business-despite-lack-quorum/ [https://perma.cc/4KWG-QXMF].

175. *See* Christopher Rowland, *Deadlock by Design Hobbles Election Agency*, BOS. GLOBE (July 7, 2013, 12:00 AM), https://www.bostonglobe.com/news/nation/2013/07/06/america-campaign-finance-watchdog-rendered-nearly-toothless-its-own-appointed-commissioners/44zZoJwnzEHyzxTByNL2QP/story.html [https://perma.cc/YY24-R2Y3].

176. These officials included Ann Ravel, Steven T. Walther, and Ellen Weintraub. *See* Eric Lichtblau, *Democratic Member to Quit Election Commission, Setting Up Political Fight*, N.Y. TIMES (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/us/politics/fec-elections-ann-ravel-campaign-finance.html [https://perma.cc/CM8Z-46GT] (discussing frequent clashes between Ravel and the Republican appointees on issues of enforcement); OFF. OF COMM'R ANN M. RAVEL, FED. ELECTION COMM'N, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP (2017), https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf [https://perma.cc/XTT8-WLBU] (highlighting numerous occasions on which Commissioners Ravel, Walther, and Weintraub were the only votes in favor of pursuing investigations or enforcement).

177. These officials included Lee E. Goodman, Caroline C. Hunter, and Matthew S. Petersen. *See* Lee E. Goodman, Caroline C. Hunter & Matthew S. Petersen, Letter to the Editor, *Chiding an F.E.C. Colleague*, N.Y. TIMES (April 9, 2014), https://www.nytimes.com/2014/04/10/opinion/chiding-an-fec-colleague.html [https://perma.cc/23H9-QSLY].

become, in the words of its own chair, "worse than dysfunctional."[178] Describing the "pattern of paralysis" characterizing the Commission's frequent 3-3 deadlocks, a *Boston Globe* analysis offered an illustration of an "open-and-shut case" in which a wealthy supporter of presidential candidate Mitt Romney spent $150,000 to fly campaign volunteers to a fundraiser:

> The three Democrats on the FEC agreed with the agency's staff that the [flight] appeared to violate rules limiting such "in-kind" gifts to $2,600 per election.
>
> But the three Republican commissioners disagreed, saying Romney's friend merely acted "*in* behalf of" Romney's 2008 campaign—not the illegal "*on* behalf of"—and thus the flight was allowed.
>
> With that twist of legal semantics, the case died—effectively dismissed.[179]

As this anecdote confirms, gridlock at the FEC does not translate into a power-sharing agreement; it translates into nonenforcement.[180] Gridlock also prevents the FEC from clarifying the law by promulgating new regulations, or even simply by issuing advisory opinions.[181] The net effect of this gridlock at the FEC is that, for years, "there has been virtually no enforcement of the [federal] campaign finance laws" at all.[182]

Remarkably, however, the version of the FEC described in the *Boston Globe* article was still much more functional than it had become by late 2019—a year that laid bare just how ineffective an agency can be. In the space of six years, three commissioners had resigned. The other three had all overstayed their terms.[183] President Trump therefore had the ability to nominate six new commissioners. Yet after nearly three years in office, Trump had nominated only one, a Republican attorney from Texas whose nomination then stalled for

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178. *See* Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html [https://perma.cc/Y5YF-4GXU].

179. *See* Rowland, *supra* note 175.

180. *See id.* (reporting an uptick in deadlock and a reduction in rates of enforcement actions).

181. *Id.*; Fed. Election Comm'n, *supra* note 174.

182. *See* Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html [https://perma.cc/FY9R-4HXY] (quoting Robert Kelner, "a prominent campaign finance lawyer"). This pattern of gridlock and enforcement continued through the publication of this Article in early 2021.

183. Dave Levinthal, *Federal Election Commission Regains Powers with New Member*, CTR. FOR PUB. INTEGRITY (May 19, 2020), https://publicintegrity.org/politics/federal-election-commission-regains-powers-with-new-member/ [https://perma.cc/R9D8-58E]. During his eight years in office, President Obama only succeeded in obtaining Senate confirmation for two FEC nominees. Dave Levinthal, *A Dubious Anniversary for the Federal Election Commission*, CTR. FOR PUB. INTEGRITY (Apr. 30, 2018), https://publicintegrity.org/politics/a-dubious-anniversary-for-the-federal-election-commission/ (updated May 7, 2018, 2:49 PM) [https://perma.cc/9L5S-VTQK].

years in the Senate—in large part because the president refused to also nominate a Democratic nominee, as had been the custom.[184] As a result, for an extended stretch of time, the FEC lacked a quorum. It accordingly lacked the ability to take even basic steps, such as calling a meeting, much less taking enforcement action or promulgating regulations.[185] Eventually, the Senate did confirm this nominee—but a mere two months later, a different Republican commissioner resigned, bringing the FEC back below a quorum. And so, through the 2020 elections, the FEC existed as an agency that was prohibited, by its own organic laws, from performing its basic functions. In this sense, Trump's refusal to nominate candidates for commissioner ensured his preferred policy outcome: nonenforcement at the FEC.

It would be incorrect to conclude that presidents are exclusively to blame for all the dysfunction at the FEC.[186] On the one hand, some presidents—those preferring an energized FEC—have had very little to show for their work. (This is at least in part because, as suggested above, the commissioners' staggered six-year terms, coupled with the requirement that the commission be bipartisan, functionally precludes an enforcement-minded president from appointing the four members necessary to overcome gridlock and implement that president's agenda.) On the other hand, presidents seeking to hamstring the FEC are hardly alone in their efforts. Some commentators have gone so far as to argue that Congress effectively intended this result by baking failure into the agency's design—though studies of the FEC's earlier performances suggests this criticism may be overstated.[187] Either way,

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184. *See* Matea Gold, *Trump Nominates Conservative Texas Lawyer to Federal Election Commission*, WASH. POST (Sept. 13, 2017, 2:04 PM), https://www.washingtonpost.com/news/post-politics/wp/2017/09/13/trump-nominates-conservative-texas-lawyer-to-federal-election-commission/ [https://perma.cc/2HJH-DYGF]; Devins & Lewis, *supra* note 57, at 489 (describing the expectation that presidents will "batch" nominees for independent agencies requiring bipartisan appointments).

185. *See FEC Chair: Lack of Quorum Is 'Completely Unacceptable*,*'* NPR (Aug. 31, 2019, 5:17 PM ET), https://www.npr.org/2019/08/31/756323244/fec-chair-lack-of-quorum-is-completely-unacceptable [https://perma.cc/89H3-JJB3]; *see also* R. SAM GARRETT, CONG. RSCH. SERV., R45160, FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 7 (2020) (listing the kinds of FEC actions that are precluded when there is a lack of quorum).

186. *See, e.g.*, Press Release, Campaign Legal Ctr., U.S. Congress: Reform Groups Today Urge Two Additional Congressional Committees to Investigate and Hold Hearings on Dysfunctional FEC (Feb. 16, 2011), https://campaignlegal.org/press-releases/us-congress-reform-groups-today-urge-two-additional-congressional-committees [https://perma.cc/3DJ7-2V3V] (discussing opportunities for congressional investigation of the FEC); David A. Graham, *This Is Why We Can't Have Nice Elections: The Dysfunctional FEC*, ATLANTIC (July 12, 2013), https://www.theatlantic.com/politics/archive/2013/07/this-is-why-we-cant-have-nice-elections-the-dysfunctional-fec/277639/ [https://perma.cc/8YEU-76N9].

187. Tokaji, *supra* note 54, at 173 ("[T]he paralysis that grips the FEC today is far beyond anything Congress envisioned."); *id.* at 179 (discussing studies suggesting that "deadlocked enforcement votes were uncommon until fairly recently").

it is clear that congressional leadership also has played a pivotal role in the FEC's descent into paralysis. Congress has declined to take legislative steps that might help to break the logjams.[188] Moreover, Congress has affected agency leadership both publicly (for example, by refusing to consider particular nominees) and behind the scenes (for example, by insisting on providing nomination recommendations to the president).[189]

The occupants of the Oval Office nevertheless remain central to the FEC's plight. And the electoral prospects of these same presidents depend, at least in part, on the FEC's execution of campaign finance laws. As a result, the potential for a president's self-dealing is not subtle. Consider President Trump. As noted above, during his tenure in office, he declined to offer nominations for the majority of open commissioner slots—much less to appoint any commissioner committed to enforcement. During that same time, the FEC has received a number of complaints against Trump's own campaign committee and affiliates.[190] Not only did the FEC fail to impose penalties during Trump's term in response to these complaints; in some cases, it failed to take any action at all, even investigatory.[191] For as long as the FEC lacks a quorum, this pattern of nonenforcement will necessarily

188. Eric Lichtblau, *Long Battle by Foes of Campaign Finance Rules Shifts Landscape*, N.Y. TIMES (Oct. 15, 2010), https://www.nytimes.com/2010/10/16/us/politics/16donate.html [https://perma.cc/MF5Q-R99D]. Admittedly, as Daniel P. Tokaji has explained, it is difficult to determine exactly what those steps should be. *See* Tokaji, *supra* note 54.

189. *See, e.g.*, Josh Israel & Aaron Mehta, *Withdrawn FEC Nominee Laments 'Broken' Confirmation Process*, CTR. FOR PUB. INTEGRITY (Oct. 7, 2010), https://publicintegrity.org/2010/10/07/2450/withdrawn-fec-nominee-laments-broken-confirmation-process (last updated Dec. 14, 2016, 2:40 PM) [https://perma.cc/R6TT-C3YV]; *see also* Lichtblau, *supra* note 188 (discussing the central role congressional leaders play in the confirmation process—such as Senator Mitch McConnell, the "politician who [had] long reveled in his reputation as the 'Darth Vader' of campaign finance").

190. *See, e.g.*, Levinthal, *supra* note 171; Kenneth P. Doyle, *Manafort Campaign-Finance Charges Dismissed by Deadlocked FEC*, BLOOMBERG GOV'T (June 24, 2019, 12:00 AM), https://about.bgov.com/news/manafort-campaign-finance-charges-dismissed-by-deadlocked-fec/ [https://perma.cc/FD7Q-688A]; Dennis Wagner, Kristine Phillips & Kevin McCoy, *Pro-Trump Super PAC Hid Source of Donation Made by Two Ukraine-Linked Associates of Rudy Giuliani, FEC Complaint Says*, USA TODAY (Oct. 23, 2019, 1:37 PM ET), https://www.usatoday.com/story/news/2019/10/23/fec-complaint-says-pro-trump-super-pac-broke-campaign-finance-law/4046892002/ [https://perma.cc/D5XS-7J3Q]; Cristina Marcos, *Democrat Asks FEC to Investigate Trump Campaign Declining to Pay Police Bills*, HILL (Oct. 28, 2019, 1:16 PM EDT), https://thehill.com/homenews/house/467751-democrat-asks-fec-to-investigate-trump-campaign-declining-to-pay-police-bills [https://perma.cc/5G5H-CU2G]; Mike Spies, Derek Willis & J. David McSwane, *The Pro-Trump Super PAC at the Center of the Ukraine Scandal Has Faced Multiple Campaign Finance Complaints*, PROPUBLICA (Oct. 18, 2019, 1:44 PM EDT), https://www.propublica.org/article/the-pro-trump-super-pac-at-the-center-of-the-ukraine-scandal-has-faced-multiple-campaign-finance-complaints [https://perma.cc/W2R5-H8YJ].

