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# The Future of Agency Independence

Lisa Schultz Bressman

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# The Future of Agency Independence

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Lisa Schultz Bressman  
Robert B. Thompson

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*Independent agencies have long been viewed as different from executive-branch agencies because the President lacks authority to fire their leaders for political reasons, such as failure to follow administration policy. In this Article, we identify mechanisms that make independent agencies increasingly responsive to presidential preferences. We find these mechanisms in a context where independent agencies traditionally have dominated: financial policy. In legislative proposals for securing market stability, we point to statutorily mandated collaboration on policy between the Federal Reserve Board and the Secretary of the Treasury. In administration practices for improving securities regulation, we focus on White House coordination of, and Treasury Department involvement in, the policy of the Securities and Exchange Commission. We argue that these mechanisms undermine the conventional distinction between independent agencies and executive-branch agencies. Additionally, we argue that these mechanisms, though producing presidential involvement short of plenary control, are consistent with the strategic political interests of the President. We further contend that they promote political accountability, particularly because greater presidential control is unnecessary to align agency preferences with presidential preferences; indeed, such control might be counterproductive. In making this argument, we present a nuanced vision of accountability and update the standard justifications for independence. We also consider the constitutional implications of the new independence-accountability hybrids that we see, as well as possible applications in areas where executive-branch agencies traditionally have dominated. Our claim is not that these hybrids are part of law in any of these contexts; rather, we seek to highlight institutional relationships that outstrip conventional categories but fit with the development of the administrative state. In the future, agency independence will occur not at odds with political accountability but engaged with it along a spectrum of institutional structures.*

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# The Future of Agency Independence

*Lisa Schultz Bressman\* & Robert B. Thompson\*\**

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## INTRODUCTION

Independent agencies occupy a different legal and political space than executive-branch agencies based largely on their relationship to the President. Independent agencies, including New Deal stalwarts such as the Federal Communications Commission (“FCC”), the National Labor Relations Board (“NLRB”), and the Securities and Exchange Commission (“SEC”), are run by collegial bodies whose members serve fixed, staggered terms.<sup>1</sup> The President cannot fire the members of these agencies for political reasons, including failure to follow administration policy, but only for “good cause,” such as neglect of duty or malfeasance in office.<sup>2</sup> This removal restriction, more than any other feature, has served to differentiate independent agencies from executive-branch agencies. By design, independent agencies are insulated from the plenary control of the President.

In this Article, we identify mechanisms that make independent agencies increasingly responsive to presidential preferences. We argue that these mechanisms undermine the traditional binary division between independent and executive-branch agencies. Others have noted that the President possesses certain means to influence independent agencies, such as appointment of members, designation of chairpersons, and assistance with budget negotiations.<sup>3</sup> The

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1. *E.g.*, 15 U.S.C. § 78d (2006) (SEC); 29 U.S.C. § 153 (2006) (NLRB); 47 U.S.C. § 154 (2006) (FCC).

2. *See, e.g.*, 29 U.S.C. § 153 (“Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”). Although the SEC statute lacks explicit removal language, it is “commonly understood” to include a “for cause” removal limitation. *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619–20 (2d Cir. 2004) (quoting *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988)).

3. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469–77 (2008) (demonstrating empirically that the President influences independent agencies through appointment of members, although with certain limits); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–91 (1984) (arguing that the President influences independent agencies through appointment of members, selection

mechanisms that we identify are more surprising and potentially more significant: they facilitate the sort of direct and formal involvement in substantive policy that the President has sought for executive-branch agencies. We do not claim that these mechanisms are identical to those that the President possesses for executive-branch agencies, but they do suggest more complex institutional relationships than the traditional on-off switch between independence and accountability. Even if an independent agency is not under the thumb of the President, it might still feel the hand of the President.

Looking at these mechanisms, we make several additional points. First, we maintain that the President does not always have a political interest in seeking maximum control of regulatory policy, although political scientists have generally assumed the opposite.<sup>4</sup> The President may actively support a degree of agency independence, rather than simply swallow it. Second, we contend that political accountability does not always require the President to possess plenary control of regulatory policy, although legal scholars have generally assumed the opposite. Accountability can be served through presidential involvement short of plenary control, particularly if such control is not necessary to align agency preferences with presidential preferences and instead might be counterproductive. In making this argument, we offer a nuanced vision of accountability in which presidential collaboration on, and selective intervention in, regulatory policy can provide the requisite political nexus. Third, we update the traditional justifications for independence. Independence entails expertise and, more specifically, the ability to resist short-term political pressures when detrimental to long-term goals. Fourth, and finally, we argue that the Constitution can accommodate the institutional relationships that we describe, although the Supreme Court's analysis could benefit from some fine-tuning.

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of chairs, and assistance with budget negotiations); see also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 291–301 (1994) (arguing that the Solicitor General influences the policy of independent agencies by controlling their litigation); Elliot Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1087–90 (2009) (arguing that the ability of the Supreme Court to call for the views of the Solicitor General even when independent agencies have their own litigating authority enables the Solicitor General to check those agencies); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943–44 & n.1 (1980) (describing jawboning as the ability of the President to influence agency decisions through informal contacts with agency officials).

4. See, e.g., Devins & Lewis, *supra* note 3, at 466 (“Presidents typically see themselves as heads of the regulatory state and fight tooth and nail to resist congressional delegations to independent agencies.”).

We make these points in a context where independent agencies long have dominated: financial policy. The Federal Reserve System is perhaps the most visible example, setting monetary policy free from political intervention. Yet we now see new relationships emerging for other key issues, including regulation of “market stability” and securities markets. The term “market stability” broadly recalls the systemic problem that imperiled the economy in the fall of 2008.<sup>5</sup> An effective response requires economic expertise. Moreover, short-term political interests may cause the system to misfire once again. Despite these justifications for independence, the legislative proposals for regulation of market stability do not hermetically seal the responsible agency from the information and judgment that political actors bring to the table. Rather, we see statutorily mandated collaboration between an independent agency (either the Federal Reserve Board of Governors or a multi-member council) and the Secretary of the Treasury, a cabinet official with direct access and ultimate responsibility to the President.<sup>6</sup>

In other areas of the financial world, such as the regulation of securities transactions and markets, we see other mechanisms for presidential involvement on matters of political salience. Even before the recent financial crisis, Secretary of the Treasury Henry Paulson took publicly visible—and largely successful—steps to redirect SEC regulations on issues at the core of securities regulation.<sup>7</sup> Secretary Paulson thus increased the Treasury Department’s level of involvement in securities issues in an official manner and without congressional assistance. Stepping back, this administration practice is similar to the ones that modern Presidents have used to increase their involvement in the policy of executive-branch agencies, both directly through personal intervention and indirectly through the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget.<sup>8</sup> Although Secretary Paulson could not back any directive to the SEC with the threat of presidential

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5. See discussion *infra* Part II.A.

6. See *id.*

7. E.g., Stephen Labaton, *Doubts Greet Treasury Plan on Regulation*, N.Y. TIMES, Apr. 1, 2008, at A1 (noting that “Treasury Secretary Henry M. Paulson Jr. laid out an ambitious plan to overhaul the regulatory apparatus that oversees the nation’s financial system,” including major alterations to the structure of securities and commodities regulation).

8. E.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006) (order by President Reagan establishing requirements for agencies to follow in promulgating regulations, reviewing regulations, and developing legislative proposals concerning regulation) (12,291 also available at 46 Fed. Reg. 13,193 (Feb. 17, 1981)).

removal, he achieved the desired result.<sup>9</sup> Through Secretary Paulson, the President steered securities regulation.

The bulk of our argument is not simply that these hybrid relationships challenge standard accounts of the line dividing independent and executive-branch agencies. We argue that what may appear to be incomplete presidential control over the policy of independent agencies is actually sufficient to satisfy political interests and to serve normative values in the financial context, particularly because the hybrid relationships are backed by other factors that reduce the need for stronger presidential control. The election mantra, "It's the economy stupid!" has broad impact for administrative law. It means that both the President and the financial agencies share a basic interest—the health of the economy—and will be evaluated by the same metric.<sup>10</sup> Furthermore, that metric is easily observed in the developed markets and the publicly available performance data about the economy. We believe that this alignment of interests suggests a reason why, from a positive political perspective, the President might favor a measure of independence. Likewise, we believe that this alignment should count in the normative accountability equation because it makes stronger presidential control unnecessary to ensure that agency preferences roughly track presidential preferences.

In addition to the alignment of interests, we note that, under certain conditions, the markets themselves provide a kind of backstop on the policy that the financial agencies can adopt. Agency discretion is implicitly limited by what the markets and their participants will tolerate. This factor, too, means that stronger presidential control is unnecessary. Moreover, such control may be detrimental to the extent that markets are sufficiently competitive. Political influence, which is democratizing in certain circumstances, can create distortions in the administrative process. An agency with a degree of independence can ensure that short-term interests do not override longer-term goals.

In making these arguments, we do not intend to discount other arguments that further a more nuanced understanding of accountability. For example, some have argued that private-public partnerships and intra-agency checks help to meet the demand for

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9. See, e.g., Amit R. Paley & David S. Hilzenrath, *SEC's Cox Defends Approach*, L.A. TIMES, Dec. 27, 2008, at 3 ("But in publicly acknowledging for the first time that the [short-selling] ban was not productive, Cox said he had been under intense pressure from Treasury Secretary Henry M. Paulson Jr. and Fed Chairman Ben S. Bernanke to take the action and did so reluctantly.").

10. See ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD 122 (2007) (noting that President George H.W. Bush blamed Federal Reserve Chairman Alan Greenspan for his 1992 reelection defeat).



accountability.<sup>11</sup> Indeed, we agree. Still, those arguments leave unaddressed the specific demand for presidential control of regulatory policy, which only seems to grow stronger over time in both political and academic circles.<sup>12</sup> We provide an alternative that speaks to the basic interests and values behind the demand for presidential control. It will not satisfy all, particularly those who believe that the Constitution vests all law execution in the President and therefore prohibits independent agencies.<sup>13</sup> But it can satisfy many.<sup>14</sup>

In the final Parts of the Article, we consider the constitutional implications of our arguments, as well as broader applications. The Supreme Court has long upheld the constitutionality of independent agencies.<sup>15</sup> As new forms present new questions, we believe that the Court's analysis would benefit from a greater focus on the precise relationships between agencies and administrations. Although the constitutional test has changed over time to better account for agency-administration interactions, it could come further still.<sup>16</sup>

As to broader applications of our arguments, we are particularly attracted to contexts in which executive-branch agencies traditionally have dominated. We identify two possibilities: health care and climate change. Independent agencies have been proposed in both contexts and have become part of the governing law in one. We can understand why. Like financial policy, these subjects are politically controversial. Moreover, they involve a predictable conflict between short-term political interests and long-term public goals.

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11. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546–47 (2000) (arguing that private actors play a role in checking the action of agency officials); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1560–62 (2007) (arguing that legal advisors within the executive branch check the actions of that branch); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316–17 (2006) (arguing that civil service members within the executive branch check the actions of that branch).

12. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 486–91 (2003) (describing the call for presidential control of regulatory policy).

13. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994) (making the constitutional argument).

14. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (offering a more pragmatic defense of presidential control); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (same).

15. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619 (1935) (finding constitutional a statutory provision that prevented the President from removing members of the Federal Trade Commission except for cause).

16. See *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988) (formulating the constitutional test as whether congressional limitations on presidential control of agency officials or decisions unduly impede presidential authority, but noting that formal agency functions are still relevant).

Because we observe some similarities in these areas, we see the potential for new hybrids to address them. But we also observe some relevant differences, which suggest that political officials may strike the precise balance between independence and accountability differently. We nevertheless believe that they help to refine our basic points, and we offer them in that spirit.

The contexts examined in this Article are not the first ones to suggest a shared relationship between independent agencies and executive-branch officials. For example, existing statutes require the Federal Reserve Board of Governors and the Secretary of the Treasury to work together to address certain discrete financial issues, such as Internet gambling and national banking subsidiary criteria.<sup>17</sup> These statutes confer joint regulatory authority on the government actors involved. Congress has also mandated joint action between the Secretary of the Treasury and other independent agencies.<sup>18</sup> In addition, several statutes require independent agencies, such as the SEC, to consult with the Secretary of the Treasury or another executive-branch official before taking action.<sup>19</sup> These statutes

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17. *See, e.g.*, Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367 (2006) (prohibiting any person from placing wagers or bets over the Internet when such wagers would be illegal in the state where they are made and directing the Secretary of the Treasury and the Board of Governors of the Federal Reserve System to work together on a series of issues, for example promulgating (in consultation with the Attorney General) regulations requiring Internet payment systems to establish procedures to identify and block prohibited transactions); National Bank Act, 12 U.S.C. § 24a(a)(3)(A)(ii) (2006) (authorizing the Secretary of the Treasury and the Board of Governors of the Federal Reserve System to jointly issue regulations defining some of the criteria that national banks must meet to control a financial subsidiary, and, for example, requiring them jointly to establish an indexing mechanism to adjust over time the amount of assets that a national bank is required to hold).

18. *See, e.g.*, Importation of Hazardous Material Act, 15 U.S.C. § 1269(b) (2006) (requiring the Secretary of the Treasury and the Consumer Product Safety Commission to issue joint regulations regarding the efficient enforcement of the provisions describing the process of examining hazardous substances imported into the United States); Shipment of Valuables Act, 40 U.S.C. § 17302(a) (2006) (directing the Secretary of the Treasury and the United States Postal Service to jointly prescribe regulations for the shipment of valuables by federal government employees).

19. *See, e.g.*, 15 U.S.C. § 78l(k)(6) (2006) (providing that before an emergency suspension of trading on all national securities exchanges, the SEC shall consult with the Secretary of the Treasury, Board of Governors of the Federal Reserve, and the CFTC); *id.* § 78o-5(e)(2) (providing that the SEC shall consult with the Secretary of the Treasury before exempting government securities brokers or dealers from the requirement of membership in a registered national securities exchange or securities association); *id.* § 78s(b)(5) (providing that the SEC must consult with and consider the views of the Secretary of the Treasury prior to approving, abrogating, adding to, or deleting any proposed rules filed by a registered securities association regarding transactions in government securities); *id.* § 7244(a)(3) (providing, under the Sarbanes-Oxley Act, that the SEC shall consult with the Secretary of Labor in issuing rules regarding the ban on insider trading during “pension fund blackout periods”); *id.* § 3391(a), (b) (providing that, although any curtailment plan of an interstate natural gas pipeline cannot

condition an important governmental power, such as the promulgation or the suspension of certain rules or requirements, on independent-agency / executive-department collaboration. These existing statutes, in our view, indicate that alternative accountability mechanisms can work in practice, at least for certain issues. We save for another day the project of cataloguing and evaluating the range of formal interactions between independent and executive-branch agencies that we see.

To be clear, we are not claiming that the examples we present in this Article have altered the legal or political landscape yet. We do not know which legislative proposals will be enacted or whether any of the recent administration practices will be repeated. Nor do we attempt to read the tea leaves concerning the future of financial reform or any other issue. Rather, we seek to illustrate institutional relationships seemingly out of place given conventional categories, political interests, and normative values. That actually may enhance our understanding of agency independence in the future.

The Article proceeds as follows. Part I discusses independent agencies in the context of administrative law, with particular reference to financial agencies. It sets forth the features that long have been understood to distinguish independent and executive-branch agencies. It also provides the justifications for independence, updated for modern financial policy. Finally, it describes the shift toward presidential control of regulatory policy. Part II presents mechanisms that make financial agencies more responsive to presidential preferences. It then argues that these mechanisms, drawn from legislative proposals and administration practices, are significant for the regulatory state from both a political and normative standpoint. Part III considers the constitutional implications of the hybrid institutional relationships that we see. We argue that the Constitution can accommodate these relationships, but that the analysis would benefit from more specific consideration of their dynamics. Part IV examines two other areas in which hybrid institutional relationships have been floated: health care and climate change. These areas, traditionally dominated by executive-branch agencies, exhibit some similarities and some differences that help to refine our analysis.

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curtail the delivery of gas for "essential agricultural use[s]," this restriction does not apply if the Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines that the use of alternative fuels is practicable); 16 U.S.C. § 1362(1)(A) (2006) (requiring the Secretary of the Interior to consult with the Marine Mammal Commission on a variety of issues related to the protection of marine mammals, including when a species has fallen below "optimum sustainable population").

## I. FINANCIAL AGENCIES IN THE CONTEXT OF ADMINISTRATIVE LAW

This Part sets the stage by describing financial agencies in their general context. It describes the structural features that have been seen as distinguishing independent agencies from executive-branch agencies. Next, it provides and updates the justifications for independence. Finally, it details the political and normative trends that form the backdrop for examining financial agencies today.

*A. Independent Agencies vs. Executive-Branch Agencies*

When Congress seeks to delegate a regulatory function, a key design choice is whether to grant that function to an independent agency or an executive-branch agency. Financial agencies, which exercise expansive influence over the nation's financial affairs, are among the most prominent independent agencies. They include the Board of Governors of the Federal Reserve System,<sup>20</sup> the SEC,<sup>21</sup> the Commodity Futures Trading Commission ("CFTC"),<sup>22</sup> and various other entities that have their own unique statutory characteristics.

The Federal Reserve System is made up of the Board of Governors, a centralized government entity in Washington, D.C., and the twelve regional Federal Reserve banks, which possess a mix of private and public characteristics. Together they operate as a central bank.<sup>23</sup> Setting interest rates, the best-known central bank function, actually belongs to the Federal Open Market Committee.<sup>24</sup> The seven Fed Governors make up a majority of this committee, and the presidents of the twelve regional Federal Reserve banks provide the other five votes.<sup>25</sup> The Board of Governors is an independent agency. Its seven members are appointed by the President and confirmed by the Senate for staggered fourteen-year terms<sup>26</sup> It is the focus of the

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20. Federal Reserve Act, 12 U.S.C. §§ 221–522 (2006).

21. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78ll (2006). The SEC oversees the work of a variety of other actors, a mix of private and public, described in more detail in Part II, such as the PCAOB, FASB, MSRB, FINRA, and the New York Stock Exchange.

22. Commodity Exchange Act, 7 U.S.C. § 2(a) (2006 & Supp. II 2008).

23. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN L.J. AM. U. 461, 475 n.66 (1994) (citing 12 U.S.C. §§ 221–522 and ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 146–61 (1941)).

24. See, e.g., Timothy A. Canova, *Financial Liberalization, International Money Dis/Order, and the Neoliberal State*, 15 AM. U. INT'L L. REV. 1279, 1295 (2000) ("Contrary to popular opinion in the United States, interest rates are not set by the Board of Governors . . . of the Federal Reserve System . . . but by the Federal Open Market Committee . . .").

25. 12 U.S.C. § 263. The President of the New York Federal Reserve bank always has a vote; the other regional banks have the remaining four votes on a rotating basis.

26. 12 U.S.C. § 241.

reform discussions discussed here and is referred to as “the Fed” in that context.

The SEC and the CFTC are more straight-forward examples of independent agencies. Each has five members, who serve staggered terms and are split between the political parties.<sup>27</sup> The SEC “regulates stock exchange markets, the capital-raising process, secondary trading markets, financial intermediaries, and collective investment vehicles.”<sup>28</sup> The CFTC “regulates trading in futures exchanges, public brokerage houses, and commodity trading advisors and operators.”<sup>29</sup>

Other independent agencies are spread across the financial regulatory space. The Federal Deposit Insurance Corporation (“FDIC”) provides insurance for depositors in financial institutions and has important responsibilities in dealing with those failed financial institutions covered by the insurance program.<sup>30</sup> As the name suggests, it is actually a corporation and has five directors.<sup>31</sup> Three directors have full-time jobs in the FDIC; two are heads of other federal bank-regulating entities.<sup>32</sup> These two entities, the Office of the Comptroller of the Currency and the Office of Thrift Supervision, each have a single administrator and are nominally bureaus within the Department of the Treasury, although they act much like independent agencies.<sup>33</sup> The Federal Housing Finance Agency, within the Department of Housing and Urban Development until 2008, is now a freestanding agency with a sole administrator.<sup>34</sup>

A host of independent agencies exist outside the financial sector. Congress created some as early government responses to the

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27. 7 U.S.C. § 2(a)(2) (CFTC); 15 U.S.C. § 78d(a) (SEC).

28. Moreno, *supra* note 23, at 476 n.68 (citing 15 U.S.C. §§ 78a–78ll and CUSHMAN, *supra* note 23, at 327–45).

29. Moreno, *supra* note 23, at 477 n.72 (citing 7 U.S.C. § 4(a) (current version at 7 U.S.C. § 2(a)(2)).

30. Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1811 (2006).

31. *Id.* §§ 1811–1812.

32. *Id.* § 1812.

33. *Id.*; *see id.* § 1; 31 U.S.C. §§ 307, 321(c) (2006) (Comptroller of Currency); 12 U.S.C. § 1428 (2006 & Supp. II 2008); 31 U.S.C. §§ 309, 321(c) (Office of Thrift Supervision).