191. Dave Levinthal, *Halloween's Over. The FEC? Still a Zombie*, CTR. FOR PUB. INTEGRITY (Nov. 1, 2019), https://publicintegrity.org/federal-politics/fec-quorum-congress-trump-elections/ [https://perma.cc/JCD7-LQT5].

continue. The actions Trump took while in office helped to render the federal campaign finance laws, in this sense, a dead letter, even as applied to his own election campaigns.

The only other agency that Congress has expressly dedicated to elections—the EAC—is also independent, with a similar leadership structure to the FEC's. Dysfunction at the EAC arises from many causes.[192] As a result, it presents a somewhat less clear narrative of presidential control through gridlock. Still, its record is similar to the FEC's.

Created in 2002 in the wake of *Bush v. Gore*, the EAC's primary charge is to provide unobtrusive election assistance to state and local jurisdictions.[193] Its four commissioners are nominated by the president, with Senate approval, for staggered terms. Only two of its commissioners can be from a given political party. Yet official decisions require the votes of three commissioners.[194] As with the FEC, congressional leadership has played a central role in both the confirmation process and the nomination process—albeit again largely by custom, not law.[195] Also as with the FEC, Republicans generally have sought to hamstring the Commission, while Democrats generally have been more supportive of its efforts.[196]

The EAC's performance also has been, in some striking ways, similar to the FEC's. When the EAC's work has direct political salience—when its decisions meaningfully affect the rules that will govern future elections, in a matter that may affect election results along predictable lines—a familiar pattern emerges. Partisan deadlocks send the Commission into a state of gridlock. This has been true, at

192. *See* Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, PROPUBLICA (July 22, 2020, 5:00 AM EDT), https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight [https://perma.cc/32NG-TBVR] ("Dogged by partisan infighting, the constant threat of elimination and a budget that bottomed out last year at less than half of what it once was, the EAC has long failed to be effective or even relevant."); *see also* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 123–30 (2012).

193. The EAC is charged primarily with developing guidance, guidelines, and information for state and local jurisdictions to refer to when administering elections; it also distributes some funds and provides accreditation and auditing services. Outside of maintaining the national mail voter registration form, however, the EAC lacks rulemaking authority. It also lacks enforcement authority. *See About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about-the-useac (last visited October 9, 2020) [https://perma.cc/3E7R-X3MH]; *see also supra* Section I.B.2 (discussing independent agencies).

194. Nou, *supra* note 44, at 147.

195. *See, e.g.*, Eric Geller, *Ryan Move to Replace Election Agency Leader Stirs Outcry*, POLITICO (Feb. 22, 2018, 8:01 PM EST), https://www.politico.com/story/2018/02/22/paul-ryan-election-agency-replacement-matthew-masterson-422725 [https://perma.cc/LQ93-9MJW].

196. *See, e.g.*, Russell Berman, *The Federal Voting Agency Republicans Want to Kill*, ATLANTIC (Feb. 13, 2017), https://www.theatlantic.com/politics/archive/2017/02/election-assistance-commission-republicans-congress/516462/ [https://perma.cc/93DK-V8T9].

least, with the ongoing legal saga emanating from Arizona's request to add a proof-of-citizenship requirement to the federal registration form that the EAC is responsible for.[197] In response to the initial request, the Commission deadlocked 2-2 along partisan lines.[198] Soon after, the EAC suffered the same indignity as the FEC, with the resignation of commissioners creating an absence of the quorum required for basic functions.[199] The EAC eventually muddled through, but only after delay, continued controversy, and, finally, court intervention that, years later, still had not completely resolved the case.[200]

Despite the EAC's struggles, the efforts of some presidents to hamstring the EAC are more subtle than with the FEC. While the EAC lacked a quorum during nearly a year of Trump's presidency, for example, the President eventually did nominate enough commissioners to reestablish a quorum. (Tellingly, the EAC also lacked a quorum during Obama's presidency—an apparent result of resistance to the agency's work by Republicans in Congress—thereby providing further support for the conclusion that this agency structure tends to empower presidents in asymmetric ways.[201]) The willingness of Trump to eventually nominate commissioners might reflect the relatively low stakes at the EAC: it has far fewer employees than the FEC; its budget is a mere fraction of the FEC's; and it has a charge that tends to be much narrower, and less politically controversial, than the FEC's.[202] Whatever the reason for the disparate treatment, presidential appointees hostile to the agency's mission can still attempt to hamstring the EAC's work across multiple administrations. Moreover,

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197. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 6 (2013); *see also* Tokaji, *The Future of Election Reform*, *supra* note 55, at 135; Nou, *supra* note 44, at 139–43.

198. Nou, *supra* note 44, at 140.

199. *Id.* at 142; *see also* Dan Froomkin, *Federal Voting Commissioners AWOL as Election Approaches*, HUFFPOST (July 31, 2012, 1:56 PM ET), https://www.huffpost.com/entry/federal-voting-commissioners-eac_n_1723939 [https://perma.cc/GQ3B-H53L].

200. See Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1188 (10th Cir. 2014) (describing developments). *See also* Final Brief for Appellees, League of Women Voters of the U.S. v. Newby, 963 F.3d 130 (D.C. Cir. 2020) (No. 19-7027), 2019 WL 5784590, at *1–11 (addressing a follow-up line of litigation).

201. *See* Amanda Becker, *The Phantom Commission*, ROLL CALL (Oct. 31, 2012, 6:38 PM), https://www.rollcall.com/2012/10/31/the-phantom-commission/ [https://perma.cc/583S-7EPM].

202. *See Staff*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about/staff-directory (last visited Dec. 21, 2020) [https://perma.cc/9X66-GGKM]; *Leadership and Structure*, FED. ELECTION COMM'N, https://www.fec.gov/about/leadership-and-structure/ (last visited Dec. 21, 2020) [https://perma.cc/UQC2-EU5W]. *Compare* U.S. ELECTION ASSISTANCE COMM'N, SERVING AMERICA'S ELECTION OFFICIALS AND VOTERS: 2019 EAC ANNUAL REPORT 50 (2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/EACAnnualReport_2019.pdf [https://perma.cc/9KGE-UTBK] (reporting a budget of $15.171 million for fiscal year 2020), *with* FED. ELECTION COMM'N, FISCAL YEAR 2020 CONGRESSIONAL BUDGET JUSTIFICATION 2 (2019), https://www.fec.gov/resources/cms-content/documents/FY20_congressional_budget_justification.pdf [https://perma.cc/3FKV-D5GS] (submitting a budget request of over $70.5 million for fiscal year 2020).

the EAC's struggles indicate that it may head down a path even more similar to the FEC's if its mandates were broadened—as proposed in recent bills such as the For the People Act, as well as relief measures proposed in 2020 in response to the COVID-19 pandemic.[203]

Overall, presidential influence over election rules looks different when the power runs through independent agencies rather than executive agencies. To the extent that future presidents become increasingly aggressive in their attempts to control independent agencies, these patterns might shift.[204] Still, a distinction is to be expected. The defining characteristic of an independent agency is its insulation from the president.

Yet, as described above, this insulation from presidential control has a counterintuitive result—at least in the context of election administration, where Congress has created agencies with bipartisan, even-numbered commissions. In this context, the independent-agency model permits some presidents *greater* control, in a sense, over election administration than an executive-agency model would. This counterintuitive result exists because a president preferring gridlock may be able to extend his influence—even into a subsequent administration—through strategic nomination decisions and the staggered terms. Even more important, however, is the uneven manner in which this arrangement empowers presidents during their times in office. To exercise meaningful control over a bipartisan, even-numbered independent agency like the FEC or the EAC, presidents generally must have policy preferences that happen to coincide with agency gridlock. Otherwise presidents lack an effective means by which to push through their agendas.

Compounding this uneven effect is the lack of adequate checks. When a president strategically appoints commissioners committed to gridlock—or simply refuses to nominate commissioners in the first place—there is no legal recourse. Even if a president's refusal to nominate could somehow be challenged on the merits, it is not clear who, if anyone, would have standing to challenge a lack of a quorum.

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203. *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021); *see also* For the People Act of 2019, H.R. 1, 116th Cong. (2019); Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001-9080).

204. An example emerging out of the 2020 elections involved the USPS, an independent agency that President Trump appeared to try to entangle in the push-and-pull of elections. *See* Washington v. Trump, No. 1:20-CV-03127-SAB, 2020 U.S. Dist. LEXIS 171873, at *20 (E.D. Wash. Sept. 17, 2020) (describing the controversy); *supra* note 79 and accompanying text (describing the role played by the USPS in elections). Once more information emerges concerning the reach and nature of this top-down pressure, it will be important to study the decisionmaking at USPS prior to the 2020 elections as a possible example of presidential control over elections, particularly given that it does not necessarily fit into the pattern of gridlock that otherwise tends to characterize independent agencies in this context.

And once an agency is gridlocked, there are few legal constraints on its failure to act.[205]

In addition to the absence of legal checks, there may also be an absence of political checks. Imagine, for example, that the electorate manages to overcome entrenchment effects to select a president committed to robust enforcement of the campaign-finance laws. For the reasons discussed above, the president likely will not be able to use the nomination power in a way that can overcome stalemates at the FEC, or any similarly structured agency.

C. Direct Grants of Power: Idiosyncratic Control

In addition to running election administration through executive and independent agencies, Congress at times uses a third form: directly empowering the president to execute the law.[206] The president can unilaterally exercise this power through legally binding orders. This arrangement provides the president with much greater flexibility, including far fewer procedural constraints, than actions taken by an agency,[207] and it often appears in areas that implicate immigration policy, government contracts, and national monuments, among others.[208] Perhaps tellingly, in the field of election administration, Congress appears to have granted the president vanishingly little power to exercise unilateral control. The few areas where the president can act independently help to confirm the limits of his authority. In these areas, the actions of recent presidents have been idiosyncratic—closely reflective of the electoral interests and governing

205. *See* Andrias, *supra* note 4, at 1119–20. It is true that parties aggrieved by the FEC's dismissal of a complaint have a limited ability to pursue judicial review of the Commission's decision. *See infra* note 321 (discussing this power in more detail).

206. *See* MANHEIM & WATTS, *supra* note 14, at 17–18; *see also, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018). The president has almost no power over election administration that runs directly from the Constitution. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). Two obvious exceptions come in the president's veto power, which he can wield strategically over legislation that affects election administration, as well as the pardon power, which the president also can use strategically to undermine disfavored applications of election-related criminal statutes. *See, e.g.*, Jacob Bogage, *Trump Says Postal Service Needs Money for Mail-In Voting, but He'll Keep Blocking Funding*, WASH. POST (Aug. 12, 2020, 7:43 PM CDT), https://www.washingtonpost.com/business/2020/08/12/postal-service-ballots-dejoy [https://perma.cc/7VGZ-CLNR]; Charlie Savage, *Can Trump Pardon Himself? Explaining Presidential Clemency Powers*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html [https://perma.cc/9WR3-AE8H].

207. *See* Manheim & Watts, *supra* note 81, at 1793–94.

208. *See id.* at 1764, 1771 & n.151, 1784; *see also* Stack, *supra* note 99, at 551 & nn.42–45.

style of each individual president—and they confirm the opportunity for self-interested decisionmaking.

The president's few unilateral powers, in the context of election administration, tend to derive from much broader grants of authority. The president then chooses to direct these broad powers toward election-related ends. For example, presidents have the legal authority to create advisory commissions. While an advisory commission cannot itself create legally binding rules, it is an entity recognized by law, and the president has the power to create it unilaterally.[209] A president also has wide discretion in deciding which areas the commissions should explore, and at times presidents have used this power to create commissions committed to election issues.[210] President Obama, for example, issued a March 2013 executive order creating the Presidential Commission on Election Administration ("PCEA"), a group dedicated to "identify[ing] best practices and otherwise mak[ing] recommendations to promote the efficient administration of elections."[211] Obama—who had famously portrayed himself as the sort of politician who desired a "team of rivals"—appointed a ten-member Commission that was highly accomplished, widely respected, and meticulously bipartisan.[212] Per its charge, the PCEA held meetings, consulted experts, conducted research, released a 112-page *Report and Recommendations to the President*, and then disbanded.[213] The charge of the PCEA overlapped quite a bit with the charge of the EAC, the independent agency created by Congress. Perhaps due to concerns over gridlock at the EAC, Obama opted to create this new commission rather than attempt to convince the agency to conduct the parallel work.

President Trump took nominally similar action once he took office. Through an executive order signed in May 2017, he created the Presidential Advisory Commission on Election Integrity, whose mission was to "study the registration and voting processes used in Federal elections."[214] Trump, whose leadership style invites controversy and

209. *See* Bybee, *supra* note 84, at 57.

210. An early example came while President Kennedy was in office. *See* Exec. Order No. 11,100, 28 Fed. Reg. 3149 (Mar. 30, 1963) (establishing the President's Commission on Registration and Voting Participation).

211. Exec. Order No. 13,639, 78 Fed. Reg. 19,979 (Mar. 28, 2013).

212. *See Presidential Commission on Election Administration Launched*, U.S. ELECTION ASSISTANCE COMM'N (May 21, 2013), https://www.eac.gov/news/2013/05/21/presidential-commission-on-election-administration-launched [https://perma.cc/T7WS-P29Z] (announcing the President's appointees).

213. *See* THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, PRESIDENTIAL COMM'N ON ELECTION ADMIN. (2014), http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf [https://perma.cc/B6YU-9LPL].

214. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017).

resists bipartisanship, selected several commissioners considered by well-established experts to be underqualified, ideologically extreme, and partisan.[215] Although Trump's order also directed the Commission to issue a report after conducting research, he nevertheless disbanded the Commission less than a year later, before it had made significant progress.[216] The Commission's abbreviated tenure was notable for the lawsuits it generated, which claimed (among other things) that the Commission violated federal law by failing to operate in a transparent and balanced manner.[217] The Commission was further notable for its perceived overreaching.[218] The Commission's first formal act was to try, unsuccessfully, to obtain voter registration lists from states—through a request, rather than a demand, presumably given that neither the President nor the Commission had any legal authority to require the disclosures.[219] Throughout its tenure, the Commission was plagued with accusations that it was a thinly veiled attempt, by Trump, to find evidence to support his unsubstantiated claim that millions of unlawful votes had been cast in the 2016 election. Trump appeared to believe such evidence would help him in future elections—not only by legitimizing his victory, but also by bolstering campaigns for stricter voting measures in future elections. The Commission, in this way, dramatically reflected the President's own political agenda. It also reflected the President's idiosyncratic governing style. In so doing, it quickly pushed up against the legal limits of the president's powers.

In other areas where the president has broadly applicable unilateral powers—for example, as related to foreign sanctions—presidents also have employed their authority, idiosyncratically, in ways that affect elections. In December 2016, for example, President Obama issued Executive Order 13,757, which imposed economic sanctions relating to "significant malicious cyber-enabled

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215. *See, e.g.*, FLAWED FROM THE START: THE PRESIDENTIAL COMMISSION ON ELECTION INTEGRITY, COMMON CAUSE 4–5 (2017), https://flawedfromthestart.org/wp-content/uploads/sites/5/2017/09/FlawedfromtheStart_Report_WEB.pdf [https://perma.cc/BA2M-LKLV]. These same critics accused the Commission of being nonpartisan only in a nominal sense.

216. Exec. Order No. 13,820, 93 Fed. Reg. 969 (Jan. 3, 2018) (terminating the Commission).

217. *See* Complaint at 2, Dunlap v. Presidential Advisory Comm'n on Election Integrity, No. 1:17-cv-02361 (D.D.C. Nov. 9, 2017), ECF No. 1 (asserting that the "partisan" operation of the Commission is prohibited by the Federal Advisory Committee Act).

218. Charles Stewart III, *Trump's Controversial Election Integrity Commission Is Gone. Here's What Comes Next.*, WASH. POST: MONKEY CAGE (Jan. 4, 2018, 10:27 AM CST), https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/04/trumps-controversial-election-integrity-commission-is-gone-heres-what-comes-next/ [https://perma.cc/H4MM-APNH] (describing states' reluctance to turn over voter registration lists to the Commission).

219. *See, e.g.*, Letter from Kris W. Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to the Hon. Denise Merrill, Sec'y of State, State of Connecticut (June 28, 2017), https://www.brennancenter.org/sites/default/files/analysis/PEIC_Letter_to_Connecticut.pdf [https://perma.cc/X3Y7-5C2Z] (requesting "the publicly-available voter roll data for Connecticut").

activities . . . [used] to undermine democratic processes or institutions."[220] Obama based this legally binding order on congressional grants of authority that run directly to the president, and he indicated that he took this action in response to Russian interference in the 2016 elections, but also that he waited until after those elections had taken place to do so. As the incoming president, Trump expressed resistance to Obama's decision, insisting that, in response to Russian interference, "[i]t's time for our country to move on to bigger and better things."[221]

Once in office, Trump continued to oppose a strong response to Russian interference. He appeared to consider it a threat to both the legitimacy of his 2016 election and his 2020 reelection efforts.[222] Consistent with this approach, the President dragged his heels for over a year, refusing to issue stronger sanctions even in response to growing evidence of concerted and ongoing election interference.[223] Eventually, faced with significant political pressure, Trump unilaterally issued an order in September 2018 entitled "Executive Order on Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election."[224] Critics immediately derided this order as weak and ineffective.[225] The order seemed to promise that more sanctions would be imposed imminently; yet months went by without any additional sanctions or civil penalties.[226] Partially due to frustration with the President's refusal to take more meaningful action in response to the threat of foreign interference, members of Congress repeatedly introduced bills seeking to amend the statutes allowing the president

220. *See* Exec. Order No. 13,757, 82 Fed. Reg. 1 (Dec. 28, 2016) (imposing sanctions in response to Russian cyberattacks on the 2016 elections).

221. *See* Missy Ryan, Ellen Nakashima & Karen DeYoung, *Obama Administration Announces Measures to Punish Russia for 2016 Election Interference*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/world/national-security/obama-administration-announces-measures-to-punish-russia-for-2016-election-interference/2016/12/29/311db9d6-cdde-11e6-a87f-b917067331bb_story.html [https://perma.cc/HB7Q-RG2V].

222. *See* Schmitt et al., *supra* note 106 (quoting Representative Adam B. Schiff as stating that "[w]e are woefully unprepared because even raising this issue is met with hostility by a President who views any discussion of election security as a threat to his legitimacy").

223. *See, e.g.*, Lily Hay Newman, *Trump's New Executive Order Slaps a Bandaid on Election Interference Problems*, WIRED (Sept. 12, 2018, 5:30 PM), https://www.wired.com/story/trump-executive-order-election-interference-sanctions/ [https://perma.cc/72NU-TKB8].

224. Exec. Order No. 13,848, 83 Fed. Reg. 46,843 (Sept. 12, 2018).

225. *See, e.g.*, Newman, *supra* note 223 (quoting senators and other commentators criticizing the limited reach of the executive order); *see also* Stein, *supra* note 83 (describing the executive order as not triggering "automatic" sanctions, among other limitations).

226. *See* Steven Aftergood, *Election Interference Emergency Order Nets No Culprits*, FED'N AM. SCIENTISTS (May 22, 2019), https://fas.org/blogs/secrecy/2019/05/election-emergency-eo/ [https://perma.cc/9LG6-WFN6].

such free rein in imposing sanctions.[227] In short, Obama and Trump each responded to Russian interference in U.S. elections by exercising these unilateral powers over sanctions, and each did so in ways that reflect their own preferences and governing styles.

Despite the importance of these direct grants of authority from Congress to the president, the powers still tend to implicate elections only in an incidental manner. Congress confers the relevant powers in a broad way; presidents subsequently direct these powers toward election-related ends. Very occasionally, however, Congress provides the president with a more targeted grant of election-related authority. Perhaps the most notable emerges from the administration of the Census.

As discussed above, the enumeration associated with the Census directly affects the apportionment of representatives in the U.S. House.[228] It also has a significant effect on redistricting across the country.[229] The Constitution sets forth the very basic structure of how the Census is to be administered, indicating that Congress must fill in the blanks.[230] Congress has done so through a set of statutes empowering the Census Bureau, via the Commerce Department, and then mandating how its work eventually translates into the apportionment of representatives.

This statutory arrangement, as noted, relies primarily on the Census Bureau for implementation. But it also gives the president a pivotal role. First, Congress requires the Secretary of the Department of Commerce to provide the president with a report of the tabulation of total population.[231] This provision triggers the mandates of 2 U.S.C. § 2a, whereby:

> [After receiving the Secretary's report], the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . .[232]

227. *See* Defending Elections Against Trolls from Enemy Regimes (DETER) Act, S. 1328, 116th Cong. (as passed by Senate, June 3, 2019); Defending Elections from Threats by Establishing Redlines (DETER) Act of 2019, S. 1060, 116th Cong. (as introduced in Senate, Apr. 8, 2019); *see also* Stein, *supra* note 83 (explaining the sanctioning mechanism of the DETER Act).

228. *See supra* notes 142–143 and accompanying text (describing connection between the Census and apportionment).

229. *See supra* note 144 and accompanying text (describing connection between the Census and redistricting).

230. *See* U.S. CONST. art. I, § 2, cl. 3.

231. *See* 13 U.S.C. § 141(b).

232. 2 U.S.C. § 2a(a).

Considering this § 2a language in a 1992 decision, the Supreme Court refused to characterize the duty of the president as "merely ceremonial or ministerial."[233] Instead, the Court held, the president can exercise his own "policy judgments" in deciding whether to accept, reject, or order changes to the secretary's report.[234] Once the president ultimately decides to send a report to Congress, it is that presidential action that has legally binding effect—"because only then are the States entitled by § 2a to a particular number of Representatives."[235]

The Supreme Court did not identify the outer bounds of a president's discretion in exercising this § 2a power.[236] In the first two census cycles after the Court's 1992 decision (which occurred during the terms of George W. Bush and Barack Obama), the presidents' exercise of this § 2a power did not appear to raise significant controversy or legal challenges. Yet in a memorandum issued in July 2020, President Trump signaled his intention to effect significant policy changes through the § 2a grant of authority and otherwise use this unilateral power over the Census in unprecedented ways.[237] Critics challenged the lawfulness of the proposed actions—including by alleging they were motivated by a desire to affect election rules—up until President Joe Biden unwound Trump's § 2a efforts on his first day in office.[238]

It is telling that this final model for presidential control of elections—direct, unilateral empowerment of the president—has few illustrations. In the context of elections, Congress generally has avoided its use. Some direct grants of power, like those involving sanctions, only incidentally involve elections. Others, such as the role played by the president himself in census administration, are rare and relatively narrow in their scope.[239]

The limited nature of these grants may reflect Congress's recognition that very few checks constrain the president when he exercises unilateral powers. Congress can, of course, impose

233. Franklin v. Massachusetts, 505 U.S. 788, 800 (1992).

234. *Id.* at 799.