34. *See* 12 U.S.C. § 4511(a) (Supp. II 2008) (establishing the FHSA as an independent agency). The FHSA oversees Fannie Mae and Freddie Mac, lending institutions that were ostensibly independent corporations before they were folded back into the federal government during the meltdown of 2008. *Id.*; *see also* Press Release, Henry M. Paulson, Jr., Sec’y of the Treasury, Statement by Secretary Henry M. Paulson, Jr. on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), *available at* <http://www.treas.gov/press/releases/hp1129.htm> (outlining the steps taken to place Fannie Mae and Freddie Mac back in direct federal control). The leaders of the offices mentioned in the text typically are appointed by the President and confirmed by the Senate and have a sphere of action in which they operate on their own, outside of the cabinet department where they may be located. *E.g.*, 12 U.S.C. § 1812 (2006).

industrialization of the economy, such as the Interstate Commerce Commission and the Federal Trade Commission (“FTC”).<sup>35</sup> Congress created others during the New Deal, such as the FCC<sup>36</sup> and the NLRB.<sup>37</sup> Congress established still others in subsequent periods of reform, such as the Consumer Product Safety Commission,<sup>38</sup> the Federal Energy Regulatory Commission,<sup>39</sup> the Federal Maritime Commission,<sup>40</sup> and the Nuclear Regulatory Commission.<sup>41</sup>

Although the most prominent independent agencies show some variety in design, they share significant features. First, they possess regulatory authority in areas of significant economic or social import.<sup>42</sup> Many possess adjudicative authority, which allows them to resolve disputes and issue orders through a hearing or trial-type process.<sup>43</sup> Most possess authority to issue rules or regulations,<sup>44</sup> which set forth generally applicable policy that binds the agency and the public no differently than the organic statutes that these rules and regulations

35. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006). The FTC “regulates competition, prevents trade restraints and unfair methods, prevents pricing discrimination, enforces proper labeling and packaging of certain commodities, and gathers economic information.” Moreno, *supra* note 23, at 476 n.67 (citing 15 U.S.C. §§ 41–58 and CUSHMAN, *supra* note 23, at 177–213).

36. 47 U.S.C. § 154 (2006). The FCC “regulates interstate and international common carrier communications by telephone, telegraph, radio, and satellite, and the use of radio spectrum for industrial and business purposes.” Moreno, *supra* note 23, at 476 n.69 (citing 47 U.S.C. § 154 (1988 & Supp. V 1993) and CUSHMAN, *supra* note 23, at 320–26).

37. National Labor Relations Act, 29 U.S.C. §§ 153–169 (2006). The NLRB “oversees the collective bargaining process, industrial relations, and the prevention and remedy of unfair labor practices.” Moreno, *supra* note 23, at 476 n.70 (citing 29 U.S.C. §§ 153–169 and CUSHMAN, *supra* note 23, at 345–68).

38. Consumer Product Safety Act, 15 U.S.C. §§ 2053–2083 (2006). The CPSC “protects the public from risk or injury from consumer products, assists consumers, and establishes safety standards for consumer products.” Moreno, *supra* note 23, at 476 n.71 (citing 15 U.S.C. §§ 2053–2083).

39. 42 U.S.C. § 7171 (2006). The FERC “sets rates, and charges for transportation and sale of natural gas and electricity.” Moreno, *supra* note 23, at 477 n.73 (citing 42 U.S.C. § 7171).

40. Federal Maritime Commission Act, 46 U.S.C. §§ 301–307 (2006).

41. 42 U.S.C. § 5841 (2006). The NRC “oversees the construction and operation of nuclear reactors and other civilian nuclear facilities; the use, handling, and disposal of nuclear materials; and the licensing of nuclear power plants.” Moreno, *supra* note 23, at 478 n.75 (citing 42 U.S.C. § 5841).

42. See CUSHMAN, *supra* note 23, at 3–4 (defining “independent regulatory commission”). Some of the agencies in this group picked up functions exercised by prior agencies or executive departments. *Id.* at 6.

43. See *id.* at 8 (explaining the “quasi-judicial” power of independent agencies).

44. See *id.* at 8–9 (“[P]robably every independent regulatory agency exercises what is sometimes called ‘quasi-legislative’ power.”). Some agencies, such as the National Labor Relations Board, have used rulemaking power sparingly. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2017 (2009) (discussing NLRB practice of eschewing rulemaking).

implement.<sup>45</sup> Many have enforcement authority, which permits them to investigate and prosecute violations of their statutes and regulations.<sup>46</sup> Some powers are unique to the agency, such as the Fed's significant power to set monetary policy and conduct banking business.<sup>47</sup>

These attributes, however, are not what gives agencies their independence or what otherwise distinguishes them from their executive-branch counterparts: independent agencies are different in structure because the President lacks authority to remove their heads from office except for cause.<sup>48</sup> Thus, these agencies are independent in the sense that the President cannot fire their leaders for political reasons and, consequently, cannot use this ultimate sanction to back up particular policy recommendations.<sup>49</sup>

Independent agencies have other structural features that distinguish them from executive-branch agencies. They are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President and thus will likely depart with a change of administration, if not before. As mentioned, the Board of Governors of the Fed is run by the seven members who serve staggered, fourteen-year terms.<sup>50</sup> Board or commission membership is often subject to other restrictions. Not more than one Fed member may "be selected from any one Federal Reserve district" and the President, in selecting members, "shall have due regard to a fair representation of the financial, agricultural,

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45. *United States v. Mead Corp.*, 533 U.S. 218, 218 (2001).

46. *See CUSHMAN*, *supra* note 23, at 10 (describing the investigation function of independent agencies).

47. *See id.* at 8 (describing the Fed, in term of its powers, as "an exception"); *see also* 12 U.S.C. § 248 (2006) (outlining the Fed's powers).

48. For example, members of the Fed Board are removable by the President only "for cause." 12 U.S.C. § 242 (2006). The SEC, meanwhile, is not governed by a statutory removal restriction; instead, the removal power belongs to the President and is "commonly understood" as limited to "inefficiency, neglect of duty or malfeasance in office." *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619–20 (2d Cir. 2004) (quoting *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988)). The Supreme Court has held that the restrictions on the President's removal of Commissioners for "inefficiency,' 'neglect of duty,' or 'malfeasance in office'" are "very broad and . . . could sustain removal . . . for any number of actual or perceived transgressions . . ." *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

49. This definition differs from some popular definitions of independence, such as "[t]hose agencies that exist outside of the federal executive departments (those headed by a Cabinet secretary)." *See Independent agencies of the United States government*, [www.wikipedia.org/wiki/Independent\\_agencies\\_of\\_the\\_United\\_States\\_government](http://www.wikipedia.org/wiki/Independent_agencies_of_the_United_States_government) (last visited Mar. 7, 2010). That definition would include, for example, the Environmental Protection Agency, although the administrator of that agency is fully removable by the President.

50. 12 U.S.C. § 241–242 (2006).

industrial, and commercial interests, and geographical divisions of the country.”<sup>51</sup> Independent agencies are often subject to express bipartisan requirements. Of the five SEC commissioners, no more than three may belong to the same political party.<sup>52</sup> Several of the financial independent agencies have funding sources, usually from users and industry, which frees them from dependence on congressional appropriations and annual budgets developed by the executive branch.<sup>53</sup>

### *B. Justifications for Independence*

At the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics.<sup>54</sup> It is to achieve such insulation that the President may remove the heads of independent agencies only “for cause”; a President who cannot remove the personnel of the agency for policy disagreements lacks a key method to impose administration views. Similarly, the collective-board structure inhibits political control because politicians or regulated entities must capture a majority of the membership rather than just one individual. As Professor Robert Cushman noted, “It seemed easier to protect a board from political control than to protect a single appointed official.”<sup>55</sup> Other membership qualifications also ensure that no single political interest dominates regulatory policy by guaranteeing others a seat at the table. For example, the requirement that members of independent agencies represent both political parties is an overt attempt at achieving political balance. It is also a means to promote nonpartisan decisionmaking, which is particularly important for agencies that perform quasi-adjudicatory functions, such as holding hearings to determine possible violations of law.<sup>56</sup>

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51. *Id.* § 241.

52. 15 U.S.C. § 78d (2006).

53. *See, e.g.*, 12 U.S.C. § 243 (2006) (authorizing Federal Reserve Board to levy assessments against Federal Reserve banks in order to pay for operating expenses and member salaries); Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 253–58 (2004) (discussing self-funding mechanisms by financial regulatory institutions).

54. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (recognizing independent agencies require insulation from politics because its operations “should not be open to suspicion of partisan direction”).

55. CUSHMAN, *supra* note 23, at 153 (discussing the Federal Reserve).

56. *See, e.g.*, 107 CONG. REC. 5847 (1961) (statement of President John F. Kennedy) (“This does not mean that either the President or the Congress should intrude or seek to intervene in those matters which by law these agencies have to decide on the basis of open and recorded evidence, where they, like the judiciary, must determine independently what conclusions will serve the public interest as that interest may be defined by law.”). *See also* Donna M. Nagy,



Yet it is possible to speak in more specific terms about the traditional justifications for agency independence, as well as to update those justifications a bit for modern circumstances. Below we discuss the role of independence in promoting expertise, inhibiting short-term or narrow interests, and connecting with the private sector.

### 1. Promoting Agency Expertise

Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.<sup>57</sup> Many at this time thought that the social and economic problems confronting the nation could not be solved, and might be made worse, by politics. Rather, such problems required the sort of dispassionate professional judgment that only a cadre of experts could supply. This New Deal vision of expertise as sufficient to solve social and economic problems lost much of its appeal by the 1960s and 1970s.<sup>58</sup> By then, agencies had exhibited their own shortcomings. In addition, the legal realist movement cast doubt on the purported distinction between law and politics.<sup>59</sup> Thus, fewer regulatory decisions were seen as requiring purely technical competence and more were seen as also requiring political judgment.<sup>60</sup>

But it was possible, even during the New Deal, to view expertise in a more limited way that still holds today. Expertise was necessary to solve social and economic problems, and only independent agencies possessed the requisite sort. Congress lacked the kind of technical competence to solve the problems for which independent agencies were created. For example, the setting of railroad rates or the establishment of monetary policy involved complex matters that generalist legislators had neither the experience nor the time to handle.<sup>61</sup> The regulation of markets and the securities traded in them presented a similar problem.<sup>62</sup>

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*Playing Peekabo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1014–18 (2005) (describing the adjudicatory functions of the PCAOB and drawing similarities to the adjudicatory functions of the SEC).

57. See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 67 (1955) (quoting Speaker of the House Sam Rayburn as to why independent agencies are needed).

58. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678–88 (1975) (discussing the evolving views of courts and scholars).

59. See generally Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

60. See Bressman, *supra* note 12, at 475 (discussing the scholarly trend toward “an interest group representation model”).

61. BERNSTEIN, *supra* note 57, at 67.

62. This is perhaps even truer in recent years, as computers have extended the range of instruments that can be traded and opened up even more sophisticated trading strategies.

Nor did executive-branch-agency officials have the time, let alone the specialized skill, to tackle the issues that Congress sought to delegate. Such officials were already “burdened with the heavy load of other executive responsibilities.”<sup>63</sup> Furthermore, independent agencies were seen as better able to recruit highly qualified personnel. They offered a sense of professionalism and, more practically, offered salaries above the normal government pay scale.<sup>64</sup> Free from the bureaucracy of larger departments, independent agencies also enjoyed a singularity of purpose. Thus, by creating independent agencies such as the Fed and delegating authority to them, Congress could ensure “that government control of a great economic problem could be made effective.”<sup>65</sup>

## 2. Inhibiting Short-Term or Narrow Interests

Perhaps the most powerful justification for committing certain decisions to independent agencies was that officials within such agencies would make difficult yet ultimately beneficial decisions that politicians would not. For example, the Fed would be willing to raise interest rates to quell inflation over the long run, though politicians might not for fear of the short-term consequences.<sup>66</sup> The short-term interests of any presidential administration have the potential to distort regulatory policies at the expense of long-range interests.<sup>67</sup> In addition, the shifting of administrations every four or eight years can threaten the stability of regulatory policy.<sup>68</sup> Legislative history reflects this concern about the Fed: “If you put Cabinet officers on [the Board

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63. CUSHMAN, *supra* note 23, at 154.

64. And the PCAOB provides even higher salaries for its board members, two or three times what the SEC commissioners receive. See Nagy, *supra* note 56, at 979 (summarizing the controversy over the disparity between salaries of PCAOB members and SEC commissioners). The Presidents of the Federal Reserve regional banks have been paid more than the Fed governors.

65. See CUSHMAN, *supra* note 23, at 150.

66. See e.g., Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 502, 546–48 (2000) (positing that the political branches remain committed to the independence of the Fed in setting interest rates because they themselves could not resist pressure from narrow interests, and providing historical examples of when this tied-to-the-mast approach has succeeded).

67. See Devins & Lewis, *supra* note 3, at 465–66 (“Some members of Congress, and the business interests supporting them, feared that the short-term incentives of Presidents would be to use monetary and banking regulation for political or electoral benefit to the detriment of long-term economic stability and investment.” (citing CUSHMAN, *supra* note 23, at 153–55)).

68. See Devins & Lewis, *supra* note 3, at 466. Of course, independent agencies do not necessarily prevent such gyrations. For example, NLRB policy has shifted to reflect the administration that appointed the members and the general counsel. Cf. *id.* at 465 (finding that agency policy can shift in the direction of the party of the President who appoints new members).

of Governors of the Fed] they will of necessity go out with each change of administration, and may go much more frequently than that.”<sup>69</sup> When continuity was an end unto itself, as was the case with monetary policy, agency independence was a means.

More recent agencies also reflect this justification. For example, Congress created the Financial Accounting Standards Board (“FASB”) to determine accounting standards without political pressure at the behest of public accounting firms.<sup>70</sup> Additionally, Congress established the Public Company Accounting Oversight Board (“PCAOB”) as an entity within an independent agency, the SEC, to avoid capture by the accounting industry.<sup>71</sup>

### 3. Connecting with the Private Sector

Another justification for independence that has not yet received much attention is increasingly important today: the ability to connect with the private sector. This ability, an expertise of a sort, is perhaps most essential for financial policy, specifically securities regulation, where the SEC regularly interacts with the stock exchanges and other groups relevant to the regulation of broker-dealers and accountants.<sup>72</sup> From its inception, the SEC has provided regulatory oversight of private, self-regulatory organizations (“SROs”), which have increased in number across the decades.<sup>73</sup> The most prominent SROs include: (1) stock exchanges such as the New York Stock Exchange (“NYSE”) and NASDAQ Stock Market (“NASDAQ”), which are private entities that operate trading exchanges but whose rules and conduct are subject to SEC review;<sup>74</sup> (2) the Financial Industry Regulatory Authority (“FINRA”), a private entity that in 2006 assumed the regulation of

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69. See CUSHMAN, *supra* note 23, at 154.

70. See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 553–56 (2003) (discussing the establishment of the FASB).

71. See Elliott J. Weiss, *Some Thoughts on an Agenda for the Public Company Accounting Oversight Board*, 53 DUKE L.J. 491, 497 (2003) (“One major concern that led to the passage of Sarbanes-Oxley was that, as accounting firms began to derive an increasing portion of their revenues from nonaudit services, they faced increasing conflicts of interest.”).

72. It is also readily visible in the setting of monetary policy, where the Fed Board works with the heads of the regional Federal Reserve banks, which in turn are picked by bankers in the various geographic areas.

73. See, e.g., Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256-01 (Dec. 8, 2004) (to be codified at 17 C.F.R. pt. 320) (describing proposed changes to self-regulated organizations).

74. See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1514 (1989) (discussing stock exchange incentives that might be superior to that of government); Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1455 (1997) (examining stock exchange incentives “to provide rules and enforcement mechanisms that increase investor returns,” and the reasons why exchanges were subjected to government oversight in the 1930s).

broker-dealer conduct from the NYSE and the National Association of Securities Dealers (“NASD”), which initially created the NASDAQ;<sup>75</sup> and (3) entities that work in the accounting field, such as the FASB, which promulgates accounting standards.<sup>76</sup>

The ability to integrate SROs into the regulatory process is crucial to effective policy for variety of reasons. First, such integration causes regulation to be based on practical information and incentives.<sup>77</sup> Second, information generated for another purpose, as in the normal course of trading, can be used for the related purpose of developing regulation when it would be difficult to assemble such data independently. Third, integration of SROs sometimes has caused cross-subsidization, as when the profits that members earned in trading over the exchanges generated revenues for self-discipline of the broker-dealers. Fourth, participants with ties to industry may be better able to effect voluntary compliance. Fifth, integration of SROs allows for a greater ability to make use of the benefits that industry may gain from policing its own. Finally, costs of a particular function may be transferred to industry as opposed to the population at large.

The ability to activate the private sector also has countervailing costs, such as the potential for conflicts of interest to arise between the SEC and the SROs. But, in reality, the SEC cannot set workable policy without the SROs. And the agency cannot effectively collaborate with the SROs absent some insulation from political pressure. Political pressure might cause the SEC to steer securities policy away from the SROs toward federal intervention. Or it might cause the SEC to delay when federal intervention is necessary to prod the SROs.

### *C. The Political and Legal History of Independent Agencies*

The traditional binary approach to agencies reflects the politics and history that surrounds their creation. Specifically, independent agencies arose in a particular political and legal climate that bears on how they function, especially relative to executive-branch agencies. We briefly trace that history below.

The Fed, the FTC, and the Interstate Commerce Commission date from the pre-World War I era, but it was during the New Deal

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75. FINRA, About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Mar. 7, 2010).

76. FASB, Facts About FASB, <http://www.fasb.org/facts/index.shtml> (last visited Mar. 7, 2010). The PCAOB, which was created by Congress in the Sarbanes-Oxley Act of 2002 to oversee auditor conduct, includes some elements of private ordering as well.

77. RAYMOND MOLEY, *AFTER SEVEN YEARS* 161 (1939).

that Congress seeded independent agencies across the regulatory spectrum.<sup>78</sup> President Franklin Roosevelt's administration accommodated the use of such agencies. For example, the original draft of the bill concerning securities regulation placed this function within the Post Office (then a cabinet-level executive department), but the President subsequently agreed to shift it to an independent agency.<sup>79</sup>

But Congress favored the use of independent agencies even without President Roosevelt's support. A good example is the Fed. When the Fed was created, the Secretary of the Treasury and the Comptroller of the Currency were *ex officio* members on what was then just a five-member Board of Governors. As Professor Cushman reported, "[t]he placing of the Secretary of the Treasury and the Comptroller of the Currency on the projected board as *ex-officio* members was a frank recognition of the vital interests which the executive branch of the government has in the board's domination of policies affecting currency and credit . . . ."<sup>80</sup> In a similar vein, "[t]here was an underlying assumption that a certain degree of 'political' control was imperative if the proposed federal reserve board was to enjoy the broad powers to be conferred upon it."<sup>81</sup> Yet during this period Congress did not resolve "how far it is wise to associate [the Fed] with and possibly subordinate it to Treasury policy, and how far it ought to enjoy the independence which we associate with the quasi-judicial regulatory bodies."<sup>82</sup> And in 1935, when enacting legislation designed to centralize more power in the Washington Federal Reserve and less in the twelve regional banks, Congress removed the executive-branch members from the Board of Governors of the Fed.

At times, President Roosevelt himself was more aggressive in seeking to rein in these independent agencies, most notably in his effort to fire—despite a statutory restriction on removal—one of the carryover FTC commissioners on the grounds that "the aims and purposes of the Administration with respect to the work of the

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78. See Moreno, *supra* note 23, at 481–88 (outlining the historical development of independent agencies).

79. See MOLEY, *supra* note 77, at 177 (noting Sam Untermyer's initial draft to place securities regulation within the Post Office as the best assurance against the legislation's constitutionality, and Moley's reaction that "the idea of sticking an immense regulatory machine into it horrified [his] sense of the administrative and legal proprieties"). The securities regulation function was initially put within the Federal Trade Commission, an independent agency, and a year later in another independent agency, the newly formed Securities and Exchange Commission. *Id.* at 178.

80. CUSHMAN, *supra* note 23, at 154.

81. *Id.* at 154–55.

82. *Id.* at 153.

Commission can be carried out most effectively with personnel of my own selection.”<sup>83</sup> In *Humphrey’s Executor v. United States*, the Supreme Court upheld the constitutionality of the statutory removal restriction, relying on legislative history indicating that the agency was to be separate from an existing department and not subject to the orders of the President.<sup>84</sup> The Court distinguished a prior case, *Myers v. United States*, in which it had held that Congress could not restrict the authority of the President to remove a postmaster, who was viewed as exercising “executive” functions.<sup>85</sup> By contrast, the Court explained in *Humphrey’s Executor*, an FTC commissioner exercised “quasi-legislative and quasi-judicial” functions and therefore could be insulated from plenary presidential removal.<sup>86</sup>

President Roosevelt also lost a battle to enact a statute bringing independent agencies under executive control. In 1937, he created a committee on administrative management, the Brownlow Committee, to study and propose changes to the existing structure of agencies.<sup>87</sup> Although the Brownlow Committee argued that the President could not control the administrative state unless cabinet officers supervised the independent agencies, the committee did not succeed in altering the law.<sup>88</sup> Future Presidents would seek similar reorganizations with few results:<sup>89</sup> some had success in influencing particular appointments or decisions,<sup>90</sup> but none were able to achieve formal change.

The Supreme Court, at least after President Roosevelt’s appointees to the Court became a majority, supported the broad

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83. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618–19 (1935).

84. *Id.* at 625, 631–32.

85. *Myers v. United States*, 272 U.S. 52, 163–76 (1925).

86. *Humphrey’s Ex’r*, 295 U.S. at 628. The President’s appointment power served as an effective substitute for the removal power. President Franklin Delano Roosevelt was able to appoint members such as Harvard Professor James Landis to the FTC and Robert Healey as its chief counsel. Within a year, Congress and the administration chose to cleave off securities regulation from the FTC with the formation of a separate independent agency, the Securities and Exchange Commission. Two FTC members and its chief counsel became three of the founding five members of the SEC, giving President Roosevelt the opportunity to place his own people in both agencies. On the early history of the SEC, see SELIGMAN, *supra* note 70, at 11–72.

87. LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 113, 148, 167 (4th ed. 1998).

88. *Id.*

89. See Devins & Lewis, *supra* note 3, at 467 n.47 (providing examples of presidential plans to reorganize the executive branch and exert increased control over independent agencies). For a historical description of presidential efforts to influence the decisions of the independent regulatory commission see Moreno, *supra* note 23, at 481–88.

90. See generally Verkuil, *supra* note 3, at 944–47 (describing how the President can influence agencies, including independent agencies, through informal contacts).

authority of the independent agencies.<sup>91</sup> In some earlier cases involving New Deal legislation, such as *A.L.A. Schechter Poultry v. United States*<sup>92</sup> and *Panama Refining Co. v. Ryan*,<sup>93</sup> the Court struck down statutes for failure to contain meaningful constraints on the regulatory authority that they granted. Although these statutes delegated authority to private industry groups nominally mediated through the President<sup>94</sup> (as opposed to independent agencies), the Court opinions put all agencies at constitutional risk. Later, responding implicitly to threats against its own power in the aftermath of the 1936 election and Roosevelt's court-packing plan, the Court upheld the constitutionality of the NLRB, an independent agency, in one of several similar decisions.<sup>95</sup> With Roosevelt's appointment of eight members of the Court, almost all of whom had front-line experience in drafting, implementing, and defending FDR's program of governmental control over finance, independent agencies achieved more stable footing and more regulatory latitude.<sup>96</sup>

Such latitude is illustrated by *SEC v. Chenery* ("*Chenery II*"), a 1947 opinion in which the Court deferred to the agency's decision to use ad hoc adjudication, rather than general rulemaking, for issuing a generally applicable policy.<sup>97</sup> The deference is telling when contrasted with a prior opinion in the same case, *Chenery I*.<sup>98</sup> There Justice Frankfurter, writing for the Court, required the agency to specify the reasons for its decision, declining to uphold the agency's decision on grounds that the agency had not articulated.<sup>99</sup> Justice Frankfurter would have reversed the agency again in *Chenery II*, requiring a more definitive statement than the agency had provided.<sup>100</sup> However, he lost his majority as the more populist of Roosevelt's appointees (Justices Black, Douglas, and Reed), who had dissented in *Chenery I*, were

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91. A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 912-17 (2009).

92. 295 U.S. 495 (1935).

93. 293 U.S. 388 (1935).

94. For example, the National Industrial Recovery Act at issue in *Schechter Poultry* authorized the President to approve codes of fair competition upon application by a trade or industrial association. 295 U.S. at 521-22.

95. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

96. Pritchard & Thompson, *supra* note 91, at 914-16.

97. 332 U.S. 194, 203 (1947).

98. 318 U.S. 80, 95 (1943).

99. *Id.* at 93-94.

100. *Chenery II*, 332 U.S. at 217-18 (Jackson, J., dissenting).

joined by two new appointees (Justices Rutledge and Murphy) to create a majority for deference to the agency.<sup>101</sup>

Backed by supportive Supreme Court decisions, Congress continued to create independent agencies as the need for them arose. During the 1970s, for example, Congress created a number of new independent agencies, including the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Occupational Safety and Health Review Commission.<sup>102</sup> This period saw significant activity overall in the regulatory state. Congress enacted a wave of legislation creating new statutory “rights” in diverse areas such as consumer protection, employment discrimination, environmental quality, and workplace safety.<sup>103</sup> Congress chose executive-branch agencies for many of these issues, but not for all. Independent agencies still occupied an important position in the mix.

#### *D. The Modern Era of Presidential Control*

Independent agencies, whether old or new, now exist in a political climate that has changed in significant ways—ways that do not directly affect them but cast a shadow over them. In the 1980s, President Reagan issued an executive order that required executive-branch agencies to take several actions.<sup>104</sup> First, the executive order required agencies to prepare an agenda of regulations at a time and in a manner specified by the administrator of OIRA.<sup>105</sup> Second, it required agencies to prepare a regulatory plan of all significant regulations (those with costs of \$100 million or more) that the agency expected to propose or finalize in each fiscal year.<sup>106</sup> Third, the

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101. See Letter from Justice Felix Frankfurter to Justice Hugo Black (Dec. 23, 1946) (on file with Robert Jackson Collection, Library of Congress, Box 138) (“With every impulse to sustain the commission, I cannot escape the conviction that the Commission has decided this case ad hoc.”).

102. See 16 U.S.C. § 797 (Federal Energy Regulatory Commission); 42 U.S.C. § 5841 (Nuclear Regulatory Commission); 29 U.S.C. § 651(b)(3) (Occupational Safety and Health Review Commission).

103. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 57–69 (1990); see also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278–94 (1986) (describing this period as the “public interest era”).

104. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006) (12,291 also available at 46 Fed. Reg. 13,193 (Feb. 17, 1981)).

105. *Id.* § 5.

106. *Id.* §§ 3, 5. As revised by the President Clinton, the executive order provided that the administrator of OIRA subsequently would circulate this plan to other agencies and would notify the agency as necessary to “request further consideration of inter-agency coordination.” *Id.*



executive order required agencies to submit to OIRA for review all proposed significant rulemaking proposals along with a cost-benefit analysis of those regulations.<sup>107</sup> President Reagan did not apply this executive order to independent agencies, fearing that he lacked legal authority and that Congress would seek to countermand such a reach.<sup>108</sup> Some independent agencies voluntarily complied with the executive order—but not for long.<sup>109</sup>

All subsequent Presidents have maintained this executive order in substantially similar form, and President Clinton supplemented it with mechanisms enabling him to assert direct “ownership” of agency decisions.<sup>110</sup> He popularized the practice of issuing written directives to agency heads, requesting that they use their authority to take a specific action.<sup>111</sup> Such presidential directives, coupled with other actions, can spur agencies into action, reducing agency inactivity and increasing agency efficacy.<sup>112</sup> Most importantly, such directives lend to agency decisions the most visible form of presidential accountability.<sup>113</sup> President Clinton also amended the executive order in a way that affected independent agencies: he extended the coordination parts of the executive order (but not the

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107. *Id.* § 3(d).

108. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1506 (2002). During the Carter administration, the Office of Legal Counsel issued a memorandum stating that the President could, as a legal matter, subject independent agencies to a regulatory review executive order. See Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget, from Larry L. Simms, Acting Ass't Atty. Gen., Office of Legal Counsel (Feb. 12, 1981), reprinted in part in PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 355–58 (1988). Legal scholars writing shortly thereafter echoed this view. See Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986).

109. Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 10–11 (2006) (citing BARRY D. FRIEDMAN, *REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE* 78 (1995)); see also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11–19 (1995) (observing that “[t]he independent agencies were asked voluntarily to comply with Executive Order 12291, but not one of them formally acknowledged their willingness to do so”).

110. Kagan, *supra* note 14, at 2299. Meanwhile, during the Clinton administration, Congress created a six-year “for cause” term for the single head of the Social Security Administration, meaning that one in every three Presidents would have no voice in the leadership of that agency.

111. Bressman, *supra* note 12, at 487–88.

112. See Kagan, *supra* note 14, at 2295–96 (“[D]irectives to agency heads were a critical means of spurring administrative initiatives, and these initiatives were an important aspect of [Clinton’s] tenure in office.”).

113. See *id.* at 2337 (arguing that “the greater openness of Clinton’s methods of administrative control” demonstrates “presidential reliance on and responsiveness to broad public sentiment”).

regulatory-review parts) to these agencies.<sup>114</sup> But no subsequent President took this action, largely leaving independent agencies out.<sup>115</sup>

These presidential control mechanisms, although relatively new in the history of the regulatory state, have quickly become permanent fixtures of the regulatory state because they simultaneously speak to political, managerial, and normative values.<sup>116</sup> Politically, President Reagan saw the strategic value of centralizing control: he could steer agency policies in directions that satisfied his political preferences.<sup>117</sup> Campaigning on a platform of deregulation, President Reagan could deliver by instructing agencies to act in conformity with his agenda.<sup>118</sup> When President Clinton converted regulatory review into a tool for reinventing rather than reducing government, he demonstrated its bipartisan appeal and secured its lasting position.<sup>119</sup>

As for managerial concerns, it had become common knowledge by the 1980s that individual agencies, if left to their own devices, would focus on their own missions without devoting sufficient attention to government-wide priorities.<sup>120</sup> As a result, they often would pursue policies that were either unnecessary or overlap with policies of other agencies.<sup>121</sup> Some scholars also considered agencies to be insufficiently attentive to the costs and benefits of their proposals.<sup>122</sup> President Reagan's executive order addressed both issues, though in the Clinton Administration, the emphasis changed from deregulation to rational regulation.<sup>123</sup>

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114. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006); Hahn & Sunstein, *supra* note 108, at 1507 (noting that the Clinton executive order took the "first step toward including independent agencies" by subjecting them to its coordination mechanism).

115. See Sherwin, *supra* note 109, at 10–11 (noting that independent agencies are excluded from the definition of "agency" in the George W. Bush version of the executive order).

116. See Bressman, *supra* note 12, at 491 ("The President's unique capacity for public responsiveness – in a word, majoritarianism – ensures that this model is likely to survive into the future.").

117. See Kagan, *supra* note 14, at 2277 (explaining the shift under Reagan).

118. Bressman, *supra* note 12, at 487.

119. *Id.* at 487.

120. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 80 (1993) (discussing the need for "increased coordination and rationalization" of regulatory agencies).

121. *Id.*

122. *E.g.*, W. KIP VISCUSI, *FATAL TRADEOFFS* 248–51 (1992) (discussing the shortcomings of new agencies regulating health, safety, and the environment); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 *YALE L.J.* 1487, 1499–50 (1983) (discussing calls for "rationality in the regulatory process").

123. *Cf.* Kagan, *supra* note 14, at 2315–17 (comparing the Reagan and Clinton administrations' approaches to the administrative state).

At the same time, the executive order and other mechanisms of presidential control speak decisively to the normative concerns that have plagued even executive-branch agencies since the New Deal. Many view the President as uniquely capable of improving the accountability, and hence the legitimacy, of agencies.<sup>124</sup> This argument has a strong (or constitutional) form and a weak (or pragmatic) form. The strong form is advanced by advocates of the “unitary executive” thesis, who posit that all “executive” authority must be vested in the President, and as a result, all officials engaged in law execution must act only in the President’s stead.<sup>125</sup> Thus, presidential control is not only normatively desirable; it is constitutionally required. The weak form comes from those who take a less formal view of presidential power. They assert that the President can ease general worries about the so-called “headless fourth branch of government” by subjecting agency policy decisions to plenary control.<sup>126</sup> More specifically, the President can increase planning and coordination of regulatory policy as a whole.<sup>127</sup> The chief executive can supply a uniform metric against which to assess individual agency policies (i.e., cost-benefit analysis).<sup>128</sup> In addition, the President can steer individual policies and energize sluggish agencies.<sup>129</sup>

Although these reforms largely did not concern independent agencies, they have impacted how scholars think about such agencies. One scholar has noted that when independent agencies make policy “that is vitally important to our national life . . . presidential interest in its formulation is both inevitable and proper.”<sup>130</sup> Some have gone further, arguing that if Congress will not abolish independent agencies, then courts should withhold judicial deference from them.<sup>131</sup> The Administrative Conference of the United States, an agency that studies and makes recommendations on administrative law, stated

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124. *E.g., id.* at 2331–32 (contending that the President, as a single actor, is uniquely visible and responsible for agency action).

125. *See, e.g.,* Calabresi & Prakash, *supra* note 13, at 570–99 (asserting “that the Constitution unambiguously gives the President the power to control the execution of all federal laws”).

126. *See, e.g.,* Mashaw, *supra* note 14, at 95–99 (contending that agencies are accountable via the President, which addresses many of the concerns about broad legislative delegations).

127. *See supra* notes 105–106, 119–121 and accompanying text.

128. *See supra* note 106 and accompanying text.

129. *See supra* notes 116–118 and accompanying text.

130. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 591 (1989); *see also* Moreno, *supra* note 23, at 512–13 (“For those IRCs that are important to the accomplishment of the presidential agenda, the White House needs to develop a legal arrangement that affords the executive total control.”).

131. Kagan, *supra* note 14, at 2376–77.

that, “as a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to rulemaking of executive-branch departments and other agencies.”<sup>132</sup> Well before centralized White House control, a central criticism of independent agencies was that they thwarted integrated policy planning and coordination.<sup>133</sup> These scholars argued that the President has authority—even the constitutional responsibility—to assert managerial control over independent agencies.

## II. FINANCIAL AGENCIES AND PRESIDENTIAL PREFERENCES

It is with this background in mind—the standard division between independent and executive-branch agencies, the updated justifications for independence, and the modern movement toward increased presidential control—that we come to financial policy. Recent crises have signaled a need for reform in many areas, including market stability and securities regulation. We would expect the existing financial agencies to retain a prominent role, given their overall level of experience. When we examined legislative proposals for market stability reform, we were not disappointed: the Fed figured centrally in all of them. And the SEC remains at the forefront of securities regulation, even as new agencies like the PCAOB arise. On closer examination, however, we were surprised to see mechanisms that made the Fed and the SEC more responsive to presidential preferences on the critical issues. In this Part, we explore these mechanisms and their implications for administrative law.

One note before we begin. We draw our mechanisms from 2009 proposals for financial regulatory reform and from previous administration practices. Ultimately, our analysis does not depend on whether any of these proposals are adopted or whether any of these practices are repeated. Instead, we mean to illustrate possibilities that do not fit the conventional mold. These possibilities undermine the standard distinction between independent and executive-branch agencies. Although they are interesting and significant for this reason alone, a deeper analysis reveals that these possibilities are consistent with the political interests of the President and further a normative vision of accountability.

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132. Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 54 Fed. Reg. 5207 (Feb. 2, 1989) (to be codified at 1 C.F.R. § 305.88-9).

133. See BERNSTEIN, *supra* note 57, at 5 (describing the criticism against independent agencies on grounds of coordination); CUSHMAN, *supra* note 23, at 5–7 (same).

### A. Market Stability

In the wake of the financial meltdown of 2008, Congress considered numerous proposals to promote market stability.<sup>134</sup> Specifically, these proposals would require the federal government to address systemic risk in the financial-services industry before that risk materializes into a crisis.<sup>135</sup> Although every proposal grants this responsibility to an independent agency, these same proposals provide that the agency would have a formal, collaborative relationship with the Secretary of the Treasury.<sup>136</sup> In addition, the independent agency would be subject to a coordination mechanism that is not altogether different in kind from the coordination mechanism that exists for executive-branch agencies.<sup>137</sup>

#### 1. The Regulation of Market Stability

Systemic risk affects financial markets as a whole because it is caused by and affects multiple players.<sup>138</sup> Before 1987, systemic risk came mainly from the commercial banking sector.<sup>139</sup> The Fed has long had authority to monitor the commercial banking industry as a result of its authority to ensure that bank holding company practices do not impair financial markets.<sup>140</sup> Since 1987, the economy has shown its susceptibility to systemic risk from nonbanking institutions, as increased use of leverage and financial innovations have broadened

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134. *E.g.*, DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 10–18 (2009) (outlining a series of proposed reforms) [hereinafter A NEW FOUNDATION].

135. *E.g.*, *id.* at 10 (proposing the creation of a Financial Services Oversight Council to identify and respond to emerging risks).

136. *E.g.*, *id.* at 10–11 (providing that the Secretary of the Treasury would chair the proposed council and that full-time Treasury staff would provide support).

137. *E.g.*, *id.* (proposing that the council would be devoted in part to resolving jurisdictional disputes between regulators and that, among its primary purposes, would be referral of emerging risks to the regulators with authority to respond).

138. *See, e.g.*, *Turmoil in the Financial Markets: Hearing on Hedge Funds Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 3 (2008) (statement of Andrew W. Lo, Director, Sloan School of Management) (“Systemic risk is usually taken to mean the risk of a broad-based breakdown in the financial system, often realized as a series of correlated defaults among financial institutions, typically banks, that occur over a short period of time and typically caused by a single major event.”).

139. *Financial Crisis and Breakdown of Financial Governance: Hearing Before the S. Comm. on Homeland Security and Government Affairs*, 111th Cong. 2 (2009) (statement of Howell E. Jackson, Professor of Law, Harvard Law School) (“As lender of last resort, the Federal Reserve has traditionally been responsible for overseeing systemic risk, but its regulatory powers were largely defined more than half a century ago when the banking system was considered to be the primary source of systemic financial risks.”).

140. *See, e.g.*, CUSHMAN, *supra* note 23, at 152 (“Broadly, [the Fed] was to have power to see that . . . the whole banking structure operated smoothly and securely.”).

both the reach of any one player and the interconnectivity of the entire group of financial actors.<sup>141</sup> The failure of major noncommercial banking institutions has the capacity to cause a crisis, as recently demonstrated by Lehman Brothers and AIG.<sup>142</sup> The resulting unavailability of new credit may increase to the point that ordinary businesses cannot meet operating expenses and ordinary individuals cannot obtain home loans.<sup>143</sup>

When successive waves of the financial crisis hit the American economy and exposed the depth of the market-stability problem in 2008, the Fed most often was the first responder. Over the second half of 2008, its balance sheet jumped from about \$800 billion to over \$2.2 trillion as it backstopped large parts of the economy.<sup>144</sup> This included not just \$200 billion to bail out Bear Stearns and AIG, but also \$225 billion for nonbank commercial paper and \$200 billion for bank loans that did not stay on bank books. In addition, the Fed opened its discount window to former investment banks Goldman Sachs and Morgan Stanley, now rechristened as bank holding companies, making additional sums available to them on favorable terms. Sometimes the Fed worked with Treasury and the FDIC, such as when it provided backing for Bank of America losses in Merrill Lynch. Other times the Fed joined with Treasury to pressure the FDIC to provide a three-year guarantee of bank promissory notes and commercial paper. In a couple of instances, Congress authorized new powers for the financial regulators, as in the \$700 billion TARP plan or the government takeover of Fannie Mae and Freddie Mac in the summer of 2008. But, for the most part, the response relied on the Fed's existing authority and money.

These developments demonstrate that the role of the regulator in the market-stability arena is not just in developing standards for capital reserves or other protections against market-stability risks,

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141. Lawrence Summers, *This is where Fannie and Freddie step in*, FIN. TIMES (London), Aug. 27, 2007, <http://blogs.ft.com/economistsforum/2007/08/this-is-where-ft.html/> ("The problem this time is not that banks lack capital or cannot fund themselves. It is the solvency of a range of nonbanks in question, both because of concerns about their economic fundamentals and because of cascading liquidations as investors who lose confidence in them seek to redeem their money and move into safer, more liquid investments.").

142. See, e.g., DAVID WESSEL, IN FED WE TRUST 150 (2009) ("The public – or at least big money investors – didn't view the shadow banks as quite so safe and grew reluctant to provide the short-term money on which the shadow banks depended."); Penelope Wang, *5 Lessons From the Crash*, MONEY, Sept. 2009, at 78, 80–81 (discussing how the financial meltdown of 2008 was caused in part by the failure of Lehman Brothers and AIG).

143. See Edmund L. Andrews, *Fed Chairman Endorses New Round of Stimulus*, N.Y. TIMES, Oct. 21, 2008, at B8 (quoting Fed Chairman Bernanke discussing the need for a stimulus in order to loosen credit for businesses and individuals).

144. WESSEL, *supra* note 142, at 251.

but also in providing a rapid response when unexpected risks arise. After all, the Fed—like almost every other bank regulator and political official—failed to foresee the systemic risk that developed in the financial crisis. Lured by financial innovation that seemed to promise new ways to deal with risk, market participants failed to account for the risk of outcomes at the tail of their distribution curves and, thus, were ill-prepared when those low probability events occurred.<sup>145</sup> The Fed's relative advantage was not in developing prophylactic standards to prevent such events but rather in addressing such events when they occurred.<sup>146</sup> This expertise and nimbleness were the regulatory characteristics that avoided another Great Depression.<sup>147</sup>

Despite these advantages, many have expressed concern about the Fed as the regulator of market stability—concern that is often framed in terms of accountability to political institutions. Consider an exchange in September 2008 when Fed Chairman Ben Bernanke and Secretary Paulson went up to Capitol Hill to brief congressional leaders on the AIG bailout. When the two officials disclosed the \$85 billion cost, lawmakers questioned whether either agency had \$85 billion available to spend. Bernanke responded, “Well, we have \$800 billion.” To this, Representative Barney Frank, Chairman of the House Financial Services Committee, responded, “No one in a democracy unelected should have \$800 billion to dispense as he sees fit.”<sup>148</sup> Others have expressed concern about the Fed's poor performance in foreseeing the meltdown, as well as residual concern about the Fed's possible bias toward big banks.<sup>149</sup> Some proposed an

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145. See Joe Nacera, *Risk Management*, N.Y. TIMES MAG., Jan. 4, 2009, at 24 (describing valuation models that did not include outcomes at the most uncertain end of the distribution of probabilities).

146. Recall the large drop in the markets in response to Congress's initial inability to pass legislation in the aftermath of the Lehman and AIG crises and the relative ineffectiveness of the Treasury's remedies of 2008. See, e.g., John Authers, *Politicians Look to Enter Another Faustian Pact*, FIN. TIMES (London), Jan. 23, 2010, <http://www.ft.com/cms/s/0/b1379f2a-07bf-11df-915f-00144feabdc0.html> (“It was a perceived political failure to make an adequate response to the problems created by the bankruptcy of Lehman Brothers – the US Congress's initial refusal to vote through the Tarp bail-out plan, and the European Union's failed attempt to agree on co-ordinated deposit insurance – that triggered the global equity collapse in early October 2008.”).

147. Another independent agency, the Reconstruction Finance Corporation, played a similar, although less fully successful role in the response to the earlier crisis. See JESSE H. JONES, FIFTY BILLION DOLLARS 3–4 (1951) (describing \$10.5 billion the agency loaned, spent, invested, and gave away to banks, railroads, agriculture, and other parts of the economy in the struggle against the depression and about \$22.5 billion disbursed later in the country's war effort).

148. Edmund L. Andrews, *A New Role for the Fed: Investor of Last Resort*, N.Y. TIMES, Sept. 18, 2008, at A1.

149. This argument, too, parallels the experience of the Great Depression. Representative Fiorello LaGuardia called the Reconstruction Finance Corporation a “millionaire's dole and you

alternative regulator in the form of a council,<sup>150</sup> such as a so-called “college of cardinals,” comprised of several different financial agency chairs or heads, tasked with addressing nonfinancial sources of risk.<sup>151</sup>

At the center of all these responses to the crisis, notwithstanding their differences, is a collaborative model. For example, the Obama Administration’s June 2009 plan on financial regulatory reform opted for the Fed Board as chief regulator but also provided for collaboration in the form of a council.<sup>152</sup> The bill passed by the House in December 2009 and the Senate bill submitted by Chairman Dodd in March 2010 follow the general outlines of the administration plan with some second order differences.<sup>153</sup> Specifically, all three proposals aim (1) to expand the Fed’s authority to supervise and regulate firms that create systemic risk, defined in the administration plan as “[a]ny financial firm whose combination of size, leverage, and interconnectedness could pose a threat to financial stability if it failed”; (2) to require the Fed to consult with the executive branch and external experts on various questions including which firms the Fed should regulate; and (3) to create a Financial Services Oversight Council to advise or in some degree oversee the Fed’s market-stability function, a relationship that varies somewhat in the different plans, and to provide a forum for reducing jurisdictional disputes between regulators.<sup>154</sup> The membership of the council varies a bit under the different proposals but includes the Secretary of the Treasury (as chair); the Fed Board chair; the chairs of

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cannot get away from it. It is a subsidy for broken bankers—a subsidy for bankrupt railroads—a reward for speculation and unscrupulous bond pluggers.” JAMES STUART OLSON, HERBERT HOOVER AND THE RECONSTRUCTION FINANCE CORPORATION 1931–1933, at 35 (1977).

150. See Stephen Labaton, *Behind the Scenes, Fed. Chief Advocates Bigger Role*, N.Y. TIMES, June 24, 2009, at B1 (outlining the disagreement among various officials about which institution should cover nonfinancial sources of systemic risk).

151. See Damian Paletta, *Finance Reforms Pared Back*, WALL ST. J., June 9, 2009, at A1 (describing the possibility of creating a “systemic-risk council” comprised of existing agencies); INVESTORS’ WORKING GROUP, CFA INST. CTR. FOR FIN. MKT. INTEGRITY & COUNCIL OF INST. INVESTORS, U.S FINANCIAL REGULATORY REFORM: THE INVESTORS’ PERSPECTIVE 25 (2009) (attributing label “college of cardinals” to Senator Mark Warner).

152. See A NEW FOUNDATION, *supra* note 134, at 10 (proposing “the creation of a Financial Services Oversight Council” but providing that the Fed should have “authority and accountability for consolidated supervision and regulation” of firms that could pose a threat to financial stability).

153. See H.R. 4173, 111th Cong. (2009); Senate Committee on Banking, Housing, and Urban Affairs, Chairman Chris Dodd, Summary: Restoring American Financial Stability (Mar. 15, 2010) [hereinafter Restoring American Financial Stability], available at [http://banking.senate.gov/public/\\_files/FinancialReformSummary231510FINAL.pdf](http://banking.senate.gov/public/_files/FinancialReformSummary231510FINAL.pdf) (summarizing Senator Dodd’s bill). These proposals view the Board of Governors as the regulator as opposed to the Federal Reserve System, which includes the Fed Board and the regional banks.

154. A NEW FOUNDATION, *supra* note 134, at 10–11.



the SEC, CFTC, and FDIC; and the director of the Federal Housing Finance Agency.<sup>155</sup>

Critically, these proposals require the Fed to collaborate with the Secretary of the Treasury on matters of political interest and social significance. The administration plan mandates that the Fed obtain the written approval of the Secretary of the Treasury before using the Fed's unconstrained lending power under section 13(3) of the Federal Reserve Act only after five governors declare the circumstances "unusual and exigent."<sup>156</sup> The House and Senate proposals are less restrictive.<sup>157</sup>

All three proposals, to different degrees, require consultation. Under the administration's plan, for example, the Secretary would have input on the Fed's internal organization, which can affect how substantive decisions are made (in questions of market stability, as opposed to monetary policy). Thus, the Secretary would be able to ensure that the newly expanded Fed would be run in a manner that facilitates collaboration—for example, by ensuring that the responsibilities of the chair leave sufficient capacity to handle the sorts of decisions on which the Secretary seeks involvement. If those decisions are instead sub-delegated to others within the Fed, the Secretary will have less access to them.

In addition, all three proposals grant the Secretary more formal authority to advise the Fed on particular decisions and overall strategies.<sup>158</sup> The Secretary receives such authority as part of a multi-member council and therefore will not enjoy the simple partnership that Bernanke and Paulson displayed in assessing emerging risks during the 2008 financial crisis.<sup>159</sup> But the Secretary would be chair of the council, which positions the President's representative to retain a significant degree of control over the advice given.<sup>160</sup> The proposal also grants the council a considerable role. It would have authority to

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155. *Id.* The council has "authority to gather information from any financial firm and the responsibility for referring emerging risks to the attention of regulators with the authority to respond." *Id.* The Senate proposal also includes as members an independent member from the insurance industry and the head of the new consumer agency. See Restoring American Financial Stability, *supra* note 153.

For an exploration of Congress's practice of granting shared authority to the President and agencies, so called "mixed delegations," see Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 276–83 (2006).

156. See WESSEL, *supra* note 142, at 160.

157. See H.R. 4173, 111th Cong. (2009); Restoring American Financial Stability, *supra* note 153.

158. A NEW FOUNDATION, *supra* note 134, at 10.

159. See *id.* (outlining the structure of the council and its relationship with the Fed).

160. *Id.*

advise the Fed on its specific regulatory responsibility: the identification of firms that create systemic risk.<sup>161</sup> In addition, it would have a general coordination and planning role quite similar to the role of OIRA with respect to executive-branch agencies. Thus, the council would “facilitate information sharing and coordination, identify emerging risks, . . . and provide a forum for resolving jurisdictional disputes between regulators.”<sup>162</sup> Similarly, OIRA has substantial involvement in agency decisions as a result of comparable functions.<sup>163</sup>

This collaborative relationship is not new in the financial area. From the earliest years when the Secretary of the Treasury was an ex officio member of the Board of Governors of the Fed, the Fed has acknowledged the interest of the executive branch in “policies affecting currency and credit.”<sup>164</sup> Congress removed the Secretary from the Board of Governors in 1935 for fear that political judgment would excessively dominate financial policies.<sup>165</sup> Nevertheless, the Fed has continued to consult the Secretary on matters concerning market stability, specifically the safety and security of banks.<sup>166</sup>

The public partnership that the Fed chairman and the Secretary have cultivated in recent years highlights this collaborative relationship. During the end of the George W. Bush Administration, Chairman Bernanke worked regularly with Secretary Paulson on crisis-management and regulatory-reform issues.<sup>167</sup> In the wake of the 2008 financial crisis and into the Obama Administration, Chairman Bernanke and new Secretary Timothy Geithner worked together so often that they often appeared as a duo in the media.<sup>168</sup>

What is significant about the 2009 legislative proposals is that they would transform an informal collaborative relationship into a formal one. Put differently, the collaborative relationship would be

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161. *Id.*

162. *Id.*

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

164. CUSHMAN, *supra* note 23, at 154.

165. *See id.* at 165–69 (summarizing the removal of the Secretary from the Board).

166. *See* Joe Nocera, *36 Hours of Alarm and Action as Crisis Spiraled*, N.Y. TIMES, Oct. 2, 2008, at A1 (describing how Bernanke consulted with Paulson about possible bank rescue plans following the Bear Stearns bailout).

167. *See, e.g.*, Dana Milbank, *Banking on Their Confidence*, WASH. POST, Oct. 15, 2008, at A3 (summarizing, in tongue-in-cheek fashion, a press conference held in at the Treasury Department by Paulson and Bernanke to instill confidence in the wake of the financial crisis).

168. *See, e.g.*, David Stout & Brian Knowlton, *Geithner Seeks Broader Powers Over Financial Firms*, N.Y. TIMES, Mar. 24, 2009, at A1 (describing congressional hearing in which Geithner and Bernanke called for Congress to cede more authority to the Treasury and Fed).

part of the governing law, thus ensuring that the relationship would outlast the particular officials in the jobs. Bernanke and Geithner may have cast one shadow, but there is no guarantee—absent formalization—that future officials will do the same.<sup>169</sup> In addition to permanence, the formalization of the relationship also adds a degree of visibility and gravity. Working together would no longer be an option to be employed only when politically expedient; working together would be required by law. This is not to suggest that the collaboration requirement necessarily would be enforceable in court. Rather, it ensures that the officials themselves would take the requirement seriously. These proposals therefore take an important step in the direction of hybridizing the independent and executive-branch agencies, and creating a spectrum along which agency independence occurs.

## 2. Political Interests

As a political matter, a codified collaborative approach can be understood to reflect a political compromise—that is, it represents the greatest degree of control that the President can secure from Congress. This understanding is consistent with political science assumptions that the President always seeks maximum political control of regulatory policy, though occasionally must settle for less.<sup>170</sup> Therefore, it fairly represents the conventional understanding.

We see the possibility of a different understanding and underlying political strategy—one in which the President himself recognizes the advantages of presidential collaboration and the disadvantages of plenary presidential control in a particular context. Bernanke and Geithner have demonstrated publicly that, on issues of market stability, two heads are better than one. Although Bernanke, as one of the nation's premier economists, has superior expertise for

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169. See Sebastian Mallaby, Book Review, *The Charm of the Chairman: Greenspan Knew All About Money, But He Also Knew How to Work a Room*, WASH. POST, Sept. 23, 2007, at T3 (reviewing GREENSPAN, *supra* note 10 and contrasting Chairman Volcker's avoidance of the White House with Chairman Greenspan's active courting of it).

170. Although political scientists have asserted that Congress may create independent agencies to prevent present and future administrations from diverting regulatory policy from statutory goals, they have assumed that the President will resist any loss of control. See Devins & Lewis, *supra* note 3, at 465 (providing examples of times when Congress created independent agencies and positing that choice was purposed on insulating those agencies from political manipulation by current and future presidents). See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 153–54 (1999) (predicting that “the trend toward independent commissions should increase the higher the level of policy conflict between Congress and the executive”).

the technical aspects of the problems,<sup>171</sup> political connections are important in obtaining information from financial-services firms, coordinating with other agencies, and evaluating emerging risks. Geithner has these requisite political connections and, through continuous contact with Bernanke, can yield decisions that have White House support.<sup>172</sup> Such White House support on large-scale economic issues is vital for Bernanke to obtain the support of the financial-services sector, the public, and Congress.

The President can support independence if simultaneously retaining sufficient involvement in regulatory policy. Thus, the President may seek a degree of independence to make credible a commitment to address a long-term problem, such as market stability. In addition, such independence may ensure expertise on issues that matter to presidential electoral prospects, such as the economy. It may prevent present and future administrations from harming overall electoral and institutional interests by succumbing to short-term interests.

### 3. Accountability Levers

Apart from potentially satisfying political needs, the collaborative approach to market stability promotes accountability. This accountability is not of the sort that requires the President to control all agency decisions, including those of independent agencies. That conception, most associated with the unitary executive view of presidential power, requires the President to control all agency decisions because the President is responsible for all law execution as a textual constitutional matter.<sup>173</sup> Most scholars (and judges) hold a more pragmatic view of presidential power.<sup>174</sup> Under this view, accountability is enhanced when the President brings agency decisions under presidential control by either directing or influencing their content, but such control is not constitutionally compelled by the text or otherwise.<sup>175</sup>

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171. See Edmund L. Andrews, *Obama to Nominate Bernanke to 2d Term at Fed*, N.Y. TIMES, Aug. 25, 2009, at B1 (describing Bernanke's background and qualifications).

172. See *The New Team: Timothy F. Geithner*, [http://projects.nytimes.com/44th\\_president/new\\_team/show/timothy-geithner](http://projects.nytimes.com/44th_president/new_team/show/timothy-geithner) (last visited Mar. 7, 2010) (describing Geithner's background and qualifications and highlighting his "close working relationship" with Bernanke).

173. See generally, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008); Calabresi & Prakash, *supra* note 13.

174. E.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 152 (1997); Kagan, *supra* note 14, at 2327–31; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–5 (1994).

175. See Bressman, *supra* note 12, at 490–91 n.146 (collecting sources).

As a matter of conventional wisdom, independent agencies are not subject to presidential control even in this relatively weaker sense of accountability. But they are subject to other, well-recognized measures of presidential influence that better promote accountability. The President appoints the high-level officials in independent agencies, and often chooses the chair from among its members.<sup>176</sup> Even the Fed chair has only a four-year term (in contrast to the fourteen-year terms of other governors).<sup>177</sup> The President can informally pressure agency officials into following specific policy recommendations.<sup>178</sup> Presidents have a variety of ways to apply pressure, including seeking new legislation from Congress. This is not unlike the “shotgun behind the door” analogy that then-SEC Chairman William O. Douglas used to characterize the government’s residual power vis-à-vis private actors, such as the stock exchange.<sup>179</sup> Similarly, the President can remove support from an agency in negotiations with Congress over budget and other matters.<sup>180</sup> Finally, the President possesses the authority to remove agency leaders for good cause, which facilitates oversight.<sup>181</sup>

The 2009 reforms uniformly contain a mechanism of presidential involvement that is different and potentially more significant: collaboration in and coordination of agency decisions. As noted above, under the reforms, the President (through the Secretary of the Treasury acting alone or through the council) would have statutorily mandated involvement in the policy decisions on market stability, from the initial stages of determining which institutions present systemic risk to the future details of how to respond.<sup>182</sup> Such collaboration is different from previous forms of presidential influence over independent agencies. It concerns policy, not personnel or budget. Furthermore, through the Secretary of the Treasury, the President

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176. See Strauss, *supra* note 3, at 590–91 (describing president’s prime control over independent agencies as appointment of the chairperson). For an interesting study showing that Presidents generally have a difficult time transforming the makeup of an independent agency (and therefore elbowing it into submission), see Devins & Lewis, *supra* note 3, at 459–61.

177. BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 4 (9th ed. 2005), available at [http://www.federalreserve.gov/pf/pdf/pf\\_1.pdf](http://www.federalreserve.gov/pf/pdf/pf_1.pdf).

178. See Verkuil, *supra* note 3, at 943–44 & n.1 (describing the practice of jawboning, through which the President influences agency decisions through informal, ex parte contacts with agency officials).

179. WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 82 (James Allen, ed. 1940).

180. *E.g.*, Verkuil, *supra* note 3, at 963 (discussing the President’s ability to exert control through his involvement in the budget process).

181. See *id.* at 955 (“[T]he President’s power to remove for cause is itself a significant tool of executive control.”).

182. See *supra* notes 152–62 and accompanying text.

would have a formal opportunity to participate in the regulatory process, rather than relying on informal pressuring or ex post monitoring. Likewise, the Fed would have a formal obligation to consider presidential views and to base its decisions on acceptable reasons.<sup>183</sup> In this way, it is much closer to the sort of authority that modern Presidents have sought over the policy of executive-branch agencies, both directly through personal involvement and indirectly through OIRA. The President would not have the ability to direct policy outcomes, backed by the threat of removal. But having a seat at the table can produce a similar result because it would allow the President, via the Secretary of the Treasury, to participate in an ongoing and official way. As a result, it would enable the President to better meet political objectives, and it would address the accountability problem that agencies are thought to present—namely, that regulatory decisions will not reflect democratic preferences.

Another example of agency coordination is that the Fed would be required by statute to coordinate with the other financial agencies in formulating market-stability policy.<sup>184</sup> Because the issue of market stability affects the jurisdiction of all financial agencies—and has generated turf battles accordingly—a mechanism to resolve conflicts is essential. The Fed has long been subject to attack for lack of coordination with the other financial agencies.<sup>185</sup> The recent proposals signal recognition of this critique. Furthermore, they bring the independent financial agencies more in line with executive-branch agencies, which have been subject to a formal White House coordination mechanism since the Reagan Administration.

In light of these mechanisms, the President does not need stronger means to influence agency decisions for either political or normative reasons. First, the Fed has a natural self-interest in collaboration and coordination. As mentioned above, all agencies have a significant interest in securing the goodwill of the President to enlist the chief executive's aid in budget battles with Congress.<sup>186</sup> This interest is magnified in the financial context. Even agencies with an independent source of funding will have a recurring need for new

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183. *See id.* We wonder whether the President could use the failure or inadequacy of consultation as a ground for removal of the independent actors. We do not imagine that the President would do so lightly because removal, for any reason, attracts considerable political attention and this ground would not only be novel but difficult to substantiate. But good cause is not well defined in administrative law and leaves the President with some room to define it if the President has the political will. Furthermore, the statute makes consultation relevant to the agency's functions.

184. *See id.*

185. *See, e.g.,* BERNSTEIN, *supra* note 57, at 145, 147.

186. *See supra* notes 1, 180 and accompanying text.

authority and new sources of funding that outstrip existing demands. Indeed, the postfinancial crisis reforms revealed the need for new authority to unwind noncommercial banking entities (such as AIG and Lehman Brothers) and the need for new sources of funding beyond what was available to the Fed.<sup>187</sup> Because of the enormous price tag and social significance of financial bailouts, Congress acted provisionally or partially in granting authority and appropriations so that it could supervise how agencies use their power and resources.<sup>188</sup> To obtain more of either, agencies know from the outset that the President will hold the keys to the kingdom. Financial agencies cannot afford to flout the views of the President, particularly when they are communicated so overtly in the process.

In addition, the nature of financial problems creates a special demand for information. If the Fed hopes to succeed in locating sources of risk, it must have access to a broad range of information. Working with the Secretary and other agencies multiplies its resources. Moreover, the White House itself is a source of information that is critical to crafting a successful policy. Such information is also likely crucial to crafting a publicly acceptable policy.<sup>189</sup> Bernanke, in addressing financial regulatory reform, has not pressed the image of the politically insulated David against Wall Street's Goliaths. Rather, he has allied with Geithner, enlisting the political strength of the Obama Administration to fortify his agency for battle.<sup>190</sup> He recognizes that for decisions so profoundly national in scope, the combination of politics and expertise is more powerful than expertise alone. All else equal, the President is likely to have information that is relevant to

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187. See WESSEL, *supra* note 142, at 199–200 (describing the point at which Ben Bernanke said to Henry Paulson in the third week of September 2008, “We can’t do this anymore, Hank. We have to go to Congress.”); *Adding Up the Government’s Total Bailout Tab*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/interactive/2009/02/04/business/20090205-bailout-totals-graphic.html> (laying out the need for funding through April 30, 2009).

188. See 12 U.S.C. § 5211 (Supp. II 2008) (creating the Troubled Assets Relief Program (TARP)); Laurie Montgomery & Paul Kane, *Senate Votes to Release Bailout Funds to Obama*, WASH. POST, Jan. 16, 2009, at A1 (describing tiered release of funds under TARP).

189. This claim is different from the one that the Court has used to constrict the reach of statutory delegations. The Court has said that some issues are too important for Congress to implicitly delegate to an agency through mere ambiguity. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (holding that the FDA lacked authority to regulate tobacco products because Congress would not have intended to implicitly delegate to the agency “a decision of such economic and political significance”). The point here is that when Congress explicitly delegates authority to an agency over an issue of national significance, subsequent presidential involvement is natural and desirable.

190. See, e.g., Labaton, *supra* note 150 (discussing Bernanke’s efforts to partner with the Obama administration in expanding the authority of the Fed).

generating sound policy on market stability and to mobilizing the necessary political will to achieve the results.

Second, a shared set of interests between the Fed and the President reduces the need for stronger control. Market stability, like monetary policy, operates in an area in which there is widespread agreement that the proper regulatory response will, like a rising tide, raise all ships.<sup>191</sup> Thus, both the Fed and the President share the same basic interest in improving the economy. This alignment is often absent or diminished in other areas, such as environmental quality or drug safety, where fundamental disagreements on the purpose of the regulatory regimes can divide agency from administration over time.<sup>192</sup> Furthermore, developed financial markets provide an easily accessible metric of performance. The public can evaluate the health of the economy by looking at the stock indices, the unemployment rate, and other related markers—and it can translate that perception, whether accurate or not, into reputational scores or approval ratings.

Third, the market can provide a buffer in these areas. Markets themselves serve to channel agency action by providing information and signals as to various choices. In periods such as that preceding the 2008 meltdown, there is reason to question distortions in the market. But markets are undeniably there and produce factors for consideration that the agency cannot ignore. These influences narrow the range of Fed action and limit the degree of potential policy divergence between the agency and the administration.