235. *Id.* at 798; *see also id.* at 797 ("[T]he action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President.").

236. *Cf. id.* at 811 (Stevens, J., concurring in part) (describing the executive's role in the census process, contrary to the majority, to be so circumscribed by law as to be ministerial).

237. *See* Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 2020 DAILY COMP. PRES. DOC. 00528 (July 21, 2020); *see also* New York v. Trump, No. 20-CV-5770, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020) (rejecting this order as unlawful).

238. *See* Trump v. New York, 592 U.S. ___ (2020) (vacating district court decision for lack of standing and ripeness); *id.* (Breyer, J., dissenting) (expressing concern over a president using discretion in this context "to increase an electoral advantage"); *see also* Exec. Order 13,986, 86 Fed. Reg. 7015 (Jan. 20, 2021).

239. *See supra* notes 230–238 and accompanying text.

substantive limits. Yet even here, it is difficult for courts or others enforce those limits.[240] Moreover, virtually no procedural limits exist at all.[241] A president exercising unilateral powers truly can act on his own.[242] Unlike with agencies, moreover, unilateral grants of power do not provide any guarantee that expertise will play a role; the expertise-forcing mechanisms of the Administrative Procedure Act simply do not apply.[243]

In short, across the administrative state, the president enjoys a complicated, heterogeneous, and often subtle collection of powers allowing him to exercise control over election rules.[244] The way presidents exercise this authority depends heavily on the legal structure Congress has imposed. Yet no structure entirely curbs the phenomenon. One way or another, the president is able to exercise control over the administration of elections. The next Section discusses this inevitability. It also provides reasons why presidential control of elections appears to be on the rise.

D. The Persistence—and Likely Expansion—of Presidential Control

Presidents can, and do, use their official powers to influence the administration of elections. Presidents do so when the changes might have an appreciable effect on election outcomes,[245] and they do so even when the elections affected are their own. As this Section explains, this phenomenon is to some degree inevitable: the basic structure of the federal government, coupled with several inexorable line-drawing problems, ensure that presidents will continue to exercise some form of control over election administration. Nevertheless, how, exactly, this power manifests depends on congressional design as well as the courts' response. In recognition of this dynamic, this Section concludes by discussing signs indicating that both Congress and the courts may be

240. *See* Manheim & Watts, *supra* note 81, at 1762–81 (discussing challenges, in the context of executive orders, associated with exercising judicial review).

241. *Id.* at 1793–96.

242. *See* MANHEIM & WATTS, *supra* note 14, at 38. *But cf.* Grove, *supra* note 92, at 901–04 (explaining that, in the normal course, presidents tend to adhere voluntarily to a process dependent on subordinate input).

243. *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the definition of "agency" contained in the APA does not include the president); Manheim & Watts, *supra* note 81, at 1777–78 (discussing this holding and its implications).

244. These powers do not generally extend to control over the legal resolution of disputed elections. *See* Lisa Marshall Manheim, *Presidential Control over Disputed Elections*, 81 OHIO ST. L.J. ONLINE 215 (2020).

245. *See supra* Sections II.A–II.C.

poised to act in ways that could amplify the president's role in election administration.

1. The Inevitability of Presidential Control

The degree, and nature, of the president's control over election administration varies in ways that tend to track how Congress has drafted the relevant law. To this end, Congress's patterns are telling. It has vested little election-related authority in unilateral grants to the president; has largely avoided vesting rulemaking authority over election administration to executive agencies; and has designed the two agencies most dedicated to election administration in a way that relies on bipartisan, independent leadership. This pattern suggests a conscious effort by members of Congress, over time, to insulate election-related decisions from the president.

Despite such effort, some degree of presidential control over elections is inevitable. The federal government executes its laws through the executive. Any effort to remove the president from the process completely would run quickly into constitutional hurdles, as well as practical difficulties.[246] As a result, so long as the federal government remains involved in elections, Congress cannot completely eliminate a president's use of official powers to influence election rules.[247]

Even if there was a way to completely circumvent the executive from influencing his own elections, any effort to eliminate presidential control of elections would quickly run into problems over line-drawing. The first line-drawing challenge arises from the distinction between, on the one hand, presidential actions that affect *election rules* and, on the other hand, presidential actions that seek merely to change *voter preferences*. The former set—the focus of this Article—threatens entrenchment and delegitimization of the administrative state in ways that the latter set does not.[248] This first set includes the many illustrations this Article already has identified and discussed:

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246. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (striking down for-cause removal protections for the Public Company Accounting Oversight Board as unconstitutional); MANHEIM & WATTS, *supra* note 14, at 23–25.

247. Even if Congress only contemplated enforcement through the courts, the federal government is empowered to bring lawsuits. And even if Congress decided to completely remove the federal government from the elections process, the federal government would still be involved incidentally. *See supra* note 69 and accompanying text. Moreover, the Constitution sets a floor with respect to how involved the federal involvement is in elections through, for example, the Enumeration Clause. *See* U.S. CONST. art. I, § 2, cl. 3.

248. Indeed, these election-conscious actions may actually help to promote electoral accountability. *See supra* note 1 and accompanying text; *see also infra* Section III.A; Mendelson, *supra* note 109 (describing and critiquing this theory).

presidential pressure on DHS leadership regarding its election-security mandates; presidential nomination decisions that promote gridlock at the FEC; legally binding orders associated with the Census; and more. Presidential actions that seek to change voter preferences, by contrast, constitute a considerably larger set. Indeed, this set arguably encompasses almost any step an election-conscious politician might take. For particularly vivid examples of actions falling into this latter category—in ways that may affect election outcomes but do not affect election rules—consider President Clinton signing a welfare bill in August 1996 in a seeming attempt to influence the results of the upcoming elections.[249] Or consider, more broadly, the official actions that President Trump took in the run-up to the 2020 presidential election, when he "obliterated the lines between campaigning and governing" by, for example, pressuring the Treasury Department to include his name and signature on federal stimulus checks.[250]

Conceptually, this line—between official actions affecting election administration and official actions not affecting election administration—has some force. Yet in practice it is not at all sharp. If the president nominates judges likely to side against plaintiffs in voting-rights cases, for example, is that an effort to influence election administration? The connection may seem too attenuated. But then where, exactly, should that line be drawn? Or consider immigration policy. What if a president were to push these policies in one direction or another, in part based on his prediction that the changes likely would have some effect on the number of naturalized citizens empowered to vote? Would this motive convert swaths of immigration policy into a form of election administration? Adding to these complications is the reality that presidential actions so often reflect multiple motivations and have multiple effects: with a single decision, a president very well might desire both to influence election rules *and* to change hearts and minds (or otherwise affect some other change). Perhaps, for example,

249. Lily Rothman, *Why Bill Clinton Signed the Welfare Reform Bill, as Explained in 1996*, TIME (Aug. 19, 2016, 11:00 AM), http://time.com/4446348/welfare-reform-20-years/ [https://perma.cc/NW8T-SEMR].

250. *See* David Nakamura & Paul Sonne, *Trailing in the Polls, Trump Enlists His Administration and Co-opts the Government to Bolster His Reelection*, WASH. POST (Oct. 31, 2020, 4:59 PM CDT), https://www.washingtonpost.com/politics/trump-election-ethics/2020/10/31/46fb0948-1b19-11eb-82db-60b15c874105_story.html [https://perma.cc/PQJ6-2ULD]. For analogous actions taken in anticipation of the 2018 midterms, see, for example, Ashley Parker & Philip Rucker, *'Pushing Every Button': Trump Mobilizes the Government in Campaign's Final Days*, WASH. POST (Oct. 31, 2018, 4:53 PM CDT), https://www.washingtonpost.com/politics/pushing-every-button-trump-mobilizes-the-government-in-campaigns-final-days/2018/10/30/009067b2-dc52-11e8-b732-3c72cbf131f2_story.html [https://perma.cc/G58K-2NGR] (quoting one observer as describing Trump's conduct as "the most focused and concerted effort to use all of the powers of the presidency to shape a midterm election that I have ever seen").

one president might make a point of pressuring agency subordinates into prioritizing criminal investigations into "voter intimidation," in the hopes of fulfilling a campaign promise. Or another president might make a similar point out of pressuring agency subordinates into prioritizing criminal investigations into "voter fraud," also in the hopes of fulfilling a campaign promise.[251] In short, the line distinguishing election rules from voter preferences is not a crisp one. While this indeterminacy does not negate the concerns associated with presidential control of elections, it does make it difficult to imagine a legal regime that simply prohibits a president from ever using his powers to influence election rules.

Another line-drawing problem emerges from a second distinction: between a president influencing election rules through use of *official powers*, rather than the *bully pulpit*. This distinction matters because the law necessarily grants the president wide latitude to engage in the latter conduct. Moreover, a president's use of the bully pulpit does not necessarily present the same normative concerns.

This Article, as noted, focuses on the former: how a president influences election rules through use of official powers. These law-based mechanisms include nomination decisions, pressure on subordinates backed by the threat of removal, legally binding orders, and more.[252] Yet the bully pulpit also matters, including with respect to election administration, given that presidents routinely use non-law-based means, including their unique access and ability to reach wide audiences, in attempts to affect issues of election administration. As an example, consider President Obama's letter to the editor of the *New York Times Magazine* calling on Congress to expand the VRA,[253] or President Trump's tweets discouraging jurisdictions from adopting "Mail-In Voting" in response to the COVID-19 pandemic.[254] While these actions very well may influence election rules, the presidents did not rely on official legal authority to take them.

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251. *See* Manheim & Porter, *supra* note 18, at 238.

252. *See* MANHEIM & WATTS, *supra* note 14, at 37–38 (discussing the president's "toolkit" for exercising the official powers of his office).

253. Barack Obama, *President Obama's Letter to the Editor*, N.Y. TIMES (Aug. 12, 2015), https://www.nytimes.com/2015/08/16/magazine/president-obamas-letter-to-the-editor.html?_r=0 [https://perma.cc/93SA-ZNN4].

254. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (June 28, 2020, 7:30 PM), https://twitter.com/realDonaldTrump/status/1277429217190428673 [https://perma.cc/6ALU-2DBK] ("Mail-In Voting . . . will lead to the most corrupt Election in USA history."); *see also, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2018, 3:11 AM), https://twitter.com/realDonaldTrump/status/948874586006925313?ref_src=twsrc%5Etfw [https://perma.cc/BUE3-9GEB] (encouraging voters to push for voter ID laws).

As a result, these actions arguably do not pose the same entrenchment or legitimacy concerns as do the actions taken on the basis of a president's official powers.[255] Again, though, this line becomes fuzzy on the margin. Consider, for example, the following tweet by Trump, sent less than a month before the 2018 elections: "All levels of government and Law Enforcement are watching carefully for VOTER FRAUD, including during EARLY VOTING. Cheat at your own peril. Violators will be subject to maximum penalties, both civil and criminal!"[256] This warning appears primarily to be rhetorical in nature. Yet it is also, arguably, a directive to DOJ, and therefore its effects on that agency arguably derive, at least in part, from the president's legal authority.

In this sense, an action like Trump's "VOTER FRAUD" tweet straddles the line between a president's attempt to exercise influence through use of official powers, on the one hand, and through a rhetorical or political mechanism, on the other. It is difficult to understand exactly how to separate these types of actions into one category or the other. Yet the law necessarily grants the president wide latitude to engage in the latter conduct, which often constitutes core political speech. The underlying indeterminacy again calls into question the possibility of a legal regime simply precluding a president from exercising official authority in ways that affect elections.