Fourth, and finally, stronger presidential control may actually be undesirable as a normative matter, if not as a political matter. As we have noted, the President may have an interest in allowing an independent agency to have final decisional authority as a form of self-protection, as if tying the presidency to the mast for fear of the Sirens.<sup>193</sup> Such a check is an understandable strategic political choice, particularly in areas such as market stability, where short-term electoral interests can be expected to conflict with long-term electoral interests and even longer-term institutional goals.<sup>194</sup> Few taxpayers want to see millions of dollars doled out to failing investment banks,

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191. See, e.g., Timothy Geithner, U.S. Sec'y of Treasury, Remarks on Financial Stability Plan (Feb. 10, 2009), available at <http://blogs.wsj.com/economics/2009/02/10/geithner-remarks-on-financial-stability-plan/tab/article/> (discussing the importance of the administration's Financial Stability Plan).

192. See, e.g., Whitman, *E.P.A. Administrator, Resigns*, ASSOC. PRESS, May 21, 2003, available at <http://www.nytimes.com/2003/05/21/politics/21WIRE-WHIT.html> (recounting disagreements between EPA Administrator Christine Todd Whitman and George W. Bush administration over environmental issues).

193. THE ODYSSEY OF HOMER 185 (George Herbert Palmer, trans. 1921).

194. See *supra* notes 66–67 and accompanying text.



but such an action may be necessary to ensure the overall health of the financial system. Many institutions might want to claim a share of the government handouts, but their rescue may not enhance market stability. The President may have trouble resisting the short-term pressures in deference to other interests and thus may seek an independent regulator for fortitude.

Agency independence also plays an important normative role. As many scholars have recognized in the years succeeding the Reagan revolution, presidential control is not always an unmitigated good.<sup>195</sup> It is a positive when it enhances democratic values—such as the responsiveness or effectiveness of government policy—but a negative when it results in the opposite.<sup>196</sup> The reasons track the political ones. Modern Presidents have used their new role in the regulatory state to prioritize short-term, or narrow, interests at public expense.<sup>197</sup> Even if we believe that the President generally should have plenary control over regulatory policy, we can recognize issues for which such power is dangerous—and even whole areas in which additional safeguards might be prudent. Market stability is one area that requires protections against presidential overreaching not simply because of the significance of the area, but also because of the predictable conflict between short-term and long-term interests. The structural

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195. See Lisa Schultz Bressman, *Deference & Democracy*, 75 GEO. WASH. L. REV. 761, 776 (2007) (“The administrations used broad statutes in an undemocratic fashion to take an action on a controversial issue that disregarded the likely preferences of Congress or to take a position on an issue subject to public debate without conducting any public process of its own.”); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (“Our main suggestion for administrative law, then, is that *MA v EPA* is part of a trend in which the Court has at least temporarily become disenchanted with executive power and the idea of political accountability and is now concerned to protect administrative expertise from political intrusion.”).

196. See Bressman, *supra* note 195, at 784 (“If accountability is to serve as the key to agency legitimacy then it is not unreasonable to expect representation and responsiveness, not just credit-claiming and blame-shifting.”); cf. Freeman & Vermeule, *supra* note 195, at 87 (explaining that the Court’s approach in *Massachusetts v. EPA* “hearkens back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which political influence over agencies by the White House is seen as a problem rather than a solution”).

197. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 510–14 (2007) (recounting the administration’s position that EPA would not regulate greenhouse gas emissions from motor vehicles even if it’s newly articulated position that it had no authority to do so were determined wrong because it would conflict with the President’s “comprehensive approach” to climate change); *Gonzales v. Oregon*, 546 U.S. 243, 248–49, 267–69, 274–75 (2006) (rejecting the Attorney General’s claimed authority to effectively criminalize physician-assisted suicide under the Controlled Substances Act via an interpretive rule, short-circuiting “‘earnest and profound debate’ across the country” without “any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment”).

protections come in the form of modified or collaborative agency independence.<sup>198</sup>

### *B. Securities Transactions and Markets*

Recent administration practices on securities transactions and markets have increased the involvement of the Secretary of the Treasury and the White House on issues of political salience. These practices loosely parallel ones that modern Presidents have used for managing executive-branch agencies. Although the President lacks the threat of removal to back such practices, the agency to which they are addressed—the SEC—has been largely responsive. Thus, the practices work as means for transmitting presidential preferences while still leaving the SEC with a distinctive independent flavor.

#### 1. The Regulation of Securities

The SEC's usual approach to regulating the securities field combines federal rulemaking focused on disclosure by public companies, and aggressive enforcement of fraud, via a combination of both public and private law suits.<sup>199</sup> Apart from this direct regulation of the companies themselves, Congress has authorized the SEC to regulate the participants in securities transactions, such as broker-dealers, accountants, and other gatekeepers.<sup>200</sup> For this task, the SEC historically has relied on self-regulation and a host of SROs—the stock exchanges and NASD for securities dealers, and various iterations of self-regulators for accountants and auditors.<sup>201</sup> As William O. Douglas, the third chairman of the SEC before joining the Supreme Court,

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198. In evaluating the 2009 proposals, some have questioned whether expanding the Fed's authority would cause the agency to lose its independence and effectiveness in setting interest rates. See Labaton, *supra* note 150 ("Some critics have raised other concerns – that the Fed is stretching itself too thin, or compromising the political independence that is essential for setting monetary policy."). If so, expanding the Fed's authority would impose an unintended cost that should detract from its normative appeal as market stability regulator. Under our analysis, the answer will depend on whether the Fed (or the chair) can successfully wear two hats—one for the regulation of market stability and another for the setting of interest rates. Although this concern is difficult to address in the abstract, we explain in Section C below why dual roles are politically and theoretically possible.

199. Private lawsuits, principally class action lawsuits under Rule 10b-5, see 17 C.F.R. §240.10b-5 (2009), are an important and controversial part of the enforcement mechanism for securities fraud, which we do not address here.

200. Regulation of broker-dealers is authorized by Section 15 of the Securities Exchange Act of 1934, see 15 U.S.C. §77o (2006); regulation of broker-dealers was increased by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (2002) (codified in scattered sections of U.S.C.A.).

201. See *supra* Part I.B.3 and accompanying notes.

described this approach: “[The] exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.”<sup>202</sup>

Although self-regulation has been a constant over the SEC's history, there has been a marked shift over time to greater government participation and oversight of the SRO regulation. For example, at a time in the 1990s when stock market prices were quoted in eighths of dollars (e.g., 1/8, 1/4, 3/8), research showed that market makers on the NASDAQ were using only the even ticks (e.g., 1/4, 1/2, 3/4) in quoting prices to retail customers, thereby doubling the spread for market makers who acted as both buyers and sellers in their trading with customers.<sup>203</sup> The SEC opened an investigation against the market makers.<sup>204</sup> As part of the investigatory and settlement process, the agency obtained broad changes in the governance of the NASD, which owned the NASDAQ and set the rules for trading.<sup>205</sup> Specifically, the reforms sought to offset industry dominance of the NASD board of directors by requiring a majority of independent members on the board who represented the public.<sup>206</sup> The agency pushed through parallel governance changes for the NYSE, which used a different trading system based on specialists making a market for each stock, when the NYSE later was embroiled in its own scandal

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202. DOUGLAS, *supra* note 179, at 82, *quoted in* *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 352 (1963). This was visible in Douglas's battle with the stock exchanges over their governance in the mid 1930s and in the statutory push in the Mahoney Act in 1935, which led to self-regulation of broker-dealers under the newly formed National Association of Securities Dealers under SEC supervision. *See Silver*, 373 U.S. at 351–53.

203. The story of the odd-eighths scandal, with the data that brought the problem to light, is told in William G. Christie & Paul H. Schultz, *Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?*, 49 J. FINANCE 1813 (1994).

204. SEC. & EXCHANGE COMM'N, APPENDIX TO REPORT PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 REGARDING THE NASD AND THE NASDAQ MARKET [hereinafter 21(a) REPORT APPENDIX], *available at* <http://www.sec.gov/litigation/investreport/nd21a-appx.txt>.

205. NASD, Inc., Report of the NASD Select Committee on Structure and Governance (Sept. 15, 1995) at App. A. The Committee was appointed by the NASD Board of Governors in November 1994 in the wake of the odd eighths scandal. *See* 21(a) REPORT APPENDIX, *supra* note 204, at 10–12, 16–24.

206. Pursuant to the reorganization, NASD reduced its board to eight members, five of whom would be drawn from the public sector and created a separate regulatory unit, NASD Regulation Inc., with a board of twenty-eight members that would be equally divided between industry and public representatives. In addition, the NASDAQ board was restructured to include sixteen members drawn equally from industry and the public. William G. Christie & Robert B. Thompson, *Wall Street Scandals: The Curative Effects of Law & Finance*, 84 WASH. U. L. REV. 1567, 1576 (2006).

questioning the fairness of its members trading with customers.<sup>207</sup> When the NYSE and NASD relinquished the regulation of broker-dealers to the newly created FINRA in 2007, the SEC-approved structure of that SRO required that half of the board be public members, with industry board members in a minority position.<sup>208</sup>

When the Enron scandal shined unwelcome light on industry-generated, peer-reviewed dispute-resolution procedures for auditing, the Sarbanes-Oxley Act of 2002 created the PCAOB to set uniform standards and to oversee the accounting industry.<sup>209</sup> Even though Congress was trying to replace a flawed system of self-regulation with more government-like prosecution of wrongdoing, it still sought an agency with a degree of independence. The members of the PCAOB are appointed by the five members of the SEC, after mandatory consultation with the Secretary of the Treasury and the chair of the Fed.<sup>210</sup> The SEC has the power to remove a PCAOB member for good cause.<sup>211</sup> Furthermore, the SEC approves the rules that the PCAOB issues and holds other supervisory functions over its actions.<sup>212</sup> The

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207. In 2004, the SEC brought enforcement action against the specialists' firms who make markets for NYSE stocks, based on illegally trading ahead of client orders and "interpositioning" a similar practice. Phyllis Diamond & Kip Betz, *SEC, NYSE Specialist Firms Reach \$241M Settlement Over Trading Practices*, 36 Sec. Reg. & L. Rep. (BNA) 602 (Apr. 5, 2004) (reporting agreement to pay \$87 million in civil penalties and \$154 million in disgorgement). The following year, the federal government indicted fifteen specialists on charges of illegally trading ahead and interpositioning, and fined the NYSE \$20 million. See Chad Bray, Aaron Lucchetti & Paul Davies, *Two Ex-Van der Moolen Specialists Are Convicted of Securities Fraud*, WALL ST. J., July 15, 2006, at A3 (reporting convictions for trading for their firm before they fulfilled customer orders); Kara Scannell & Aaron Lucchetti, *Ex-Specialists Face Indictment for NYSE Deals*, WALL ST. J., Apr. 12, 2005, at C1. But see *Government Drops Case Against Five NYSE Specialists*, 38 Sec. Reg. L. Rep. (BNA) 2002 (Nov. 22, 2006) (reporting that U.S. Attorney Michael Garcia had dropped five of the fifteen indictments). During this same period, new leadership at the exchange, brought in after a controversy as to the amount of former CEO Richard Grasso's compensation, revamped the governance structure to make it more independent along the lines of the earlier NASD reforms. See Richard Hill, *Reed Details Proposal for Revamped Governance Structure of Embattled NYSE*, 35 Sec. Reg. & L. Rep. (BNA) 1873 (Nov. 10, 2003); Stephen Labaton, *Different Roles and Fresh Faces Promised at Big Board*, N.Y. TIMES, Oct. 17, 2003, at C1 (reporting overhaul of the NYSE board and a regulatory structure reporting to independent directors).

208. See Order Approving Proposed Rule Change to Amend the By-Laws of NASD, Exchange Act Release No. 56,145, 72 Fed. Reg. 42, 169 (July 26, 2007), available at <http://sec.gov/rules/sro/nasd/2007/34-56145.pdf> (SEC Order approving bylaw amendment for NASD setting up the new governance structure of FINRA, with Board to include eleven public members, ten industry members and the CEO).

209. 15 U.S.C. § 7211 (2006).

210. *Id.* § 7211(e)(4)(A) ("[T]he Commission, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, shall appoint the chairperson and other . . . members of the Board . . .").

211. *Id.* § 7211(e)(6).

212. *Id.* § 7217.

PCAOB is not a traditional independent agency because its members are not removable by the President or even a presidential agent, such as the Attorney General. Rather, it is an ostensibly private entity within the envelope of an independent agency.

The PCAOB's unusual structure reflects the alternative that it replaced: it is one step removed from the previous regime of self-regulation and therefore not immersed in the governmental sphere, even to the same extent as the SEC. Although auditing standards could no longer be left to industry alone, just as broker-dealer regulation by the NASD and the NYSE could no longer be controlled by industry alone, this structure nonetheless maintains sufficient proximity to the profession to make it workable. The auditing scandals did not alter the profession's possession of the requisite experience and information for setting standards. At the time of the PCAOB's creation, greater proximity to politics was not, and still now is not, necessary and might instead produce its own pathologies. For example, industry participants could attempt to dominate the SEC if the power resided there. An agency carefully structured to include industry members and public representatives, like the PCAOB, might fare better.<sup>213</sup> For example, two—and only two—members of the PCAOB are permitted to be accountants.<sup>214</sup>

Although the PCAOB has received a considerable amount of attention,<sup>215</sup> we are more interested in administration-initiated innovations that have attracted less notice. During the George W. Bush Administration, Treasury Secretary Henry Paulson's first major speech on the economy called for more efficient and cost-effective agency rulemaking for internal corporate controls, one of the key provisions flowing from the Sarbanes-Oxley Act.<sup>216</sup> The speech was part of a broader Paulson effort to reduce regulation for addressing competitiveness of the U.S. capital market, including litigation reform

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213. Senator Sarbanes, who gave a name to the statute that created the PCAOB, noted that "if we can structure the board well enough, it might actually have more independence from political influence than the SEC would have." *Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies: Hearing Before the S. Banking, Housing, and Urban Affairs Comm.*, 107th Cong. 1027 (2002).

214. 15 U.S.C. § 7211(e)(2).

215. Public interest in the PCAOB recently increased when the Supreme Court heard oral arguments as to the constitutionality of the entity's structure. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (2009); *cf.* Peter L. Strauss, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 62 VAND. L. REV. EN BANC 51 (the first in a series of *Roundtable* essays about the case specifically and the PCAOB generally).

216. Press Release, U.S. Dep't of the Treasury, Henry Paulson, U.S. Sec'y of the Treasury, Remarks on the Competitiveness of U.S. Capital Markets, Address Before the Economic Club of New York (Nov. 20, 2006), <http://www.ustreas.gov/press/releases/hp174.htm>.

under Rule 10b-5, which acts as the workhorse for securities fraud prevention.<sup>217</sup> The so-called Paulson Committee, a private committee that neither included nor was appointed by Paulson—but whose work had been blessed by him—published similar recommendations around the same time. In addition, two other private-sector reports echoed similar themes.<sup>218</sup>

The SEC adopted new rules shortly thereafter.<sup>219</sup> To be sure, rulemaking may have occurred without the influence of the Secretary. Section 404, as this issue was labeled, had been a flash point for some time. The SEC and its recently appointed Republican chair, former California congressman Christopher Cox, had been considering rulemaking in the area.<sup>220</sup> Nevertheless, the recommendations were a particularly visible administration effort at agency redirection. Unlike recommendations to executive-branch agencies, they did not come from the President himself, and they could not be backed by the threat of removal. However, the visibility of the comments made them more difficult to ignore than ordinary jawboning.

Secretary Paulson continued his public regulatory push beyond the section 404 rulemaking. In March of the next year, he and SEC Chair Cox co-chaired a discussion on capital market competitiveness at which financial reporting, a key SEC subject-matter area, was one

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217. See Stephen Labaton, *Treasury Chief Urges "Balance" in Regulation of U.S. Companies*, N.Y. TIMES, Nov. 21, 2006, at C1 (discussing Paulson's speech in the broader political context).

218. The Committee on Capital Markets Regulation, as it was formally called, issued an interim report in November 2006. COMMITTEE ON CAPITAL MKTS. REGULATION, INTERIM REPORT (2006), available at [http://www.capmktreg.org/pdfs/11.30Committee\\_Interim\\_ReportREV2.pdf](http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf). The other contemporaneous reports were by the U.S. Chamber of Commerce. U.S. CHAMBER OF COMMERCE, COMM'N ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, REPORTS AND RECOMMENDATIONS (2007), available at <http://www.uschamber.com/publications/reports/0703capmarketscomm.htm>; MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE U.S.' GLOBAL FINANCIAL LEADERSHIP (2007), available at [http://www.nyc.gov/html/om/pdf/ny\\_report\\_final.pdf](http://www.nyc.gov/html/om/pdf/ny_report_final.pdf).

219. The proposed rules were issued on December 20, 2006 and final rules were promulgated in 2007. The final rules, as corrected, are described in the SEC release, Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting, Exchange Act Release No. 55,928, Securities Act Release No. 8809, 72 Fed. Reg. 35,310 (June 27, 2007) available at <http://www.sec.gov/rules/final/2007/33-8809.pdf> (codified in scattered sections of 17 C.F.R. pts. 210, 228, 229, and 240).

220. The SEC issued a concept release in the summer of 2006, Concept Release Concerning Management's Reports on Internal Control Over Financial Reporting, Exchange Act Release No. 54,122, 71 Fed. Reg. 40, 866 (proposed on July 18, 2006), available at <http://www.sec.gov/rules/concept/2006/34-54122.pdf>, and earlier in the year Chairman Cox had testified that his goal was to make section 404 work for small business, although not by removing them from coverage of the statute, Tim Reason, *Cox: "My Goal Is to Make 404 Work,"* CFO, Apr. 25, 2006, <http://www.cfo.com/article.cfm/6848926>.

of the key topics.<sup>221</sup> Two months later, Treasury asked two former SEC leaders to co-chair a committee to analyze the auditing system, a key focus of the SEC and the PCAOB.<sup>222</sup> At the same time, Paulson announced that Treasury would commission a rigorous analysis of factors driving financial restatements, again an issue within agency purview.<sup>223</sup> Paulson also stated that Treasury supported convergence of U.S.-based GAAP accounting principles and international standards, a still-controversial issue for the SEC.<sup>224</sup> A year later, in March 2008, Treasury published its Blueprint for Financial Regulatory Reform.<sup>225</sup> Ideas in this document can be traced to the 2006 Paulson speech and Paulson report, and many of the same issues reappear in the 2009 reform debate (for example, the Blueprint recommended a merger of the SEC and CFTC), although the answers have changed somewhat.

In addition to selective intervention in SEC policy, we also see systematic collaboration on such policy. An example is the President's Working Group, an interagency panel chaired by the Secretary of the Treasury and including the chairs of the Fed, the SEC, the CFTC and the chief banking regulators.<sup>226</sup> This group was formed initially to work out jurisdictional disputes between the agencies on an informal basis.<sup>227</sup> Under the Obama Administration's June 2009 proposal, the group would be replaced by a Financial Services Oversight Council ("FSOC"), which will have more formal jurisdiction over such conflicts.<sup>228</sup> This is the same group discussed earlier with whom the Fed would be required to consult before setting requirements for firms determined to create systemic risk.<sup>229</sup> Other parts of the proposed 2009 reform legislation divide derivatives regulation between the SEC

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221. Press Release, U.S. Dep't of the Treasury, Schedule for Treasury Conference on U.S. Capital Markets Competitiveness (Mar. 9, 2007), <http://www.treas.gov/press/releases/hp304.htm>.

222. Press Release, U.S. Dep't of the Treasury, Paulson Announces First Stage of Capital Markets Action Plan (May 17, 2007), <http://www.treas.gov/press/releases/hp408.htm>.

223. *Id.*

224. *Id.*

225. Press Release, U.S. Dep't of the Treasury, Remarks by Secretary Paulson on Blueprint for Regulatory Reform (Mar. 31, 2008), <http://www.treas.gov/press/releases/hp897.htm>.

226. President Reagan established the Working Group on Financial Markets in response to the stock market crashes of October 19, 1987. Exec. Order No. 12,631, 53 Fed. Reg. 9421 (Mar. 18, 1988). The Working Group was to report to the President within sixty days and periodically thereafter, and the "heads of Executive departments, agencies, and independent instrumentalities" were instructed to assist this group in its inquiries. *Id.*

227. *See id.* (explaining that one of the purposes of the group is "policy coordination").

228. A NEW FOUNDATION, *supra* note 134, at 10.

229. *Id.*

and the CFTC and task the FSOC to referee disputes between the two agencies.<sup>230</sup>

How will this collaborative relationship work in practice? In a setting where a single agency is resisting administration policy, as apparently occurred in the late 1990s when CFTC Chair Brooksley Born sought to regulate derivatives,<sup>231</sup> this council would work to cabin the outlier. But the effort to do so there occurred within the President's Working Group, which had no formal decisionmaking authority. Thus, when Chair Born persisted in publishing the concept paper on derivatives regulation, the Group did the only thing that it could: it sought legislation to ban regulation of derivatives.<sup>232</sup>

When agencies like the SEC and the CFTC split on an issue, each will seek to persuade others on the council to support its position. It seems likely that the Secretary will be first among equals in this setting—among a group of federal officials who have their own sets of concerns. Those officials may defer to the Secretary and to the staff that will come from Treasury, and moreover, to the President's agenda implicitly reflected in the Secretary's position. Alternatively, coalitions may form and a majority result may emerge, much like what often occurs in the White House as different offices and agencies jockey to determine the specifics of the President's agenda.<sup>233</sup>

## 2. Political Interests and Accountability Levers

To see the political and normative advantage of these practices, consider first other means of presidential influence over the SEC. The President's most important power in the securities context is the ability to designate a chair in a five-member commission that can have no more than three members from one political party.<sup>234</sup> The practical effect is that control of the agency changes with every change in administration. When there is a vacancy, the President can appoint a

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230. *Id.* at 51–52.

231. See Timothy L. O'Brien, *A Federal Turf War Over Derivatives Control*, N.Y. TIMES, May 8, 1998, at D3 (describing CFTC's regulatory reform proposal).

232. See Evan N. Turgeon, Note, *Boom & Bust for Whom?: The Economic Philosophy Behind the 2008 Financial Crisis*, 4 VA. L. & BUS. REV. 139, 162–63 (2009) (summarizing the legislative debate surrounding the Financial Derivatives Supervisory Improvement Act of 1998).

233. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68 (2006) (describing how various White House offices created coalitions with regard to “the development of EPA rules”).

234. This has been the President's statutory right since 1949 and was followed by custom for most of the prior period beginning with Franklin Roosevelt who designated Joseph P. Kennedy as the first chair, followed by James M. Landis, and then William O. Douglas when Landis left to be dean of the Harvard Law School.



new member and make that person the chair. If there is no vacancy, replacing the chair—particularly with a member of the opposing party—leads the outgoing chair to seek other opportunities.<sup>235</sup> As with other independent agencies, the President's power to appoint all members serves as a real source of political accountability.

The White House has also utilized informal pressure to influence the SEC. William Cary, a leading corporate law academic who was chairman during the Kennedy Administration, wrote later that the Kennedy White House had influence over appointments to high positions at the agency: "There is an informal understanding as to clearance which some of us felt we could not ignore in more than one or two instances. Policies of selection vary widely in different administrations."<sup>236</sup> More recently, as discussed previously, CFTC Chair Born was dissuaded from regulating derivatives by the combined jawboning of the Secretary of the Treasury, White House officials, and the chair of the SEC.<sup>237</sup> A more recent example is the expletive-laden effort of Secretary Geithner to stifle the dissent of banking regulators concerning parts of the Obama Administration's 2009 reform proposals.<sup>238</sup>

In addition, the President is instrumental in obtaining appropriations for the SEC, even more so than for the Fed. The Fed has a congressionally specified independent source of funds, but the SEC is subject to the normal congressional appropriations process in which the administration makes an initial submission to Congress.<sup>239</sup> Thus, the SEC needs the White House on its side to retain its funding and strength.

Another source of presidential involvement is the control of SEC litigation. The Solicitor General, a presidential appointee in the Department of Justice who is subject to at-will presidential removal,

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235. See Audio Recording: Oral History of Harold Williams, conducted by Daniel Goelzer & Amy Goodman (Jan. 19, 2006), available at <http://www.sechistorical.org/collection/oral-histories/williamsH011906Transcript.pdf> (describing Williams' unwillingness to remain at SEC after he lost the chairman position).

236. WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* 13 (1967).

237. Manuel Roig-Franzia, *Credit Crisis Cassandra*, WASH. POST, May 26, 2009, at C1 (describing combined efforts of Fed Chairman Allen Greenspan, Treasury Secretary Robert Rubin, future Treasury secretary Lawrence Summers, and SEC Chair Arthur Levitt against CFTC Chair Brooksley Born's plan to release a concept paper on regulation of derivatives).

238. Andrew Ross Sorkin, *Geithner Is Said to Lash Out at Regulators*, N.Y. TIMES DEALBOOK, Aug. 4, 2009, <http://dealbook.blogs.nytimes.com/2009/08/04/geithner-said-to-lose-his-cool-at-regulators-meeting/?apage=2>.

239. See 31 U.S.C. § 1108 (2006) (providing for OMB review of annual requests for appropriations).

handles Supreme Court litigation of securities cases.<sup>240</sup> The Solicitor General sometimes has taken positions on securities cases that diverge from the SEC view.<sup>241</sup> The Department of Justice plays another role. Although the SEC makes independent decisions to bring civil enforcement actions, the Department of Justice and the relevant U.S. Attorney's offices filter criminal referrals.<sup>242</sup>

The previously identified administration practices go a step further than these means to make the SEC responsive to presidential preferences. In fact, they are quite similar to those administration practices that have come to define presidential control of executive-branch agencies. As previously noted, modern Presidents have sought to centralize and review proposed regulations to better align executive-branch agency and presidential preferences. Scholars have contended that official presidential directives and even OIRA "prompt" letters, which recommend that an agency take a particular action, have an especially positive effect on accountability because they are so transparent and intentional. As Elena Kagan has written, they connote White House ownership of agency decisions.<sup>243</sup> Such recommendations from the Secretary of the Treasury to the SEC might have a similar effect. When the Secretary publicly announces recommendations and the SEC complies, it is reasonable to attribute the resulting rules to the Secretary, or at least to assume that the rules reflect a preference shared by the Secretary. And this shared preference tends to dispel the notion that the SEC, as an independent agency, has no connection to the President or to the will of the people.

To date, the Secretary of the Treasury has not intervened in SEC decisions often enough to establish a pattern. We make no claim concerning the frequency of this practice, and we certainly do not wish to overstate its significance. We mean only to show that the Secretary of the Treasury has used this tool to influence SEC decisions, in contrast to earlier periods when the White House often was silent and

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240. See Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. STATE L. REV. 185, 190–91, 191 n.22, 195–96 (stating that, though the Solicitor General handles litigation by independent agencies, he is subordinate to the Attorney General and subject to at-will removal).

241. See Devins, *supra* note 3, at 291–301 (discussing changing relationship of Solicitor General and SEC, and the Solicitor General's willingness to prevent the SEC from advancing a position at odds with those of the administration).

242. The Department of Justice represents the United States in bringing criminal actions. See 17 C.F.R. § 202.5(f) (2008) (stating that it is SEC policy to devolve responsibility for criminal prosecutions to the DOJ).

243. Kagan, *supra* note 14, at 2290–99.

the agency regularly resisted any encroachment on its turf.<sup>244</sup> In addition, when used, this tool has worked to achieve its purported goal of influencing SEC decisions, though it is not backed by a threat of presidential removal. Even a one-time occurrence demonstrates a possibility that in theory may have seemed incompatible with agency independence.

Moreover, the Secretary is unlikely to use public directives very often if they serve a strategic political purpose. No President has used directives on any more than a selective basis as to executive-branch agencies.<sup>245</sup> The White House has picked its battles, acting only when an issue is particularly salient. The Secretary likely will intervene even less frequently in SEC policy. Extreme selectivity is necessary to prevent the Secretary from disrupting the relationship that the SEC maintains with the exchanges and professionals. As noted above, this relationship is critical to workable securities policy, and workable securities policy is in the mutual interest of the President and the SEC. More control is not always better control.

Collaboration on SEC policy is likely to draw the SEC closer to executive-branch agencies. The modern efforts to centralize control of executive-branch agencies in the White House are well-known and have been mentioned here. Presidents have enlisted OIRA in this capacity since the 1980s. Other White House offices and executive-branch agencies have also participated in the process. President Clinton frequently issued personalized directives to agencies. President Obama has appointed regulatory czars to oversee specific areas or tasks,<sup>246</sup> such as executive compensation,<sup>247</sup> climate change,<sup>248</sup>

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244. Prior Chairmen Harold Williams and John Shad acted like traditional independent agency heads and either did not talk to the White House (Williams) or rebuffed OMB efforts to intervene (Shad). But Williams did meet with Treasury Secretary Mike Blumenthal, who held that position for the first 2 ½ years of President Carter's term, because he knew Blumenthal from his prior life. See Oral History of Harold Williams, *supra* note 235, at 4–5.

245. See Bressman & Vandenberg, *supra* note 233, at 70 (demonstrating selectivity in environmental context); Kagan, *supra* note 14, at 2307–08 (acknowledging that presidential control of regulatory policy is selective in its focus).

246. See Steve Holland, *Obama Fashions a Government of Many Czars*, REUTERS, May 29, 2009, <http://www.reuters.com/article/newsOne/idUSTRE54S5U120090529> (describing the administration's "reliance on czars" in various regulatory contexts).

247. See Brian Wingfield, *Time to Get Angry About AIG Again*, FORBES STREETTALK, Feb. 3, 2010, <http://blogs.forbes.com/streettalk/2010/02/03/time-to-get-angry-about-aig-again/> (describing Kenneth Feinberg as the "executive compensation czar").

248. See Press Release, Nat'l Ctr. for Pub. Policy Research, *Following Obama Comments, Corporate and Environmental Interests Lobby Administration Officials on Global Warming Legislation* (Feb. 11, 2010), [http://www.nationalcenter.org/PR-Cap\\_and\\_Trade\\_021110.html](http://www.nationalcenter.org/PR-Cap_and_Trade_021110.html) (describing Carol Browner as the administration's "Climate Change Czar").

and auto regulation.<sup>249</sup> The highlighted processes parallel these practices, although they are clearly identical to none because they are not backed by the threat of removal or ultimate policy control. Nevertheless, they temper agency independence with presidential involvement.

These mechanisms provide a sufficient tether to the administration to satisfy political and normative needs, especially in light of the circumstances that obviate the need for, and cut against, stronger presidential control. As with the Fed, the SEC has the economy to align its interests with the President's interests. This alignment reduces the need for stronger presidential control, given that the SEC and the President already share the same basic goals, inextricably tying their fates. Whatever the rules, they must aim generally to promote the integrity of the securities markets, which in turn serves the interests of both the agency and the administration.

More so than the Fed, the rich array of private actors involved in the securities process provides accountability bumpers, at least to the extent that markets are not distorted by bubbles or similar behavior. The SEC cannot disregard the securities markets and the participants in the markets because the success of the regulatory regime depends on them. In a sense, these players do double duty. First, they provide the experience and information necessary to set workable rules. Second, they furnish a limit on the rules that the SEC can adopt. Their involvement also means that there must be a limit on the amount of presidential control that any administration exhibits. The agency must be able to enlist both private actors and public representatives; too much one-sided political pressure will disrupt the balance.

The upshot is that the SEC can be subject to more accountability levers than ever before, two of which are quite similar to those that Presidents have used in recent years to transform the regulatory state. Thus, the SEC can be transformed alongside executive-branch agencies, albeit more gradually and less thoroughly. At the same time, it can retain the independence that is beneficial on both political and normative grounds.

### *C. Monetary Policy*

Monetary policy is one area which does not currently exhibit any changes that increase presidential involvement. Recall the history

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249. See John Crudele, *Car Czar's Roundabout Ties to General Motors*, N.Y. POST, Nov. 3, 2009, at 36 (describing Steven Rattner as the "car czar").

of the Fed. Congress created the Fed as an independent agency to insulate the setting of monetary policy from political influence.<sup>250</sup> Originally, the Fed was not as independent as it is today because the Secretary of the Treasury and the Comptroller of the Currency were ex officio members. It soon became apparent that even such limited political involvement was detrimental to the setting of interest rates. In 1935, as part of reform that centralized additional monetary power in the Fed and less in the regional banks, Congress removed the ex officio politicians from the board and constituted the Fed Board as a traditional independent agency. The further passage of time has proven the wisdom of that decision: modern economic studies have confirmed that interest rates and politics do not mix.<sup>251</sup>

We raise this issue not merely to show why agency independence remains the unquestioned choice for monetary policy, but to address some concern about allowing the Fed to handle market stability, either in consultation with and subject to the oversight of the Secretary of the Treasury, or as part of a council with the Secretary of the Treasury and others. To what extent would these sorts of developments (which generally satisfy political interests and further normative values) affect monetary policy? Could the Fed retain its independence for setting interest rates, or would we witness a de facto return to the hybrid model that Congress, for good reason, abolished in 1935? If the latter, the market-stability mechanism would lose some of its appeal.

Although the effect of the changes explored here remain somewhat unknown, dual roles nonetheless are politically and theoretically possible. As a political matter, consider that the Obama Administration has not claimed an interest in influencing monetary policy.<sup>252</sup> This position is credible because the Administration's leading financial advisor, Lawrence Summers, coauthored one of the studies demonstrating the deleterious effects of politics on monetary policy.<sup>253</sup> The expectation is that the Fed essentially would have separated

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250. See *supra* notes 66–69 and accompanying text.

251. See, e.g., Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT & BANKING 151, 158 (1993) (“On the other hand, as one would expect given our findings about inflation variability, there is a clear negative relationship between central bank independence and the variability of ex post real interest rates.”).

252. Jon Hilsenrath, *A Reshaped Fed is Likely to Gain Some Powers, Lose Others*, WALL ST. J., at A2 (May 18, 2009) (“Fed officials believe critics are missing a key distinction: While the central bank has aligned itself with the Treasury on individual rescues, its broader decisions about interest rates and how much money to pump into the economy are still entirely the Fed’s own. Its independence, in other words, remains intact.”).

253. Alesina & Summers, *supra* note 251.

functions: it would regulate market stability in collaboration with the Secretary of the Treasury, among others, but it would regulate monetary policy entirely on its own. No one can enforce this expectation against the Obama Administration or any other. But presidential self-interest is a powerful force, and it points against intervention in monetary policy.

Additionally, many agencies possess more than one function and manage to address the conflicts that arise.<sup>254</sup> For example, some independent agencies possess both adjudicatory and rulemaking functions, the former requiring insulation from politics and the latter requiring no such insulation. When agencies conduct adjudicatory proceedings, they are banned from receiving *ex parte* contacts of any sort by due process<sup>255</sup> and the Administrative Procedure Act (“APA”).<sup>256</sup> But the APA contains no similar ban on *ex parte* contacts during rulemaking, and courts have been reluctant to imply one based on due process.<sup>257</sup> Thus, independent agencies can be more enmeshed in politics when engaging in rulemaking—although in this instance they still are not subject to politics in the way that executive-branch agencies are.

The Fed, nevertheless, is more vulnerable to political pressure than adjudicatory agencies in the sense that neither the APA nor the Due Process Clause would prevent the Secretary of the Treasury from seeking to influence the regulation of monetary policy. Moreover, current proposals do not segregate the functions by allocating them to different officials within the agency, as is often the case when an agency possesses both prosecutorial and adjudicatory power. The same officials (the full Fed membership or the chair) would be the decisionmakers for issues of market stability and monetary policy, and therefore the monetary policy decisionmakers cannot be walled off from the Secretary. Thus, administration self-interest alone would

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254. *E.g.*, *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (holding that a state medical examining board’s “combination of investigative and adjudicative functions does not, without more, constitute a due process violation”).

255. *See* Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1786–88 (2007) (discussing *ex parte* contacts).

256. *See* 5 U.S.C. § 557(d) (2006) (providing that “no interested person outside the agency shall make . . . to the agency, administrative law judge, or other employee who is . . . involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding,” and providing remedy if such communication nonetheless occurs).

257. *E.g.*, *Action for Children’s Television v. FCC*, 564 F.2d 458, 469–78 (D.C. Cir. 1977) (refusing to find a due process violation as a result of *ex parte* contacts during informal rulemaking where the determination at issue did not involve “competing claims to a valuable privilege”).

need to restrain the Secretary from seeking to influence those officials. Admittedly, this is certainly asking a lot.

There is the additional question of whether giving the Fed more responsibilities will dilute its main mission in pursuing effective monetary policy—another unintended consequence. On this point, John Taylor, professor of economics at Stanford and a Treasury undersecretary in the George W. Bush Administration, has voiced a familiar refrain from the history of independent agencies: these entities do best when assigned “a limited area of understandable goals.”<sup>258</sup> Ultimately, the inevitable tradeoff between expertise and effectiveness cannot be resolved fully. On the one hand, the expertise of the Fed in regulating monetary policy will assist it in regulating market stability (whether alone or as part of a commission). On the other hand, the effectiveness of the Fed in the latter area may be diminished by responsibility in the former. At this time, a political judgment to involve the agency in both functions would not be clearly problematic from a normative perspective. But the concern remains.

### III. CONSTITUTIONAL IMPLICATIONS

Our principle aim in this Article is to highlight and evaluate the hybridization of independent and executive-branch agencies in the financial context. In this Part, we consider the constitutional implications of the resulting institutional relationships. Although the Supreme Court long ago upheld the constitutionality of independent agencies,<sup>259</sup> new forms are likely to present new challenges. Indeed, the Court heard arguments during the current Term in a case challenging the constitutionality of the PCAOB.<sup>260</sup> Our goal in this Part is not to beat the Court to a decision in this case but, rather, to inform the thinking on it and future cases. We offer the following discussion to connect the political and the normative with the constitutional.

#### *A. The Constitutional Framework*

When the Supreme Court first confronted the constitutionality of independent agencies, it articulated a formal test heavily focused on the functions of those agencies. If an agency possessed purely

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258. Edmund L. Andrews, *Two Authorities on Fed Advise Congress Against Expanding Its Power*, N.Y. TIMES, July 9, 2009, at B3.

259. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–32 (1935).

260. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008) (upholding the constitutionality of PCAOB), *cert. granted*, 129 S. Ct. 2378 (2009).

executive functions, as did the Postmaster General in *Myers v. United States*, then Congress could not constitutionally restrict the ability of the President to remove the official.<sup>261</sup> The Court reasoned that the “disciplinary influence” of the removal power was “an indispensable aid” to meet the President’s responsibility “under the Constitution for the effective enforcement of the law . . . .”<sup>262</sup>

In *Humphrey’s Executor v. United States*, the Court held that the President need not have plenary control over quasi-legislative or quasi-judicial functions, such as those belonging to the FTC.<sup>263</sup> When President Roosevelt attempted to replace a FTC commissioner with someone who would share his view of the statute, the Court upheld the constitutionality of the removal restriction. It distinguished *Myers*, writing that “[t]he office of a postmaster is so essentially unlike the office now involved that the decision in . . . [that case] cannot be accepted as controlling our decision here.”<sup>264</sup> Whereas the postmaster

is an executive officer restricted to the performance of executive functions, . . . [t]he Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or a judicial aid.<sup>265</sup>

It therefore confined *Myers* to “purely executive officers” and upheld the authority of Congress to limit the removal of officers whose agencies are “created by Congress as a means of carrying into operation legislative and judicial powers.”<sup>266</sup> The Court reaffirmed this distinction in *Wiener v. United States*, which involved the War Claims Commission, an agency created to adjudicate claims for compensation by those “who suffered personal injury or property damage at the hands of the enemy in connection with World War II.”<sup>267</sup>

The heavy focus on the “character of the office” ended with the 1988 decision in *Morrison v. Olson*.<sup>268</sup> That case involved the Ethics in Government Act, which gave the Attorney General the authority to investigate whether high-level officials “may have violated any Federal criminal law” and to request that a special division of the D.C. Circuit appoint an “independent counsel” to further investigate and

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261. 272 U.S. 52, 163–64 (1926).

262. *Id.* at 132.

263. 295 U.S. at 629–30.

264. *Id.* at 627.

265. *Id.* at 627–28.

266. *Id.* at 628, 630.

267. 357 U.S. 349, 350, 356 (1958) (upholding removal restriction for members of the War Claims Commission).

268. 487 U.S. 654 (1988).



prosecute these officials.<sup>269</sup> The Attorney General could remove the counsel only for “good cause.”<sup>270</sup> Although the independent counsel possessed purely executive functions—the power to investigate and prosecute—the Court did not invalidate the removal restriction in conformance with *Myers*.<sup>271</sup> Rather, it recast the constitutional test in functional, rather than formal, terms. It stated that

[t]he analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the constitutionally appointed duty to ‘take care that the law be faithfully executed’ under Article II.<sup>272</sup>

Thus, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”<sup>273</sup>

Applying the test, the Court found that the removal restriction in the Ethics in Government Act did not unduly interfere with the President’s authority.<sup>274</sup> Despite the executive nature of the counsel’s authority and the substantial amount of discretion that she possesses, the Court could not see “how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”<sup>275</sup> Furthermore, the Court stated that the “good cause” provision gave the President, through the Attorney General, “ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the Act.”<sup>276</sup> Additionally, the Court stated that the Act, “taken as a whole,” did not violate separation-of-powers principles “by unduly interfering with the role of the Executive Branch.”<sup>277</sup>

The Court dealt with a line of cases including *INS v. Chadha* and *Bowsher v. Synar*, in which it had held that Congress cannot

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269. *Id.* at 660–61.

270. *Id.* at 663 (citing 28 U.S.C. § 596(a)(1) (Supp. V 1982)).

271. *Id.* at 686.

272. *Id.* at 689–90.

273. *Id.* at 691.

274. *Id.*

275. *Id.* at 691–92.

276. *Id.* at 692; see Kevin M. Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate’s Wake*, in *PRESIDENTIAL POWER STORIES* 401, 403, 435 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (arguing that the *Morrison* Court upheld the removal provisions by analogizing independent counsel to the Watergate special prosecutor).

277. *Morrison*, 487 U.S. at 693.

retain for itself a role in agency decisions consistent with separation of powers.<sup>278</sup> Thus, Congress could not at once delegate authority to an agency and possess a legislative veto over its decisions or possess the removal power over its officials. Such simultaneous action served to “increase its own powers at the expense of the Executive Branch.”<sup>279</sup> The Court stated that the Act in question did not grant Congress a role in independent counsel decisions but “put[] the removal power squarely in the hands of the Executive Branch.”<sup>280</sup> It also cast the prior removal cases in a different light. *Myers* did not simply involve a purely executive official; the case involved a provision that gave Congress an impermissible role—the President could not remove the postmaster without the advice and consent of the Senate.<sup>281</sup> *Humphrey’s Executor* and *Weiner* were different in this respect. The “good cause” limitation granted Congress no extra power at the expense of the executive branch.<sup>282</sup>

As for the Act as a whole, the Court determined that it did not undermine the power of the executive branch.<sup>283</sup> Most importantly, the Attorney General could remove the independent counsel for good cause.<sup>284</sup> In addition, the Attorney General determined whether to request an independent counsel and could refuse to request one on finding “no reasonable grounds to believe that further investigation is warranted.”<sup>285</sup> The Court also noted that “the jurisdiction of the independent counsel is limited with reference to the facts found by the Attorney General, and once a counsel is appointed, the Act requires that counsel abide by Justice Department policy unless it is not ‘possible’ to do so.”<sup>286</sup>

By contrast to a strict focus on functions, *Morrison* presents a more forgiving framework. The removal restriction in the Ethics in Government Act would have been invalidated if the character of the

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278. *Id.* at 694; see *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (holding that Comptroller General, as an officer of the legislative branch subject to congressional removal, violated separation of powers by retaining executive power to direct budget cuts); *INS v. Chadha*, 462 U.S. 919, 956–59 (1983) (holding that legislative veto power authorizing action by one house of Congress violated Article I requirements of bicameralism and presidential presentment).