In short, in one form or another, presidential control of elections is an inevitable feature of government. This inevitability is ensured through a combination of constitutional hurdles, logistical realities, and line-drawing difficulties. Yet how, exactly, this phenomenon manifests depends heavily on the checks and balances provided by the other branches, and in particular on congressional design. As the next Section explains, there are reasons to believe that, in the near future, these actors may further loosen the reins.

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255. *See* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 442 (2003) (discussing various types of entrenchment, including laws that do not formally entrench but "that have the effect of entrenching—what might be called informal entrenchments"—and distinguishing between them); *see also infra* Section III.A. To be clear, a president's use of the bully pulpit in this way may pose its own normative concerns—particularly when the president is using his platform to spread misinformation or otherwise disrupt the voting process. *See, e.g.*, Aaron Rupar, *How Trump's Mail Voting Sabotage Could Result in an Election Night Nightma*re, VOX (Aug. 11, 2020, 10:30 AM EDT), https://www.vox.com/2020/8/11/21358960/trump-mail-voting-sabotage-explained [https://perma.cc/9S48-66LK] ("Trump, for whatever reason, has long been convinced that mail voting is bad for him. In April, for instance, he tweeted (falsely) that mail voting has 'tremendous potential for voter fraud' and 'for whatever reason, doesn't work out well for Republicans.' "). However problematic, the normative concerns implicated by this use of the bully pulpit are not necessarily the same as those implicated when the president uses his official powers to influence election rules.

256. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 20, 2018, 5:36 PM), https://twitter.com/realDonaldTrump/status/1053807130120200192 [https://perma.cc/7J98-D7EY].

2. The Likely Expansion of Presidential Control

Despite its inevitability, an important intuition remains about presidential control of elections: something is different, and troubling, about a president using his elected office to control the rules of future elections. Notwithstanding these concerns, several developments suggest that the coming years may bring an expansion of this phenomenon. These developments include the erosion of norms associated with the presidency, jurisprudential changes in the courts, and the push for greater federal involvement in election administration.

Presidential Norms. The first development involves the erosion of presidential norms—the "unwritten rules of legitimate or respectworthy behavior" that both augment and constrain the President of the United States.[257] In Daphna Renan's study of the phenomenon, she discusses the importance of what she terms "insulation norms," which separate certain forms of executive branch decisionmaking from the president.[258] At the forefront of these insulation norms is investigatory independence—"a set of structural norms that insulate some types of prosecutorial and investigatory decisionmaking from the President."[259] A lead example came in 1997, when President Bill Clinton learned that the Federal Bureau of Investigation had been investigating possibly illegal foreign contributions to his own reelection campaign. Despite the "profane rage" Clinton articulated in response to this probe, he did not seek to control the agency's investigation.[260] Norms constrained him.

By contrast, President Trump pushed back aggressively against these norms.[261] He directed pressure at Attorney General Barr, for example, with respect to specific investigations, including those of high political relevance involving election law.[262] Trump also expressed

257. Renan, *supra* note 21, at 2189.

258. *Id.* at 2207.

259. *Id.*

260. *See id.* at 2212 (chronicling the tension between President Clinton and FBI Director Louis J. Freeh); *see also* John F. Harris & David A. Wise, *With Freeh, Mistrust Was Mutual*, WASH. POST (Jan. 10, 2001), https://www.washingtonpost.com/archive/politics/2001/01/10/with-freeh-mistrust-was-mutual/37ede22a-2229-46c8-9a73-7859bd54b85f/ [https://perma.cc/S6YE-B4VA].

261. *See* Renan, *supra* note 21, at 2214 (discussing, among other actions, President Trump's decision to fire FBI Director James Comey and the public pressure he has put on DOJ with respect to which investigations it prioritizes).

262. *See supra* note 129 and accompanying text (describing the decision of Attorney General William Barr to internally probe past FBI investigations into election interference); *see also* David E. Sanger, *Taking Page from Authoritarians, Trump Turns Power of State Against Political Rivals*, N.Y. TIMES (Oct. 10, 2020), https://www.nytimes.com/2020/10/10/us/politics/trump-barr-pompeo.html [https://perma.cc/DN6D-8HYU] (alleging that President Trump has been taking "a step even Richard M. Nixon avoided in his most desperate days: openly ordering direct, immediate government action against specific opponents, timed to serve his re-election campaign"); Robert

interest in exercising more control over enforcement practices outside of DOJ—including at the IRS, which for decades has been defined by strong insulation norms.[263] Most prominently, Trump's flagrant disregard of norms leading into the 2020 presidential election—including his refusal to acknowledge he would accept the result of the election and facilitate a peaceful transition of power—caused astonishment and concern among many commentators and prominent political actors.[264] Unfortunately, that consternation was appropriate. Trump's conduct after losing that election, which unfolded as this Article was entering its very final stages of publication, strained both law and norms nearly to a breaking point.[265] In short, to the extent that insulation norms have restrained presidents from interfering too brazenly with the enforcement of rules that directly implicate elections, they took a direct hit in the Trump era, and it remains to be seen how they will fare going forward.

Jurisprudential trends. A second development—suggesting that presidential involvement in election administration may be on the rise—involves jurisprudential trends. As the federal courts, and in particular the Supreme Court, become more jurisprudentially conservative,[266] it may become even more difficult for judges to check the president's control of elections. One set of developments involves judicial deference to the president. These lines of related doctrines include courts' resistance to legal challenges based on claims of pretext (including arguments that a president's facially neutral justification in actuality masks motives that call into question the lawfulness of his

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Faturechi & Justin Elliott, *DOJ Frees Federal Prosecutors to Take Steps that Could Interfere with Elections, Weakening Long-standing Policy*, PROPUBLICA (Oct. 7, 2020, 12:40 PM EDT), https://www.propublica.org/article/doj-frees-federal-prosecutors-to-take-steps-that-could-interfere-with-elections-weakening-long-standing-policy [https://perma.cc/R7VK-YZGK].

263. *See supra* notes 133–135 and accompanying text (discussing indications by President Trump that he would like greater White House involvement in IRS decisionmaking).

264. *See, e.g.*, Rosa Brooks, *What's the Worst that Could Happen?*, WASH. POST (Sept. 3, 2020), https://www.washingtonpost.com/outlook/2020/09/03/trump-stay-in-office/ [https://perma.cc/7YGY-CJD4] (describing efforts by the Transition Integrity Project to predict and prepare for scenarios that might result from this breakdown of norms).

265. *See, e.g.*, Rutenberg et al., *supra* note 26 (describing the outgoing president's "extralegal campaign to subvert the election"); *supra* note 119 and accompanying text (describing some of the post-election pressure Trump directed at DOJ); Marshall Cohen, *Chronicling Trump's 10 Worst Abuses of Power*, CNN (Jan. 24, 2021), https://www.cnn.com/2021/01/24/politics/trump-worst-abuses-of-power/index.html [https://perma.cc/XG6G-G5KC] ("There is broad agreement among experts that Trump's most severe abuse of power was his relentless effort to undermine the 2020 election and overturn the legitimate results."); Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors, H.R. 24, 117th Cong. (2021).

266. *See, e.g.,* Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019, 6:32 PM CST), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html [https://perma.cc/J6PN-HTGU].

actions), as well as what appears to be an increased willingness to issue extraordinary relief in response to requests by the solicitor general.[267] Offsetting this deference toward the president, at least to some degree, is reluctance by these same courts to according analogous deference to agencies.[268]

Another line of doctrine involves skepticism toward the constitutionality of Congress's efforts to protect agencies from presidential control, including through novel leadership structures.[269] Indeed, some prominent jurists have called into question the constitutionality not only of new designs for insulating agencies against presidential control, but of independent agencies writ large.[270]

A third jurisprudential trend involves the increasingly parsimonious view the federal courts have taken toward private rights of action.[271] Indeed, a recently appointed judge went so far as to call into question decades of settled precedent relating to whether individuals may sue states for violations of section 2 of the VRA.[272] As discussed below, the existence of private rights of action help to offset presidential control by providing a countermeasure to nonenforcement decisions.[273]

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267. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (refusing to find that discriminatory intent motivated President Trump's travel ban, despite claims of pretext). *But cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) (refusing to accept a facially implausible explanation offered by the Secretary of Commerce). *See also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (characterizing current Solicitor General Noel Francisco as "*far* more aggressive" in seeking extraordinary relief than any of his immediate predecessors).

268. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (addressing the deference due by courts to agencies' interpretations of their own regulations); *Dep't of Com.*, 139 S. Ct. at 2575 (concluding that the administrative record could not support a decision by the Secretary of Commerce). *See generally* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (discussing "contemporary anti-administrativism").

269. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2204 (2020) (implying that novelty in agency leadership structures raises constitutional concerns); *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 857 (2020).

270. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 179 n.7 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (suggesting that, based on "the constitutional text alone," independent agencies appear to violate Article II).

271. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 752–53 (2020) (refusing to recognize a private right of action against federal officers in a cross-border shooting); Alexander v. Sandoval, 532 U.S. 275, 288–93 (2001) (refusing to recognize a private right of action as relevant under Title VI); *see also* Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37 (2018) (analyzing the modern retrenchment of opportunities and incentives associated with private enforcement of federal rights).

272. *See* Ala. State Conf. of the NAACP v. Alabama, 949 F.3d 647, 655 (11th Cir. 2020) (Branch, J., dissenting) (concluding that Congress failed to "unequivocally abrogate" state sovereign immunity under section 2 of the VRA).

273. *See infra* notes 320–321 and accompanying text (discussing the check on presidential power that private rights of action could provide in this context).

A fourth relevant jurisprudential trend involves a distinct but conceptually overlapping phenomenon: political gerrymandering. Faced with these brazen efforts at entrenchment by state legislatures, the Supreme Court recently concluded that the political question doctrine simply bars federal courts from judging their constitutionality.[274] The Court has expressed a similar unwillingness to engage with other apparent attempts at entrenchment by state actors.[275] These doctrines potentially provide a shield to presidents seeking to defend their own entrenchment efforts.

In short, the jurisprudential trends tend to point in the same direction: more leeway, not less, for presidents seeking to exercise control over election administration.

Possible Congressional Legislation. A third development—further suggesting that presidential involvement in election administration may be on the rise—involves the possibility that Congress will pass legislation expanding the federal government's role in elections. It has been well over a decade since Congress last enacted major election-related legislation, with the disputed presidential election of 2000 providing the most recent impetus.[276] Tellingly, the most significant change in federal election law since that time has been the Supreme Court's functional invalidation of section 5 of the VRA.[277]

Political pressure has been mounting to reverse this inertia and further expand federal involvement in elections. The challenges presented by the COVID-19 pandemic, for example, convinced many lawmakers that jurisdictions across the country needed more federal support to conduct the 2020 elections, and even in that highly politicized environment, they managed to secure some funding for this purpose.[278] Even before the pandemic hit the United States, moreover, Democratic lawmakers had been prioritizing legislation that would

274. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering claims present nonjusticiable political questions).

275. *See* Manheim & Porter, *supra* note 18, at 254–55 (explaining how, recently, litigants and the Supreme Court have avoided an expansive understanding of the right to vote in part by narrowly framing disputes and factual circumstances).

276. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, 166 Stat. 1666; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81; GARRETT, *supra* note 21, at 7–14 (providing a brief overview of major election-related statutes).

277. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (holding unconstitutional the coverage formula in section 4 of the VRA).