279. *Morrison*, 487 U.S. at 693–94.

280. *Id.* at 686.

281. *Id.* (explaining *Myers v. United States*, 272 U.S. 52 (1926)).

282. *Id.* at 691.

283. *Id.* at 695.

284. *Id.* at 696.

285. *Id.* (quoting 28 U.S.C. § 592(b)(1) (Supp. V 1982)).

286. *Id.* The Court also rejected the arguments that the Act constituted judicial usurpation of executive power by giving the special division of the D.C. Circuit a role in appointing an independent counsel. *Id.* at 675.

functions controlled, as no one questioned that the functions of an independent counsel are purely executive. But the Court did not focus strictly on the character of the functions. Rather, it considered whether the functions, however characterized, unduly interfered with the President's authority. The Court ultimately upheld the removal restriction but did so in a way that teed up the question of how much insulation those protections provide.<sup>287</sup> It suggested that the centrality of the functions to the President's duties matter, though it did not say more. Nor did it clarify what role the need for independence—for example, to prevent a conflict of interest in the investigation and prosecution of high-level officials—plays in the analysis. The fact that the Act was a response to Watergate presents a compelling case for political insulation of an independent counsel, regardless of the character of the functions.<sup>288</sup> But the Court did not wrestle with the political reality, as it had in *Humphrey's Executor*. There, the Court stated that “[the FTC’s] duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.”<sup>289</sup> As a result, the Court left room to argue about what factors matter in future cases.

### B. The Open Questions

Any financial agency that takes the form of a standard independent agency is not likely to garner particular constitutional attention. But the agencies discussed in this Article do not take the standard form, at least not entirely. We consider two agencies below: the Fed (as potential regulator of market stability) and the PCAOB (as partial regulator of securities transactions and markets).

#### 1. Market Stability

Since its creation, the Fed has looked like the paradigmatic independent agency. It is comprised of members removable by the President for good cause, and it performs a function, the setting of monetary policy, that requires insulation from politics.<sup>290</sup> But the

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287. See Stack, *supra* note 276, at 442–43 (“By viewing the good cause restriction as allowing the President adequate authority to supervise the independent counsel, the Court also opened up the question of how much protection its validation of removal protections really provide to the independent counsel—or to the independent agencies.”).

288. *Id.* at 408, 420 (discussing the relationship between the creation of the independent counsel and President Nixon’s termination of the first Watergate special prosecutor).

289. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935).

290. See 12 U.S.C. § 242 (2006) (describing appointment, tenure, and removal for the Board of Governors of the Fed).

analysis changes if the Fed is granted authority to regulate market stability, as included in some 2009 proposals. Although the Fed already has authority to oversee financial institutions, the extension to nonfinancial institutions would be significant because this category encompasses an enormous swath of the economy. Virtually any institution engaged in financial activity might fall within the Fed's regulatory authority. Though the level of control varies with the scope or significance of the functions, an extension of this magnitude might trigger meaningful judicial scrutiny.

However, the Fed would not be the only independent agency with broad or significant regulatory authority. The FTC, which the Court approved as constitutional in *Humphrey's Executor*, has a profound effect on the economy, as do other independent agencies, such as the CPSC, FCC, NLRB, and SEC. It would be hard to devise a test that could distinguish permissible from impermissible independent agencies on this basis.

In any event, the Fed actually would be more connected to the President in its capacity as market-stability regulator than in its existing capacities. The President would have the customary levers of control, including the authority to remove the members of the Fed for good cause and to make appointment decisions.<sup>291</sup> The President also would have an opportunity to select the chair at some point during the presidential term because the chair turns over every four years.<sup>292</sup> But, as discussed above, the President, through the Secretary of the Treasury, would also have an ongoing role in the formulation of market-stability policy.<sup>293</sup> Thus, the President would be able to ensure that the agency takes actions consistent with the faithful execution of the laws through continuous monitoring rather than ex post oversight. Because the President has better access to information about agency actions, this form of supervision is superior to removal authority alone.

In addition, the President, through the Secretary of the Treasury, would have a means other than removal authority to influence the decisions of the Fed. In *Morrison*, the Court considered it significant that the Attorney General possessed means other than removal authority to shape the authority of the independent counsel.<sup>294</sup> For example, the Court considered the role of the Attorney

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291. See Strauss, *supra* note 3, at 590–91 (including appointment power among means for the President to influence independent agencies).

292. See 12 U.S.C. § 242.

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

294. *Morrison v. Olson*, 487 U.S. 654, 696 (1988).

General in requesting an independent counsel and in defining the jurisdiction of the counsel.<sup>295</sup> Those roles were sufficient to ensure that the authority of the independent counsel did not undermine the President's authority. The Secretary of the Treasury would play a comparable role on issues of market stability. The Secretary would not call the Fed into operation but would assist in determining when federal intervention is necessary. The Secretary also would help to determine the policies that guide such intervention.

To be sure, the Fed is not subject to plenary presidential control. By virtue of the removal restriction, the Fed is capable of rejecting the judgment of the President on particular policy decisions. But, as discussed in the previous Part, the need for this political backstop is compelling; the removal restriction can operate to prevent short-term interests from overriding long-term ones at public expense.<sup>296</sup> The need for political insulation has not always been at the forefront of the Court's analysis, but it is likely a motivating consideration. Here, the need for independence sufficiently limits the President's involvement in market-stability policy to ongoing supervision and participation, instead of allowing for ultimate control.

## 2. Securities Transactions and Markets

Although the SEC is a well-established independent agency, it is now the keeper of a new creature: the PCAOB. The members of the PCAOB, which sets standards for the auditing profession, are subject to removal for good cause by the SEC, whose members themselves are removable by the President only for cause.<sup>297</sup> The Supreme Court will decide in the October 2009 Term whether this structure violates separation of powers.<sup>298</sup> In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the D.C. Circuit held (Judge Rogers writing and joined by Judge Brown) that the structure is permissible because the SEC is subject to sufficient presidential oversight and because the PCAOB is a "heavily controlled component" of the SEC.<sup>299</sup> As for the SEC, the President can remove the members of that agency for cause, which was constitutionally sufficient in *Morrison*.

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295. *Id.*

296. *See supra* notes 193–197 and accompanying text.

297. 15 U.S.C. § 7211(e)(6) (2006) (providing for PCAOB member removal by SEC for "good cause"); *see supra* note 48 (citing authority for proposition that SEC members are removable only "for cause").

298. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (2009).

299. *Id.* at 680–81.

Furthermore, the President can appoint the chair of the SEC, which provides another significant “lever[] of influence.”<sup>300</sup> In addition, the D.C. Circuit recognized that “independent agencies generally require ‘presidential good will’ to obtain budgetary and legislative support.”<sup>301</sup> Finally, given the “centralization of contracting, personnel requirements, and property allocations,” the D.C. Circuit, quoting Professor Peter Strauss, stated that “‘any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced.’”<sup>302</sup>

Although the PCAOB’s members are removable only for good cause by the SEC, the D.C. Circuit concluded that it is “subject to pervasive Commission control.”<sup>303</sup> First, “any policy decision made by the Board is subject to being overruled by the Commission.”<sup>304</sup> Second, “[t]he Act also provides authority for the Commission to limit and to remove Board authority altogether,” and third, “the Act fully preserves the Commission’s authority to regulate the accounting profession, set standards, and take any action against a company or individual.”<sup>305</sup> The D.C. Circuit also noted that the SEC approves the PCAOB’s “annual budget and supporting fees.”<sup>306</sup>

In a vigorous dissent, Judge Kavanaugh argued that the President’s control over the PCAOB is too indirect to pass constitutional muster because it is subject to removal by an agency over which the President has limited control.<sup>307</sup> As Judge Kavanaugh stated, “the President is two levels of for-cause removal away from Board members, a previously unheard-of restriction on and attenuation of the President’s authority over executive officers.”<sup>308</sup> Although the majority believed the case was analogous to *Humphrey’s Executor*, Judge Kavanaugh wrote that the PCAOB presented a wholly unique situation in which the agency is essentially a government unto itself.

Our view is that the PCAOB is constitutional but for reasons more specific to the design of that agency than the constitutional test typically has picked up. The PCAOB addresses a kind of conflict of

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300. *Id.* at 680.

301. *Id.* (citing Strauss, *supra* note 3, at 594–95).

302. *Id.* (citing Strauss, *supra* note 3, at 596).

303. *Id.* at 680–81.

304. *Id.* at 680.

305. *Id.* at 680–81 (citing 15 U.S.C. §§ 7217(d)(1), 7202(c) (2006)).

306. *Id.* at 681 (citing § 7219(b), (d)).

307. *Id.* at 686 (Kavanaugh, J., dissenting).

308. *Id.*

interest, though not between short-term and long-term political interests per se (as in the market-stability context) but between private and public interests. As described in Part II, Congress created the PCAOB for the very purpose of replacing a system of self-regulation that had failed in large part because accounting firms dominated the prior peer-review approach.<sup>309</sup> It could not achieve its purpose without preventing the accounting firms from using their political connections to dominate the new system of government regulation. Nor could it expect any agency to generate adequate accounting standards without the extensive participation of the accounting firms. Despite their selfish tendencies, the accounting firms still possess the requisite information and knowledge for setting the standards that govern their business. Seeking a solution, Congress doubly insulated the members of the agency responsible for setting standards. But it gave the SEC a large measure of supervision and influence over that agency to prevent it from becoming wholly disconnected.

As previously stated, the Court has not clarified how the need for insulation plays into the constitutional analysis, but when increased presidential control would threaten the purpose of the statute at hand, it is hard to argue persuasively that a removal restriction interferes with the President's ability to ensure the faithful execution of laws. This does not mean that Congress could not have granted authority to set auditing standards to a traditional independent agency, such as the SEC, instead of the PCAOB, because to do so would render statutory purposes vulnerable to politics. Rather, it suggests that the legislative determination to create a commission within a commission in this instance is not constitutionally problematic. Nor is it to say that the PCAOB could be removed entirely from politics as necessary to effectuate statutory purposes. That is simply not the case here. The PCAOB is subject to the heavy control of the SEC, as the D.C. Circuit correctly recognized, and under *Morrison*, the SEC is subject to the sufficient control of the President. The Constitution does not prevent Congress from innovating so long as the President retains the ability to discharge his constitutional duties.

But even if the Court disagrees and invalidates the PCAOB, our basic points in this Article remain intact. The PCAOB, while an interesting agency, is not central to our story. The political and normative reasons for creating the unique structure are well-known, and the constitutional analysis should account for these reasons

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309. See *supra* notes 213–218 and accompanying text.

because it is directed at the same basic question: whether the President has a meaningful connection to the agency. At the same time, other mechanisms of presidential involvement in financial policy are more interesting because, in a way, they are more conventional than the PCAOB. Rather than lodging an agency within an independent agency, they pair an independent agency with an executive-branch official. Furthermore, they address matters of greater political and social significance. The PCAOB thus is relatively less important, even if the Supreme Court uses it as a vehicle to make major constitutional law.

#### IV. NONFINANCIAL APPLICATIONS

In this Part, we identify two other contexts in which hybrid institutional relationships have entered the political scene: health care and climate change. Both contexts traditionally have been dominated by executive-branch agencies. They are also among the most politically and socially significant of this time. Perhaps unsurprisingly, the new institutional relationships that have been proposed in these areas do not reflect the same balance between independence and accountability as we observe in the financial context. Thus, we do not claim that independence is developing in a standard fashion. Nor are we making any prediction here about the likelihood that these new relationships will become part of governing law—indeed, the chances of broad use in the health care context seem particularly low in light of new legislation. The point of considering the relationships in the health care and climate change contexts is twofold: (1) to demonstrate that proposals for reform in areas of traditional executive-branch concern also include independent agencies, and (2) to refine our arguments about such agencies by comparing the similarities and differences across diverse contexts.

##### *A. Health Care*

In March 2010, Congress enacted new health care legislation at the behest of the Obama administration. Health care was a key issue during the Democratic primaries in 2008 and remained a central goal of the new Administration, even as the financial crash and political obstacles pushed back the timetable.<sup>310</sup> The major goals, which

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310. Patricia Zengerle & Ross Colvin, *Factbox: Health Care, War, Climate on Obama's Tough Agenda*, REUTERS, Aug. 24, 2009, <http://www.reuters.com/article/GCA-HealthcareReform/idUSTRE57N5M520090824>.



President Obama described during the summer of 2009, were to expand health care in the direction of near-universal coverage and to bring costs under control. Other priorities included reforming insurance in the health care field and providing basic consumer protections.

The federal government's health care regulation, more so than the financial regulation discussed above, has come from executive-branch departments as opposed to independent agencies. The Department of Health and Human Services plays a central role, particularly the Centers for Medicare and Medicaid Services ("CMS").<sup>311</sup> The Obama Administration expanded that structure by adding a health care "czar" within the White House, bringing health care even more tightly under the President's wing.<sup>312</sup> The new legislation does not alter this basic structure.

Yet the debate over health care reform put independent agencies on the table as to both main pillars of the administration's health care agenda—broadening coverage and containing costs. As to coverage, the Health Choices Administration ("HCA"), which would have allocated health care services as part of the so-called "public option" for providing health care services, was included in the House bill but did not make it into the final legislation. When the public option failed to get through the Senate and thus into the final bill sent to the President, neither did the HCA. As to the costs, the final legislation created an independent agency to bolster cost containment. We discuss both reform proposals because they illustrate possible uses of hybrid independent agencies even in areas of traditional executive branch concern.

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311. This was formerly the Health Care Financing Administration within HHS. Susan Bartlett Foote, *Why Medicare Cannot Promulgate a National Coverage Rule: A Case of Regula Mortis*, 27 J. HEALTH POL. POL'Y & L. 707, 709 n.1 (2002). The Social Security Administration, which in its early days had cabinet level status, and later was put with the Department of Health, Education and Welfare, has been an independent agency since 1995. *Id.*; Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Justice in an Ever-Expanding Agency*, 3 HEALTH MATRIX 339, 378 (1993). It is headed by a single administrator rather than a board. Bernard, *supra*, at 378. Yet SSA and CMS remain closely linked despite their different status. Both are headquartered outside the beltway in the Baltimore suburb of Woodlawn, and the nationwide SSA offices provide the registration point for those who qualify for Medicare.

312. Former Senate majority leader Tom Daschle was the original choice for both roles. After his withdrawal, Kansas Governor Kathleen Sebelius was named to the cabinet position and former HCFA Administrator Nancy-Ann De Parle was named to the czar position as director of the White House Office of Health Reform. Michael Fletcher, *Nancy-Ann DeParle and Kathleen Sebelius Announced to Lead Obama Health Effort*, WASH. POST, Mar. 2, 2009, [http://voices.washingtonpost.com/44/2009/03/02/nancy-ann\\_deparle\\_announced\\_as.html](http://voices.washingtonpost.com/44/2009/03/02/nancy-ann_deparle_announced_as.html).

The HCA, included in the bill that passed the House but not in the final legislation, was inserted to oversee a key part of the plan to provide access to health insurance.<sup>313</sup> This agency, an “independent agency in the executive branch,” would have been headed by a single commissioner, who would have been appointed by the President and confirmed by the Senate.<sup>314</sup> The agency’s charge was to establish a health insurance exchange, a key flashpoint of the Administration’s proposal to the extent that it would provide for a public option, cooperative, or private insurance.<sup>315</sup> The HCA would also have been charged both with establishing qualified health benefit plan (“QHBP”) standards for those who would provide plans within such an exchange and with entering into contracts with QHBPs that would be offering plans through the Health Insurance Exchange.<sup>316</sup> Additionally, the HCA would administer the individual affordability credits designed to make the insurance more affordable.<sup>317</sup>

The HCA’s status as an “independent” agency was somewhat ambiguous. For one thing, the HCA was placed “in the executive branch.” For another, the bill did not explain clearly how the commissioner could be removed. The bill did not contain an express provision concerning removal of the commissioner but referred to certain provisions of the Social Security Act that concerned terms such as compensation and general powers but not removal.<sup>318</sup> The HCA may have been independent only in the sense that it was not part of an established executive department. In other words, it would have been more like the EPA than the Fed or the SEC. At the same time, it would not have been quite like the EPA because the commissioner

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313. America’s Affordable Health Choices Act, H.R. 3200, 111th Cong. § 141 (2009) (establishing HCA).

314. The House bill directed the HCA to consult and coordinate with a variety of other regulators, including state insurance regulators, the Secretaries of the Treasury (before specifying the benefits to be made available under each participating health benefit plan), Health and Human Services (prior to entering into memoranda of understanding with each state), and Indian tribes and tribal organizations. *Id.* § 143.

315. *Id.* § 142 (describing functions).

316. *Id.*

317. *Id.*

318. *Id.* § 141(b)(2) (“The provisions of paragraphs 2, 5, and 7 of subsection (a) (relating to compensation, terms, general powers, rulemaking, and delegation) of section 702 of the Social Security Act (42 U.S.C. 902) shall apply to the Commissioner and the Administration in the same manner as such provisions apply to the Commissioner of Social Security and the Social Security Administration.”). The Social Security Act contains a good-cause removal provision for its commissioner. 42 U.S.C. § 902(a)(3) (2006) (“An individual serving in the office of Commissioner may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.”). The House health care bill did not cross-reference that particular section of the Social Security Act.

would have lacked a seat at the President's cabinet meetings. It would have been fairly described as in the middle, which is still significant for our story.

On the costs side, the use of an independent agency to cut costs was first broached in a letter from President Obama to the late Senator Edward Kennedy and Senator Max Baucus in June 2009. There, the President declared that he was "open" to giving "special consideration" to the use of the Medicare Payment Advisory Commission ("MedPAC"), an earlier Republican initiative, for reducing costs.<sup>319</sup> MedPAC would make recommendations for cost reductions that would become law unless opposed by a joint resolution of Congress, a process similar to the one used for closing military bases.

Legislation on this subject, introduced in the Senate by Jay Rockefeller and in the House by Jim Cooper, went further toward independence by adopting a Fed-type model that authorizes the agency to issue the cost cuts without coming to Congress for a vote.<sup>320</sup> Representative Cooper has defended this structure as necessary "to take politics out of health care."<sup>321</sup> As an example, he pointed to a MedPAC initiative to require physicians to report industry relationships: "That's a necessary step. But Congress will never do it on its own. All it takes is a doctor complaint from back home and Congress backs off."<sup>322</sup> To ensure accountability, Representative Cooper says Congress would have the power to abolish MedPAC, just as it could "uncreate" the Fed. This is a variation of Douglas's "shotgun behind the door" idea.<sup>323</sup>

The legislation signed by the President includes an Independent Payment Advisory Board ("IPAB") charged with coming up with plans for reducing the Medicare per capita growth rate.<sup>324</sup> The

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319. Letter from President Barack Obama to Senators Edward Kennedy & Max Baucus (June 2, 2009) (released by the White House Office of Press Secretary), available at <http://www.healthreform.gov/2009healthcareletterpres.pdf>.

320. Medicare Payment Advisory Committee (MedPAC) Reform Act of 2009, S. 1380, 111th Cong. (2009) (Senate bill); H.R. 2718, 111th Cong. (2009) (House bill).

321. Ezra Klein, *An Interview with Jim Cooper*, WASH. POST, June 10, 2009, [http://voices.washingtonpost.com/ezra-klein/2009/06/remember\\_a\\_few\\_years\\_ago\\_how\\_c.html](http://voices.washingtonpost.com/ezra-klein/2009/06/remember_a_few_years_ago_how_c.html).

322. *Id.*

323. See *supra* text accompanying note 202.

324. See Patient Protection and Affordable Care Act, amending H.R. 3590 (2009), § 3403 (creating the Independent Medicare Advisory Board), § 10320 (expanding the scope of the Independent Medicare Advisory Board and changing its name to the Independent Payment Advisory Board). The IPAB can propose plans if the Chief Actuary of the Centers for Medicare and Medicaid Services determines that the growth rate exceeds a target growth rate. The IPAB cannot make recommendations as to certain issues, such as rationing health care and raising revenue or premiums.

Secretary of Health and Human Services is required by the legislation to implement such proposals unless Congress enacts alternative legislation to achieve that goal.<sup>325</sup> The fifteen members of the board serve staggered six-year terms, appointed by the President and confirmed by the Senate with removal only for cause.<sup>326</sup> In addition to specifying expertise as a qualification, the legislation requires the President to consult with the majority and minority members of the two houses of Congress as to appointment of three members each.<sup>327</sup>

We see in the HCA and the IPAB a possibility for blending executive-branch and independent agency authority. Consistent with our observations about the proposals for market-stability reform, the HCA would have been somewhat independent but also would have been required to collaborate with cabinet-level officials, who could have ensured that administration preferences are represented in policy discussions. The IPAB looks more like a traditional independent agency in some respects, but it operates together with executive-branch officials, causing it to cross or blur some of the usual lines.

Our argument is not that independent agencies are indispensable for health care reform, or that they can manufacture the necessary political will for the more far-reaching aspects. Rather, we seek to highlight that, when proposing such aspects, Congress considered hybrid agencies to implement them. Our argument helps to make sense of these proposals from both a political and normative perspective. Like market stability and securities regulation, health care involves matters that turn on expertise. More significantly, it is vulnerable to political influence on behalf of narrow groups. Len Nichols, coauthor of a book on Medicare, points to a recurring example:

[The Centers for Medicare and Medicaid (“CMS”)] does their due diligence and takes their public reporting responsibilities seriously and . . . device manufacturers present their case to CMS and frequently lose. And when they lose, they come to Congress and get friendly senators to sponsor an amendment and overturn CMS’s rules. Every member of finance has seen this a hundred times.<sup>328</sup>

Nichols concludes that this whole genre of proposals “[is] really about empowering information and science and evidence over lobbying. Everything else is a device to make this happen.”<sup>329</sup>

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325. *Id.* § 3403(e).

326. *Id.* § 3403(g).

327. *Id.* The President can appoint the remaining three members without mandated consultation with an individual legislative leader.

328. Ezra Klein, *How Obama Plans to Reform Medicare*, WASH. POST, June 3, 2009, [http://voices.washingtonpost.com/ezra-klein/2009/06/how\\_obama\\_plans\\_to\\_reform\\_medi.html](http://voices.washingtonpost.com/ezra-klein/2009/06/how_obama_plans_to_reform_medi.html).

329. *Id.*

Of course, an administration might also seek to derail rules for short-term gains. Thus, there is another way to frame this problem. Genuine health care reform may be impossible absent some degree of agency independence. The short-term interests of administrations will predictably outweigh the long-term goals of providing comprehensive coverage and reducing costs. To make a credible commitment to solve the health care problem, a President must act to protect the government-provided health care system over the long term.

At the same time, political representation is important for health care. Health care is personal to voters. It gets citizens to town hall meetings in a way that monetary policy or market stability does not. Constituents tend to personalize the benefits they receive and fear losing. When significant funding is coming from those same groups, increased accountability to the President and Congress may be productive. The compromise is a modified, or hybrid, form of agency independence. The President, through cabinet officials, will have involvement on health care policy but not dictatorial control.

Although such political involvement furnishes accountability, the President might seek other involvement. Unlike financial policy, health care is not an area in which the President has less need for control because agency preferences are aligned roughly with presidential preferences. Even if their preferences are aligned today, there is no guarantee that this alignment will continue over time and across administrations. Nor does the President have an abiding interest in allowing expertise to control in the name of "getting it right." Health care, though personal to voters, is not the top voting issue; the economy is. To the extent that health care imposes large costs, the President actually may have interests adverse to the agency now or over time. Furthermore, there is no discernable metric for determining the "right" level of health care. Similarly, markets do not provide any kind of a buffer on agency discretion. As a consequence, health care agencies will have more room to depart from political preferences than financial agencies. In light of these factors, a pitch for more presidential control in this context is understandable.

But understandable is not always the same as better. Increased presidential control would not necessarily result in "better" regulation, meaning regulation that is more effective for achieving its general purpose. Instead, it might result in "worse" regulation to the extent that political control compromises the independence necessary to effective regulation. It also might mean no regulation at all if independence is necessary for the President to make a credible commitment to provide a government-financed health care system.

### B. Climate Change

Like health care, the issue of climate change has fallen to executive-branch agencies. Under existing law, the Environmental Protection Agency has authority to regulate the emission of air pollutants, which includes carbon dioxide and other greenhouse gases.<sup>330</sup> Furthermore, the National Highway Traffic Safety Administration within the Department of Transportation has authority to regulate the fuel economy of automobiles, which promotes auto safety and energy conservation as well as reduces greenhouse gas emissions.<sup>331</sup> The two agencies also have responsibilities that require them to work together.

The two most recent Presidents, one Republican and one Democratic, have made visible efforts to centralize the issue of climate change in the White House. For example, President George W. Bush intervened in the EPA's determination whether greenhouse gases constitute "pollutants" under the Clean Air Act.<sup>332</sup> The agency determined that they did not, largely because Congress had meant to address greenhouse gases separately from air pollutants.<sup>333</sup> The EPA also cited White House policy reasons for refusing to regulate greenhouse gases. The President did not want to approach climate change in a piecemeal fashion or without due consideration for its effect on foreign affairs.<sup>334</sup>

President Bush also exerted influence on the EPA's decision to grant California a waiver to impose more stringent air quality standards than required by federal law. The Clean Air Act requires California to obtain such a waiver before imposing its own standards and allows other states to follow its lead.<sup>335</sup> Although the EPA had always granted California's waiver request, it denied the request for

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330. See Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006); *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (holding that carbon dioxide satisfies the definition of "pollutant" in the Clean Air Act).

331. See Energy Policy and Conservation Act, 42 U.S.C. § 6201(5) (2006) (stating as among purpose of the Act promotion of energy efficient vehicles).

332. See *Massachusetts v. EPA*, 549 U.S. at 510–14, 533–34 (rejecting the EPA's refusal to regulate greenhouse gases for policy reasons, including the Bush Administration's preference for a "comprehensive approach").

333. *Id.* at 528–29.

334. *Id.* at 533–34. Subsequently, in *Massachusetts v. EPA*, the Supreme Court rejected the EPA's arguments, holding that greenhouse gases constitute "pollutants" for purposes of the statute and therefore required regulation upon a finding that they endanger human health, regardless of the President's contrary wishes. *Id.* at 528–29, 534–35.

335. 42 U.S.C. § 7543(b) (2006).

the first time under the direction of the Bush Administration.<sup>336</sup> Almost immediately upon assuming office, the Obama Administration began work to reverse this decision.<sup>337</sup> Thus, the new Administration continued to assert control, though it pushed in the opposite direction.

President Obama also made personnel decisions that would help his Administration take control of climate change. He selected as EPA Administrator Lisa Jackson, who had worked to reduce greenhouse gas emissions and develop alternative energy sources as head of New Jersey's environmental protection agency.<sup>338</sup> He also created the position of climate "czar" to coordinate climate and energy policy from within the White House and named Carol Browner, EPA Administrator in the Clinton Administration, to the position.<sup>339</sup> Additionally, President Obama selected a strong leader for the White House Council on Environmental Quality, Nancy Sutley, who was a former Los Angeles deputy mayor for energy and environment.<sup>340</sup>

Most significantly, President Obama publicly has backed climate change legislation.<sup>341</sup> If enacted, the legislation would be the first in the United States to limit greenhouse gas emissions. It would do so through a "cap-and-trade" system that requires major sources of greenhouse gas emissions, such as companies that burn fossil fuels, either to reduce their emissions or buy allowances on a market, similar to a commodities market.<sup>342</sup> The limits on emissions would gradually tighten, with a goal of reducing U.S. emissions to 17 percent

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336. See Micheline Maynard, *E.P.A. Denies California Emission's Waiver*, N.Y. TIMES, Dec. 19, 2007, available at <http://www.nytimes.com/2007/12/19/washington/20epa-web.html> (describing role of Bush administration).

337. See Memorandum, State of California Request for Waiver under 42 U.S.C. 7543(b), the Clean Air Act, 74 Fed. Reg. 4905 (Jan. 26, 2009) (directing, six days after President Obama's inauguration, the EPA administrator to reassess the Bush administration's decision to deny California's waiver request); Jim Tankersley, *California Wins EPA Waiver on Greenhouse Emissions*, L.A. TIMES, June 30, 2009, at A6, available at <http://articles.latimes.com/2009/jun/30/nation/na-california-waiver30> (reporting that the Obama administration granted California's waiver request).

338. Kent Garber, *Obama's Energy and Environment Team Includes a Nobel Laureate, Veteran Regulators*, U.S. NEWS & WORLD REP., Dec. 11, 2008, <http://www.usnews.com/articles/news/obama/2008/12/11/obamas-energy-and-environment-team-includes-a-nobel-laureate-veteran-regulators.html?PageNr=1>.

339. *Obama Names First 'Climate Czar' for U.S.*, Dec. 15, 2008, <http://www.cnn.com/2008/WORLD/americas/12/15/eco.obamaenergyteam/index.html>.

340. Garber, *supra* note 338.

341. See Jeff Mason, *Obama "Flexible" on Climate Legislation*, REUTERS, Apr. 8, 2009; *Obama Implores Senate to Pass Climate Bill*, ASSOCIATED PRESS, June 27, 2009, .

342. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 311 (2009) (containing new § 702 and § 703 to the Clean Air Act).

of the 2005 level by 2050.<sup>343</sup> In June 2009, the House passed the American Clean Energy and Security Act of 2009 by a narrow margin of 219 to 212 votes.<sup>344</sup>

Yet this legislation does not anchor the issue of climate change exclusively to the executive branch. As proposed, the Act divides responsibility for its various parts among many different agencies, including independent agencies. Not surprisingly, the agency with the most experience on environmental issues, the EPA, would perform the bulk of the work. For example, through amendments to the Clean Air Act and the Safe Water Drinking Act, it would design and promulgate regulations for implementing a carbon capture and sequestration strategy.<sup>345</sup> Most importantly, it would take the lead in implementing and overseeing the cap-and-trade system.<sup>346</sup> It would issue regulations that establish the gradual limits on greenhouse gas emissions as well as the program for the issuance of offsets.<sup>347</sup>

Although the EPA has the most prominent role, independent agencies have an important role in the new climate change regulatory space. For example, the proposed legislation directs the Federal Energy Regulatory Commission (“FERC”) to “promulgate regulations for the establishment, operation, and oversight of markets for regulated allowances . . . .”<sup>348</sup> It “[a]mends the Commodity Exchange

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343. *Id.* (containing new § 702 of the Clean Air Act). In addition to creating a cap-and-trade system to reduce nation-wide greenhouse gas emissions, the bill contains other major provisions, including those aimed at promoting renewable sources of energy, carbon capture and sequestration technologies, low-carbon transportation fuels, clean electric vehicles, energy efficient buildings, and green jobs. *See generally id.*

344. John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, available at <http://www.nytimes.com/2009/06/27/us/politics/27climate.html>.

345. H.R. 2454, 111th Cong. § 112 (2009) (creating a new § 813 of the Clean Air Act for carbon capture and sequestration).

346. *Id.* § 311 (containing new § 702 and § 703 of the Clean Air Act for capping greenhouse gas emissions).

347. *Id.* (containing new § 732 of the Clean Air Act for offsets). Other agencies would have a role in the cap-and-trade program. For example, the Department of Agriculture will be responsible for determining which domestic agricultural activities qualify as offsets. *Id.* § 321. The President himself would be required to “establish an interagency working group on carbon market oversight.” American Clean Energy and Security Act of 2009, H.R. REP. NO. 111-137 (2009), at 213 (describing § 341, which amends § 401(d) of the Federal Power Act).

348. H.R. REP. NO. 111-137, at 209 (describing new § 401(b)); Katherine Ling & Ben Geman, *Senate Dems Wrestle Over Carbon Market Regs*, N.Y. TIMES, July 24, 2009, available at <http://www.nytimes.com/cwire/2009/07/24/24climatewire-senate-dems-wrestle-over-carbon-market-regs-91367.html> (“The House-passed climate bill, H.R. 2454(pdf), would place the Federal Energy Regulatory Commission in charge of emissions allowance markets while the Commodity Futures Trading Commission would oversee carbon allowance futures and other derivatives.”).



Act”<sup>349</sup> to “[p]rovide[] for transactions in derivatives that involve energy commodities,” and “[g]ives the Commodity Futures Trading Commission (CFTC) jurisdiction over the establishment, operations, and oversight of markets for regulated allowance derivatives.”<sup>350</sup> The role of the FERC and CFTC in trading allowances is unremarkable to the extent that it simply capitalizes on preexisting expertise. At the same time, these roles speak to the perceived value of independence when sophisticated, private markets are involved.

More important for our discussion is the part of the bill that concerns emissions offsets—a part that is critical to the future success of the legislation. As journalist Jessica Leber noted:

If a tree grows in a forest, does it make an emissions offset? What happens if it burns down? Both the integrity and the cost of the legislation working its way through Congress that would put a cap on U.S. greenhouse gas emissions hang on questions like these.<sup>351</sup>

The answers to such questions will determine who qualifies for offsets, how many are generated, and how much they cost. Poor decisions could unwind the program entirely and make the legislation largely ineffective.

For this function, the proposed Act requires the EPA to establish nearly immediately an “independent” Offsets Integrity Advisory Board.<sup>352</sup> The bill provides that the board “shall make recommendations to the administrator for use in promulgating and revising regulations under this part and part E, and for ensuring the overall environmental integrity of the programs established pursuant to those regulations.”<sup>353</sup> It also specifies criteria for the board to consider.<sup>354</sup> The board is to be comprised of nine members serving

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349. H.R. REP. 111-137, at 420 (describing new § 351-58 of the Commodity Exchange Act (7 U.S.C. § 2)).

350. Congressional Research Service Summary of H.R. 2998, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02998:@@D&summ2=m&> (summarizing the relevant section as included in a slightly different version of the legislation). Some senators have already reflected concern about these provisions and the precise market mechanisms may change, though they are likely remain in the hands of independent agencies. See Ling & Geman, *supra* note 348.

351. Jessica Leber, *Forest Offsets Give Regulators Some Tough Nuts to Crack*, N.Y. TIMES, May 27, 2009, available at <http://www.nytimes.com/cwire/2009/05/27/27climatewire-forest-offsets-give-epa-regulators-some-toug-91999.html>.

352. American Clean Energy and Security Act of 2009, H.R. 2454, 11th Cong. § 311 (2009) (containing new § 731 to the Clean Air Act).

353. *Id.* (new § 731(a)).

354. *Id.* (requiring the Board to consider “(A) the availability of a representative data set for use in developing the activity baseline; (B) the potential for accurate quantification of greenhouse gas reduction, avoidance, or sequestration for an offset project type; (C) the potential level of scientific and measurement uncertainty associated with an offset project type; and (D)

staggered three-year terms, appointed by the EPA administrator, and “qualified by education, training, and experience to evaluate scientific and technical information on matters referred to the board under this section.”<sup>355</sup>

The decision to create the Offsets Integrity Advisory Board reflects a political choice not to leave the offsets matter solely in presidential hands. Although an executive-branch agency retains the bulk of the work in the proposed legislation, an independent commission factors prominently in the passage and future success of the cap-and-trade program. Projecting from the financial context, a blend of accountability and independence in this context perhaps is expectable. An independent agency is necessary to constrain short-term political choices because those choices are likely to divert the program. Among other reasons, climate change presents a public goods problem,<sup>356</sup> similar to market stability, in which regulation of individual firms is necessary to protect the system as a whole. But climate change is really the “granddaddy of public choice problems,” as economist William Nordhaus has said, because it involves a public goods problem on a global scale; no country has an incentive to make the necessary emissions reductions because the benefits are shared by all countries.<sup>357</sup> In addition, climate change involves a latent-benefits problem. Voters are reluctant to support a gas tax today knowing that they will not directly reap the benefits.<sup>358</sup> It is hard enough to get individuals to forego their own self-interest for a group of which they are a part, but the nature of climate change requires individuals to sacrifice for a future group they will never even know. Furthermore, climate change is a problem that cannot be addressed through one-time action but requires dedication over many decades and administrations. The solutions build on each other, anticipate evolving technologies, and require global cooperation. The shifting of

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any beneficial or adverse environmental, public health, welfare, social, economic, or energy effects associated with an offset project type”) (new § 731(c)(1)).

355. *Id.* (new §731(b)).

356. See Robert W. Hahn, *Climate Policy: Separating Fact from Fiction*, 33 HARV. ENVTL. L. REV. 557, 558 (2009) (“The public good nature of this problem means that each country has an incentive to free ride on the efforts of others, and that widespread cooperation among countries will eventually be needed if we are to make headway on limiting global emissions.”).

357. William D. Nordhaus, *Reflections on the Economics of Climate Change*, 7 J. ECON. PERSP., Fall 1993, at 11, 18.

358. See Kenneth Stier, *Senate to Take up Landmark Climate Change Legislation*, June 2, 2008, available at <http://www.cnbc.com/id/24891046> (“It seems unlikely that as American families face harsh economic times that any Senator would dare stand on the Senate floor and vote in favor of significantly increasing the price of gas at the pump and cost millions of American jobs – all for no environmental gain.” (quoting Senator James Inhofe)).

administrations may be disruptive to the effort. Thus, ensuring some agency independence is essential to develop effective regulations.

Another reason for delegating climate change policy to an independent agency reflects an implicit lesson from the financial sector. The lack of a consensus on how to address climate change is largely due to different interpretations of the uncertainty of future events—for example, when and if the Earth will warm sufficiently to lead to environmental and climate harm. Much of the catastrophic harm will occur if the “tail” part of the probability curve for global warming is where we end up, just as the financial meltdown occurred because low-probability losses at the tail of valuation models came to pass. Politicians may be unwilling to acknowledge the long-term harm until it is too late to prevent the harm, a variation of how short-term thinking may prevail over long-term thinking. An independent agency may be better able to plan for those low-probability events and respond to cataclysmic events if they do materialize, just as the Fed was better able to respond to the financial crisis.

Despite these arguments, we see a thumb on the scale for political control in the 2009 proposals. That is, we detect no political support for shifting the decisional authority for offsets or other significant matters to an independent agency in this context, especially against the backdrop of increasing White House control of climate change. The President seeks the final say and stands positioned to obtain it. Perhaps the balance in the proposed law can be explained in terms similar to those we have used in this Article. First, climate and energy policy is not an area in which agency and administration interests are reliably aligned. Even if there is general agreement on the need for government intervention to address climate change, the question of how much and how quickly still occupies center stage in the political debates. This debate would transfer to administrative venues. Second, agency discretion is not restricted by markets or any other external limitation. The offsets will be traded on markets, but the nature of those offsets will be determined by agency regulation. Thus, markets play an operational role but not a constraining one.

In addition to these explanations, there is an unquestionable element of climate change policy that demands the official stamp of the President. When other countries consider the position of the United States on this matter of collective significance, they consider the position of the President. Moreover, the President negotiates with other nations on behalf of the United States. President George W. Bush recognized these factors. The mistake that his Administration

made was using foreign policy as a reason to refrain from regulating greenhouse gas emissions under the Clean Air Act.<sup>359</sup>

Furthermore, this area seems a candidate for presidential leadership particularly because the United States has been lagging other nations in recognizing the need for more governmental action on climate change. Although the global public overwhelmingly acknowledges that climate change is occurring, the United States ranks among the lowest in prioritizing a governmental response. In a 2009 poll, only 30 percent of Americans said that climate change should top the Obama Administration's political agenda.<sup>360</sup> The President can help to ensure that the implementation of any legislation keeps pace with the rest of the world.

Many of these political reasons for continued executive-branch control overlap with the normative ones. If the President has a political need to oversee climate and energy policy, than perhaps the nation is better off as a result. Climate change strategies will require life-changing and business-altering actions, both of which demand the highest level of accountability. It will raise the stakes globally, both from an economic and national security perspective, and thus requires the continued involvement of the President, who is seen as largely responsible for both issues. And it requires presidential leadership to prevent unnecessary delay in the implementation phase.

In sum, climate change is another area in which the long-term nature of the problem may call for some insulation from short-term electoral interests, including presidential interests. But we also can understand a thumb on the scale for presidential control. Such weighting is appropriate from both a political and normative standpoint, given the particular issue involved.

More generally, this example helps to refine the point that opens this Article: agency independence can occur, and does occur, along a spectrum. In light of this example and the others presented here, we can now imagine the administrative state as being composed of more than conventional independent agencies and conventional executive-branch agencies. And even among independent agencies, we can envision different relationships with executive-branch officials. Politicians will determine which, if any, agency form will control (and

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359. See *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (rejecting presidential policy reasons for refusing to regulate greenhouse gases under the Clean Air Act).

360. The Pew Research Center for the People and the Press, Survey Reports, *Economy, Jobs Trump All Other Policy Priorities in 2009*, Jan. 22, 2009, available at <http://people-press.org/report/485/economy-top-policy-priority>. Fifteen other countries registered strong support for increasing the level of governmental involvement. Only Iraq and the Palestinian territories joined the U.S. on the other side.

the Supreme Court may have some say as to the constitutionality of atypical forms). But scholars will determine how they fit with the overall scheme of democratic government. We offer a start.

#### CONCLUSION

This Article has identified mechanisms that align independent agencies with presidential preferences. These mechanisms undermine the binary distinction that long has been understood to exist between independent and executive-branch agencies and suggest a spectrum of hybrid relationships. Furthermore, though they entail presidential involvement short of plenary control, these mechanisms can be understood in both political and normative terms. Mechanisms that offer such simultaneous advantages hold promise for the development of the regulatory state. Indeed, mechanisms of presidential control have had such a powerful effect since the 1980s for just this reason.

In essence, presidential control is not the only option or the best option for structuring institutional relationships under all circumstances. For certain core financial issues such as market stability and securities fraud, presidential collaboration on, and selective intervention in, regulatory policy might better satisfy political interests and better serve normative values. In making this argument, we point to a different view of presidential strategy than the one typically provided by political scientists. And we present a more nuanced vision of accountability than the one typically provided by legal scholars. We also invite a more precise, pragmatic constitutional analysis than that in which the Supreme Court generally has engaged.

Some may object that the mechanisms that we identify are too speculative to support our arguments because we draw them from unenacted legislative proposals and one-off administration practices. But it is not that these mechanisms have already ushered in a new era of administrative law. Rather, they can help us to see past the conventional categories that have for too long defined the relationship between agencies and administrations. Once we see past those categories, we can open our view to the future of agency independence, however it may evolve.