278. *See, e.g.*, Alana Wise, *Funding for Postal Service, Mail-In Voting Stall Coronavirus Relief Talks*, NPR (Aug. 12, 2020, 7:46 PM ET), https://www.npr.org/2020/08/12/901961002/funding-for-post-office-mail-in-voting-stall-coronavirus-relief-talks [https://perma.cc/6UYQ-87YV] (discussing the Democratic Party's fight for additional funding to support mail-in voting for the 2020 election).

strengthen federal election laws.[279] Across the aisle, Republican lawmakers expressed resistance to most of these reforms but occasionally joined bipartisan efforts to improve election security, collectively producing a "raft" of proposed legislation in recent years.[280] In multiple subfields—campaign finance, voter registration, election security, and beyond—these proposals aim to increase federal involvement in elections. With rare exception, any increase in the federal government's involvement in elections also expands the president's role.[281]

In short, presidential control of election administration is, in one form or another, inevitable. It also is a phenomenon that may be poised to grow, perhaps dramatically, in its reach and impact. The next Part explores the implications of this phenomenon. It first considers the possibility that presidential control of elections might have some benefits. It then asks what is normatively problematic about this phenomenon—and what, if anything, can be done to mitigate those negative effects.

III. WHETHER (AND HOW) TO CHECK PRESIDENTIAL CONTROL

Exercising the powers of her office, the President of the United States can—and does—exercise significant control over election rules. Prominent in the background of this descriptive claim is a range of normative concerns. Assessing the desirability of presidential control of elections is particularly important in this moment, as lawmakers consider expanding the role of the federal government in elections, presidents continue to push legal limits on exercising influence within the executive branch, and a polarized electorate increasingly expresses skepticism toward the work of the federal government and its elected officials.[282] This Part begins by exploring the normative implications of presidential control of elections. It concludes that they are, in

279. Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001-9080). *See supra* note 203 and accompanying text; *see also infra* note 327 and accompanying text. Presidential candidates also offered their own sweeping proposals. *See, e.g.*, Elizabeth Warren, *My Plan to Strengthen Our Democracy*, MEDIUM (June 25, 2019), https://medium.com/@teamwarren/my-plan-to-strengthen-our-democracy-6867ec1bcd3c [https://perma.cc/UWE3-NGZ5].

280. *See* Nicholas Fandos, *New Election Security Bills Face a One-Man Roadblock: Mitch McConnell*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2019/06/07/us/politics/election-security-mitch-mcconnell.html [https://perma.cc/Y96T-Q87Q] (connecting Senator McConnell's obstruction of these bipartisan efforts to pressure from the White House); *see also, e.g.*, Michael Sulmeyer, *Assessing the Bipartisan Secure Elections Act*, LAWFARE (Jan. 3, 2018, 7:00 AM), https://www.lawfareblog.com/assessing-bipartisan-secure-elections-act [https://perma.cc/3SFE-6KHQ].

281. *See supra* Section II.D.1.

282. *See supra* notes 22–27 and accompanying text.

many ways, quite troubling. It then turns to the question of how to best respond.

A. The Normative Implications

Certainly, presidential control over administration has potential benefits. The president is elected, and this connection to the electorate is understood to increase accountability across the executive branch.[283] Moreover, a president can act quickly, and decisively, in ways that more cumbersome governmental entities cannot.[284] She can also help to coordinate coherent policy regimes across disparate agencies.[285]

Despite these potential advantages, presidential control of administration inevitably comes at a cost—a cost that is particularly difficult to defend in the context of election administration. As this Section explains, presidents' influence over election administration raises a unique combination of overlapping concerns. Viewed through an administrative law lens, presidential control of elections not only threatens technocratic expertise, as presidential control so often does; it also, perversely, threatens political accountability. In this way, presidential control of elections threatens the two central values—expertise and accountability—bolstering the work of the modern executive branch.[286] The practice hardly looks better when viewed through the lenses most familiar to election-law scholars. These lenses help to focus attention on how this phenomenon may facilitate entrenchment, which in turn calls into question the extent to which affected elections reflect the democratic will.[287]

As both administrative and election-law scholars are quick to acknowledge, many of these intersecting concerns rest on empirical assumptions that remain impracticable, if not impossible, to verify.[288] As a result, normative conclusions regarding presidential control of elections must remain tentative. Nevertheless, the information that is available points to a problem. The remainder of this Section provides further explication of these observations.

At the outset, presidential control over election administration is in tension with one of the central values legitimizing the administrative state: the benefits provided by technocratic expertise. Administrative institutions, largely staffed by unelected experts, are

283. *See supra* note 1 and accompanying text.

284. *See supra* Section II.C; *see also* MANHEIM & WATTS, *supra* note 14, at 37–38.

285. *See* Andrias, *supra* note 4.

286. *See infra* notes 289–302 and accompanying text.

287. *See infra* notes 304–308 and accompanying text.

288. *See infra* notes 309–313 and accompanying text.

designed to have the capacity to develop and implement fact-driven, technocratic policies in response to general grants of statutory authority.[289] If elected presidents introduce too much political pressure, this top-down control very well may compromise the expert execution of the law.[290] Certainly, this concern applies to the technically challenging world of election administration.

The recent census controversy provides an illustration. Administration of the Census, like administration of an election, is a highly complicated and challenging endeavor. Reliance on nonpartisan experts, including career civil servants working in the Census Bureau, can help to advance neutral values such as accuracy and efficiency. Disregarding their views often accomplishes the opposite.[291] Tellingly, when the Trump White House pushed officials to add a citizenship question to the 2020 census, it did so squarely against the recommendation of virtually every nonpartisan expert involved in the process. Secretary of Commerce Wilbur Ross nevertheless decided he would include the question.[292] In this way, the changes sought by the White House, if the Secretary had had his way, would have come at a clear cost: those changes would have eroded the value added by technocratic expertise. This tension—between presidential control and expertise—helps to explain why presidential control over agency administration so often elicits criticism and calls for "expertise forcing" reform.[293] As the Census example helps to confirm, these same normative concerns very much hold in the context of election administration.

Yet this anxiety over technocratic proficiency tells only half the story. While presidential control may compromise the role of expertise in election administration, it also threatens to undermine the

289. *See, e.g.*, Metzger, *supra* note 268, at 75 (discussing the "the independent expertise model of the administrative state"); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968–69 (2015) ("Presidents have worked assiduously to increase their control over the executive branch and independent agencies, and have used this control to engage in what has been called 'presidential administration.' ").

290. *See* Watts, *supra* note 21, at 685–86 (discussing the advantages and disadvantages of increased presidential control over agencies).

291. *See* Levitt, *supra* note 143, at 1362–86 (noting the detrimental effects, judged by accuracy and efficiency, of adding a citizenship question to the Census, which the Secretary of Commerce attempted to do against the advice of experts in the Census Bureau).

292. *Id.* at 1356.

293. *See, e.g.*, Watts, *supra* note 21, at 720 ("The most common response by courts, Congress, scholars, the media, and others when faced with specific instances of presidential control over the regulatory state has been a kind of reflexive 'expertise forcing.' "); *id.* (defining "expertise forcing" as "generalized efforts—both inside and outside courts—to try to force regulators to exercise expert judgment based on apolitical, technocratic reasons"); *see also id.* at 706–11 (discussing controversy over "Plan B" regulation, for an example of how these arguments unfold outside the context of elections).

other central principle underlying the administrative state: political accountability.[294]

Normally, this works in the opposite direction, with presidential control understood to promote accountability. "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 . . . policy choices . . . ."[295] Indeed, without presidential control, agency action might "be seen as coming from a headless and unaccountable fourth branch,"[296] calling into question the agency's legitimacy and possibly even its constitutionality.[297] Presidential control responds to these problems by more closely connecting unelected bureaucrats to the electorate. This connection is particularly important in light of the policymaking that inevitably occurs when agencies administer statutes. Just like reasonable minds can differ, for example, with respect to how to administer immigration statutes, labor laws, or the Clean Air Act, reasonable minds also can differ with respect to how to administer voting rights statutes, campaign finance laws, or the Census Act.[298]

The central insight here—that presidential influence helps to ensure electoral accountability—has persuasive force across a range of substantive areas. Yet it is also precisely what triggers a special concern in the context of elections. What if, contrary to the line of logic articulated above, presidential control of elections, on balance, actually *undermines* electoral accountability? What if the president's efforts at influencing election rules contributes to the *distortion* of voters' preferences, in a manner that leads to entrenchment, both for the president and his political allies in Congress? In that circumstance, presidential control may be inconsistent with both technocratic expertise *and* accountability.

To this end, a precedent like the 2003 redistricting out of Texas should set off alarm bells. As discussed above, in that episode, top-down pressure from political appointees seemed to result in DOJ

294. *See* sources cited *supra* note 1; *see also* Watts, *supra* note 21 (arguing that presidential control furthers political accountability).

295. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

296. Watts, *supra* note 21, at 730.

297. *See* Metzger, *supra* note 268 (describing a conception of accountability that is "embedded in the Constitution's electoral provisions, commitment to self-government, and grants of legislative power to an elected Congress and executive power to an elected President"); *see also supra* note 1 and accompanying text.

298. *See* Morley, *supra* note 120, at 291 (making this point with respect to differences in how the Bush-era DOJ and the Obama-era DOJ prioritized NVRA cases); *see also* U.S. DEP'T OF JUST., *supra* note 114 (explaining how voting-related enforcement priorities of DOJ have changed over time). *See generally* MANHEIM & WATTS, *supra* note 14, at 37–54 (discussing powers the president has in his "toolkit" and examples of how various presidents have employed these powers).

administering the VRA in ways that favored Republican electoral interests. As a result, President Bush appeared to emerge from the 2004 midterms with fewer checks on his presidential agenda than he likely would have had otherwise.[299] Given various challenges of measurement, it is not possible to definitively prove up this causal narrative.[300] Nevertheless, this pattern is very much consistent with a successful attempt at entrenchment—and entrenchment tends to diminish, rather than promote, political accountability.[301]

Even more ominous illustrations of possible entrenchment have emerged more recently. More specifically, in the run-up to the 2020 elections, Trump repeatedly sought to exercise his official powers in ways that appeared to be intended to promote entrenchment. To take but one of many examples, Trump continued to use his powers to resist, against the near-universal advice of nonpartisan experts, an effective legal response to election intervention by foreign governments. To the extent that such conduct signals to foreign powers that the government will not enforce laws designed to prevent the subversion of elections, this manifestation of presidential control poses a truly dire threat to democratic accountability.[302] Trump's conduct after those elections further underscores, for a wide range of reasons, the threats to accountability that potentially arise when presidents seek to influence election rules.[303]

These concerns are grounded in administrative law theory, which assumes that a president will not evade accountability by entrenching herself and her allies in office. These same anxieties also implicate election law. These concerns are, in a sense, opposite sides of the same coin. This is because giving an incumbent control over election rules virtually always heightens risks of entrenchment.[304]

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299. *See supra* notes 158–160 and accompanying text.

300. *See infra* notes 309–313 and accompanying text.

301. *See infra* note 309 and accompanying text.

302. *See, e.g.*, David Corn, *Trump's Sordid History of Accepting, Requesting, and Encouraging Foreign Interference in US Elections*, MOTHER JONES (Dec. 6, 2019), https://www.motherjones.com/politics/2019/12/trumps-sordid-history-of-accepting-requesting-and-encouraging-foreign-interference-in-us-elections/ [https://perma.cc/6A5L-NFZR]. For a second example, consider Trump's attempted attacks on mail-in voting. *See, e.g.*, Deb Riechmann & Anthony Izaguirre, *Trump Admits He's Blocking Postal Cash to Stop Mail-In Votes*, AP NEWS (Aug. 13, 2020), https://apnews.com/14a2ceda724623604cc8d8e5ab9890ed [https://perma.cc/MCE2-QV93]; Anita Kumar, *Trump Aides Exploring Executive Actions to Curb Voting by Mail*, POLITICO (Aug. 8, 2020), https://www.politico.com/news/2020/08/08/trump-wants-to-cut-mail-in-voting-the-republican-machine-is-helping-him-392428 [https://perma.cc/ES4V-5RX9].

303. *See supra* notes 261–265 and accompanying text.

304. *See supra* notes 18–21 and accompanying text.

Entrenchment, in turn, threatens to undermine fundamental democratic values.[305]

These risks appear all the more acute when the official accused of entrenchment is the President of the United States. A president acts alone and, as a result, has an unparalleled ability to exercise power in a self-serving manner. She is not a member of a multimember body such as Congress or a state legislature. Nor is the president competing with other elected executive branch officials.[306] These sorts of checks limit what these elected officials can do. By contrast, there is no analogous check restraining the president. To contemplate what can result from this unique arrangement, consider, again, how recent presidents have handled election-related sanctions. The erratic pattern characterizing U.S. policymaking on this front is not partisan, per se, in nature; instead it reflects each president's idiosyncratic preferences and political prospects.[307] The stakes for entrenchment are heightened even further in light of the far-reaching nature of presidential power. A president's control of election administration is not limited to a single jurisdiction, but instead has nationwide effects. The expansive nature of a president's powers also puts into greater perspective the policy consequences of possible entrenchment. While in office, a president wields a truly staggering amount of authority, both home and abroad.[308]

In short, presidential control of elections poses serious normative concerns. It threatens to undermine two central principles justifying the administrative state: technocratic expertise and accountability. In so doing, it calls into question not only the legitimacy of federal election administration, but of the administrative state more generally. Presidential control of elections potentially wreaks this havoc by facilitating entrenchment, which in turn raises concerns over the extent to which affected elections reflect the will of the electorate. These normative implications for presidential control of elections are both troubling and wide-ranging.

Still, these observations remain tentative, as they must. More definitive conclusions would require empirical analyses that are beyond the scope of this Article—and, to some extent, beyond the current capacity of researchers. As this Article has previously suggested, measurement of the relevant data poses extraordinary difficulties. For example, it may be the case that presidential control of elections,

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305. *See supra* notes 15–16 and accompanying text.

306. A state's secretary of state, for example, may also be empowered to act on his own, rather than through a multimember body—but only alongside other state executive officials also empowered by the electorate, such as the state governor.

307. *See supra* notes 220–227 and accompanying text.

308. *See* MANHEIM & WATTS, *supra* note 14, at 35–36.

however concerning on the surface, is ineffective in affecting actual election outcomes—or, at least, that it affects election outcomes in such a nominal way that it does not meaningfully break any electoral connection or otherwise facilitate entrenchment in a normatively worrisome way.[309] An empirical test of this idea would be of great value. But due to the many confounding factors affecting any given election—particularly when coupled with the subtleties of presidential control—it is not clear how to design such a study. These problems of measurement are compounded once one considers multiple elections and presidential administrations over time. Still, practical difficulties of measurements do not mean that normatively worrisome effects are not at play.

It likewise might be the case that presidents tend to influence election administration in ways that, rather than reflecting self-serving efforts at entrenchment, simply coincide with the shifting policy preferences of the electorate—regarding, for example, the optimal balance of efficiency and accuracy when regulating elections.[310] Were this characterization correct, presidential control of elections *would* be advancing accountability in more familiar ways, and perhaps in ways that overcome any incidental entrenchment effects. This possible defense of presidential involvement in elections is reflected in heated debates over the propriety of how administrations (in particular the administrations of Presidents Bush, Obama, and Trump) have enforced the VRA. Supporters of each administration often argue that DOJ's varying enforcement priorities simply reflect reasonable policy-based disagreements over how to administer open-ended statutes.[311]

Recently, this theory has become harder to advance, given the attempts by the Trump White House to engage in what appears to be entrenchment with unusual brazenness. Yet for any administration, the accuracy of this type of argument remains extremely difficult to measure. Multiple complications stand in the way: much of the work of the White House remains confidential; this line of argumentation itself depends on elusive measurements of entrenchment; and,

309. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 363–64 (2004) (discussing examples of the electorate overcoming efforts at entrenchment).

310. While presidents might indeed influence election policy based on concerns over good governance, rather than their own electoral prospects, history suggests that the latter set of considerations tends to dominate. *See* Manheim & Porter, *supra* note 18, at 232–34.

311. *Compare, e.g.*, Morley, *supra* note 120, at 291–92 (pushing back against the conclusion that the Bush-era DOJ, and other administrations headed by Republican presidents, improperly politicized the VRA), *with* Karlan, *supra* note 112, at 19 ("[W]e saw an administration transform the Department of Justice, and particularly the Civil Rights Division's Voting Section, from a nonpartisan protector of voting rights into a political actor."). *See generally* RHODES, *supra* note 120 (describing how DOJ's enforcement of the VRA has changed over time).

fundamentally, it assumes normative baselines (regarding, for example, how an election statute should be interpreted or what a fair election looks like) that are themselves hotly disputed.[312] Moreover, the electorate itself may desire entrenchment, thereby collapsing the relevant distinction. In short, it is difficult to separate presidential control driven by mere policy preferences with presidential control driven by entrenchment interests. Once again, however, these practical difficulties do not mean that the normative concerns are unfounded.

Finally, it may be the case that the underlying electoral connection—between voters, the president, and the administrative state—is already so tenuous that any theory of accountability fails at the outset. Stated otherwise, perhaps presidential control of elections poses no new normative concerns because elections are *already* failing to hold the executive branch accountable or to otherwise reflect the will of the electorate. Once again, it is not easy to test this hypothesis empirically—though scholars, such as Nicholas Stephanopoulos, drawing on recent political science literature, have tried, with results generally not faring well for well-worn theories about electoral accountability.[313] Still, whatever the data show, the theories are not going away anytime soon: vast swaths of legal scholarship, as well as judicial doctrines, continue to posit that the electoral connection helps to legitimize the work of the executive branch.[314] If this proposition is empirically correct, at least in part, then presidential control of elections is a concern because it threatens to compromise this electoral connection. If, as an empirical matter, the proposition is flatly incorrect, presidential control of elections may help to provide a partial explanation as to why.

In short, despite persistent difficulties of measurement, presidential control of elections does pose significant normative concerns, with relatively little to offset its potentially negative effects. These concerns are most prominent when the president's influence actually impairs the electoral connection—by influencing election rules in ways that make it meaningfully more difficult for the electorate to hold the president accountable. Particularly in those circumstances,

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312. *See generally* Manheim & Porter, *supra* note 18, at 236 (describing fundamental disagreements regarding normative baselines); Lisa Marshall Manheim, *Belling the Cat: The Story of* Vieth v. Jubelier, *in* ELECTION LAW STORIES, *supra* note 159, at 179, 181–82:

> [*Vieth*] reflects a long history in the United States of politically motivated redistricting, which . . . has been defined by a deep analytical struggle over what sorts of practices should be accepted as fair (or constitutional) and, by contrast, what sorts of practices must be rejected as unfair (or unconstitutional).

313. Stephanopoulos, *supra* note 1, at 1067.

314. *See supra* note 1 and accompanying text; *see also* Andrias, *supra* note 4, at 1099 (addressing this counterargument in a related context).

presidential control of elections should be carefully checked. The next Section turns to the question of how.

B. Checking Presidential Control

While checking presidential control of elections has normative appeal, it also poses a range of challenges, including those relating to efficacy, cost, and constitutionality.[315] Still, reformers need not begin on a blank slate. Congress—as the entity empowering the president to influence election administration in the first place—appears to have structured many of these powers with these concerns in mind.[316] And so each of Congress's efforts presents a model to consider. As discussed above, Congress has relied primarily on three basic models: an executive-agency model with little rulemaking power; an independent-agency model with an even-numbered, bipartisan commission; and limited grants of unilateral power to the president. Each of these frameworks has flaws. Yet tweaks to these preexisting structures, particularly when coupled with doctrinal changes in the courts, may help to minimize, at an acceptable cost, the most problematic forms of presidential control.

This Section will discuss how reformers might begin this process. It recognizes that these congressional models reveal at least four areas where, under current law, the president is able to exercise control over elections without significant checks. These include nonenforcement decisions; induced gridlock; unilateral exercise of presidential power; and unchartered waters—what this Article calls places where presidents generally have not ventured, but soon might. For each of these areas, appropriate reforms would look to install meaningful checks by empowering entities outside the executive branch.

In taking this approach, this Section resists the temptation to try to identify a sweeping cure-all. It instead recognizes that no panacea for this complicated set of issues could possibly exist. Control over election administration is a highly problematic form of power, one whose threats to democratic values can be managed but not neutralized. Control over election administration is inherently problematic: the exercise of this type of power by *any* official helps to shape electoral mechanisms that, directly or indirectly, are intended to justify and check that official's exercise of power in the first place.

315. *See supra* Section III.A.

316. *See supra* Section II.D.1 (explaining how the ways Congress has designed these grants of power, across all three of the basic models, suggest a conscious effort by lawmakers to insulate election-related decisions from the president).

Stated otherwise, even if it were possible to completely remove the president from the process of election administration,[317] that authority would have to reside somewhere—and no locus of power provides a perfect solution. Assigning powers of election administration to any other elected official implicates similar normative concerns relating to entrenchment and, particularly in the case of multimember legislative bodies, strains their institutional capacities. Assigning these powers to politically insulated bureaucrats—those truly independent of electoral politics—poses its own threats to legitimacy and also implicates risks of capture, which can lead to particularly ominous forms of entrenchment. Assigning these powers to other unelected bodies—such as courts—not only threatens to overcome their own institutional (and constitutional) capacities; it also may undermine their legitimacy in the eyes of the electorate.[318] None of these observations should be taken to suggest that these alternative actors should be removed completely from the project of election administration. To the contrary, each serves as a necessary contributor. Instead, these observations confirm the need for nuanced reform—and, ultimately, a regime whereby this problematic form of power is exercised in cabined ways, by different actors, all subject to meaningful checks.

The U.S. Constitution itself provides a model for managing such problematic forms of power, through its dogged reliance on checks and balances.[319] This Article proposes an analogous approach. Rather than trying to eliminate this problematic form of power, legislators and jurists should seek to ensure that control of election administration runs through different entities, on parallel tracks, thereby ensuring adequate checks on each—including the president.

This approach requires identifying areas where a president can exercise control without robust checks. As noted above, several areas stand out in this regard: nonenforcement decisions; induced gridlock; and unilateral presidential orders. A fourth area of concern involves unchartered waters—the places where prior presidents have not ventured, but where they soon might, particularly in light of the breakdown of norms. For each of these areas, appropriate reforms would look to install meaningful counterbalance by empowering entities outside the executive branch.

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317. *But see supra* Section II.D (explaining why it is not possible to remove the president entirely from the process).

318. *See* Renan, *supra* note 21, at 2273, 2281 ("[T]he judicial role in presidential norm enforcement should be limited. Courts cannot solve the problems of constitutional governance.").

319. This high-level approach also is reflected in a recent essay by Edward B. Foley. *See* Foley, *supra* note 20, at 139.

The first comes in the area of nonenforcement. In response to nonenforcement decisions by the executive branch, Congress struggles to respond, and the courts are notoriously hesitant to intervene.[320] To some extent, the only effective check comes in the next presidential election, when dissatisfied voters theoretically can vote in a more committed chief executive (assuming, of course, that they can overcome any entrenchment effects). In the meantime, however, a partial solution does come through robust private rights of action.[321] When the executive branch will not enforce a statutory mandate, private rights of action allow outside actors to pick up at least some of the slack. Unfortunately, private rights of action do not exist, or their availability is limited or in dispute, in important areas of election administration.[322] Congress should clarify that these rights of action exist and also pass measures to better facilitate their use. The courts, meanwhile, should reconsider their growing resistance to recognizing and accommodating these private rights of action, particularly in the context of election administration.[323]

A second area with feeble checks emerges out of a related issue: agency gridlock. Many—scholars, judges, politicians, and members of the gridlocked agencies themselves—have roundly criticized this phenomenon, particularly as it relates to the FEC.[324] The concerns raised by presidential control of elections add further fuel to this fire. From this perspective, Congress's attempt at curbing presidential control—through a bipartisan, evenly numbered leadership team with tenure protections—has not been a success. Perhaps this perverse result was intentional.[325] Regardless, as a means of curbing presidential control, the current structures of the FEC and EAC are hard to defend. The structure grants some presidents too much power. It grants other

320. *See* Andrias, *supra* note 4, at 1034 ("Nonenforcement in particular, which is subject to few judicial checks, has proved to be an important tool for advancing the presidential agenda."); *see also, e.g.*, Citizens for Resp. & Ethics in Wash. v. FEC, 892 F.3d 434, 438–40 (D.C. Cir. 2018) (discussing the validity and jurisprudential support for an "agency's prerogative not to proceed with enforcement").

321. Another possibility is to give individuals the statutory right to challenge agencies' non-enforcement decisions. However attractive this option might be in theory, an apparent attempt by Congress to confer this power vis-à-vis the FEC has not accomplished much in practice. *See* Citizens for Resp. & Ethics in Wash.v. Am. Action Network, 410 F. Supp. 3d 1, 6 (D.D.C. 2019) ("To the Court's knowledge, this is the first suit to be filed under FECA's citizen-suit provision."); *see also Citizens for Resp. & Ethics in Wash*., 892 F.3d at 440 ("[A]n agency's exercise of prosecutorial discretion is not subject to judicial review.").

322. *See supra* notes 271–272 and accompanying text.

323. *See supra* Section II.D.2 (discussing jurisprudential trends).

324. *See, e.g.*, Tokaji, *supra* note 54, at 179–84 (criticizing the "frequency and intensity of party line deadlocks" at the FEC).

325. *See supra* Section II.B.

presidents too little.[326] Some changes to the commission structure, such as replacing the even-numbered commission with an odd-numbered commission or revisions to the quorum rules, may help to reduce these opportunities for gridlock.[327] Other tweaks, such as the gridlock-resisting judicial doctrines advanced by Jennifer Nou, are steps in the right direction.[328] Without such changes, the opportunity for gridlock will continue to produce an unfortunate and counterintuitive result: independent agencies proving, in fundamental respects, to be worse than executive agencies for purposes of curbing presidential control.

As for unilateral presidential control, this implicates a third area with inadequate checks. Congress should act more aggressively on its apparent intuition that this form of control is particularly problematic in the context of elections. It is hard for courts to enforce substantive limits over direct grants of power to the president.[329] Very few procedural limits even exist.[330] The result is what one might expect: an erratic set of decisions that track the idiosyncratic preferences—or, even more troublingly, the electoral prospects—of the sitting president. Admittedly, there is one offsetting benefit potentially associated with unilateral presidential control: the clarity with which the president acts as the decisionmaker, which theoretically facilitates efforts by voters to hold the president politically accountable. Otherwise, however, this regime provides little incentive for a president to effectuate the concerns of the electorate, rather than advance her own interest in entrenchment. In short, this form of control poses particularly acute normative concerns. To this end, it is telling that even in the hyperpolarized political environment that dominated the Trump era, Congress worked on a bipartisan basis to try to strip some unilateral power from the presidency in the area of elections.[331] Congress should

326. *See supra* notes 174–180 and accompanying text.

327. *See, e.g.*, Tokaji, *supra* note 54 (identifying and criticizing possible reforms). Notably, some of these reforms appear in a bill recently introduced in the House of Representatives. *See* Federal Election Administration Act of 2017, H.R. 3953, 115th Cong. (2017).

328. *See* Nou, *supra* note 44, at 138 (proposing "an institutional understanding of *Skidmore* deference to interpretive documents prepared by politically insulated actors within election-related administrative agencies"); *see also id.* at 177 (questioning whether courts should adhere to a form of election-administration exceptionalism, in light of the "unique problems of federal election administration"); Jennifer Nou, *Administering Democracy: Policing a Partisan Census*, TAKE CARE BLOG (Apr. 22, 2019), https://takecareblog.com/blog/policing-a-partisan-census [https://perma.cc/DA4E-3YP4] (arguing that "arbitrary and capricious review should be more searching in the electoral context").

329. Manheim & Watts, *supra* note 81, at 1769–74 (discussing the unsettled nature of judicial review for presidential orders).

330. *Id.*

331. More specifically, Congress stripped some power from the presidency in response to President Trump's controversial exercise of unilateral power over election-related sanctions, and it contemplated further steps. *See supra* Section II.C.

expand these efforts—including with respect to the narrow but potentially consequential form of control the president can exercise over the Census via 2 U.S.C. § 2a.[332]

A final area warranting attention looks to the future, where a president seeking control over election administration might be willing to break new ground. At least two areas of possibility are of particular importance. The first involves control over election-related rulemaking. Were Congress to move more of this power to create legally binding orders to executive agencies—or if, with respect to regulatory power of the IRS, the president were to disregard norms separating his own preferences from that agency's work—the president may begin to influence these rulemakings in a way that dramatically expands the scope of presidential control. This development would exacerbate the threat of entrenchment. In this circumstance, judicial review plays an invaluable check. Courts have the ability to develop and enforce doctrines pushing back against inappropriate forms of rulemaking.[333] Here, a significant challenge would be in designing doctrines able to suss out and resist improper political influence in agency rulemaking.[334] The precise shape that these doctrines could take, particularly as applied to election administration, deserves extensive study. Outside the context of election administration, both courts and scholars are turning their attention to these questions. This area of the law nevertheless remains unsettled,[335] with presidential control of elections helping to confirm the urgency of this ongoing work.

The second area of future concern involves presidents intervening in individual enforcement actions for political purposes. As discussed above, recent norms prohibiting this sort of behavior developed out of the scandals engulfing Richard Nixon's presidency, including as a response to Nixon's commandeering of the IRS to help friends and hurt foes in support of his own reelection efforts.[336] If

332. *See supra* notes 231–238 and accompanying text.

333. *See, e.g.*, Manheim & Watts, *supra* note 81, at 1748 (suggesting that the recent rise in litigation aimed at President Trump may indicate "an enduring change in the way litigants challenge executive-branch policies"); Watts, *supra* note 21, at 727 (outlining doctrinal mechanisms through which courts can manage presidential control, including "statutorily facing rules," "transparency-enhancing mechanisms," and "process-forcing rules"); *cf. supra* Section II.D and accompanying text (discussing current jurisprudential trends that may be headed in a different direction).

334. *See, e.g.*, Watts, *supra* note 21 (explaining that there are both positive and negative aspects of presidential influence on agency rulemaking).

335. *See, e.g.*, Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 282–83 (2019) (describing developments in presidential administration, corresponding shifts in Supreme Court jurisprudence, and how the role of states complicates the implications of both).

336. *See supra* notes 133–135 and accompanying text.

presidents were to follow Trump's lead in allegedly reviving this approach to selective enforcement,[337] it will be imperative for Congress and the courts to identify ways to aggressively curtail such behavior.[338]

This list of concerns and corresponding proposals is hardly comprehensive. Instead, it is a start to the project of unpacking the many implications of presidential control of elections. It is important to consider these implications not only in response to isolated incidents or concerns, but also in a holistic manner. After all, the effects that a president has over elections are cumulative, with the sum potentially worse than the parts. By carefully examining and, as appropriate, checking this phenomenon across the executive branch, reformers may be able to advance values such as technocratic expertise and political accountability, all while helping to increase the degree to which election results reflect the will of the electorate. Each of these conditions is vital in a democracy.

CONCLUSION

Elections undergird the modern administrative state. They determine who serves as the chief executive atop a sprawling branch of government. Elections also determine who serves in Congress, the branch charged with checking—and, to a large extent, defining—the scope of executive power. For these reasons, elections normally are understood to help justify and moderate not only the president's own efforts in office, but also the vast work accomplished by administrative agencies. In both legal scholarship and judicial doctrines, this electoral connection appears routinely, and prominently, as a legitimizing force.

Yet as this Article has explained, there is a strain in the basic logic underlying this electoral connection. At core, the model takes as a given that the elections purporting to legitimize the president's time in

337. *See, e.g.*, Matt Ford, *Trump Conscripts DOJ into His Reelection Campaign*, NEW REPUBLIC (Feb. 14, 2020), https://newrepublic.com/article/156585/trump-conscripts-doj-reelection-campaign [https://perma.cc/FJ9A-4QS5] ("[President Trump] appears to be eager to use [his] powers to advance his own personal political interests.").

338. In response to these developments, commentators have been attempting to identify the governing legal principles and propose appropriate responses. *See, e.g.*, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters*, PROTECT DEMOCRACY 29–35 (2018), https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/ [https://perma.cc/F7NF-S3CW]; Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 72–73 (2018) ("The effort to exert total control over DOJ is part of a larger pattern in which [President Trump] has undermined the institutions of democracy and the rule of law . . . ."). I am indebted to Joshua Sellers for an informative discussion addressing the many ways that Congress could consider reforming agencies, as well as exercising its own oversight powers, to deter these potential abuses and also to bring them light.

office serve as an exogenous referendum on the president's performance. In light of presidential control of elections, however, this assumption starts to break down. The elected head of the executive branch has legal tools to affect election rules in consequential ways. By using these tools to tilt electoral playing fields in his favor, the president does more than simply influence election outcomes (though that effect alone is, of course, of great significance). He also threatens the lines of accountability that purport to legitimize his use of these legal tools in the first place.

Understanding the normative implications of this phenomenon requires examining how it manifests in practice. As this Article has demonstrated, presidential control of elections manifests in ways that tend to track how Congress has structured the relevant grant of power. These patterns demonstrate that congressional attempts at agency insulation from the president may at times backfire, as they empower the president to control election administration in significant but erratic ways that at times lack a meaningful check. These forms of control raise serious normative concerns. Without adequate checks, presidential control of elections threatens to undermine both technocratic expertise and accountability, two principles underlying the administrative state. The phenomenon also heightens risks of entrenchment, which in turn raises concerns over the extent to which affected elections reflect the will of the electorate.

It is time to consider course corrections. Congress and the courts should identify specific areas where the president's influence over election administration lacks an effective check and empower other political actors to counterbalance the president's influence in those spaces. This approach reflects a longstanding insight about inherently problematic forms of governmental power: sometimes they must be managed, rather than eliminated. For these particularly tricky forms of official authority, checks and balances offer a promising way forward.