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Rethinking Independence: the Lack of an Effective Remedy for Improper For-Cause Removals

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I. INTRODUCTION

Despite persistent constitutional questions, United States administrative agencies have grown in influence during this century.[1] Much of this controversy has centered around Congress's ability to control the removal of administrative officials constitutionally. In an effort to retain control of administrative agencies and in recognition of the need to conduct certain adjudicative functions outside the executive's domain, Congress has sought to create some agencies free from presidential influence. In particular, Congress has focused on attempting to limit the President's power to remove administrative officials. Although such limitations have always been controversial,[2] the Supreme Court is generally thought to have resolved this particular constitutional issue: while Congress itself may not control the removal of a government official performing executive duties,[3] Congress may limit the President's power to remove.[4] Congress has therefore won the constitutional battle to establish its power to limit the President's removal authority. The essential question now is how this victory affects the larger struggle to create agencies independent of presidential control. How much legal protection has Congress actually secured for government agency heads, and what legal rights vest in these officials as a result?

Congress has sought to limit the President's removal power, and thereby insulate some administrative activities from direct presidential control,[5] by including "for-cause" removal provisions in the enabling statutes of certain administrative agencies. Such clauses allow the President to remove officers only "for cause," and they typically limit "cause" to "inefficiency, neglect of duty, or malfeasance in

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1. William H. Hardie III, Note, *The Independent Agency After* Bowsher v. Synar*—Alive and Kicking*, 40 Vand. L. Rev. 903, 904 (1987).

2. This controversy is evident in the many cases challenging Congress's ability to limit the President's removal authority. See generally *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988).

3. See *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding Congress's retention of veto power over removals unconstitutional); *Myers*, 272 U.S. at 176 (finding unconstitutional a requirement of senatorial consent to the removal of a postmaster).

4. See *Morrison*, 487 U.S. at 694-97 (allowing limitation of the President's power to remove an Independent Counsel); *Wiener*, 357 U.S. at 356 (inferring for-cause requirements for the removal of War Claims Commissioners); *Humphrey's Executor*, 295 U.S. at 629-32 (upholding for-cause requirements for the removal of Federal Trade Commissioners).

5. Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 627, 657 n. 169 (1989).

office."[6] Theoretically, this limitation, along with other measures enacted by Congress,[7] frees an agency head from the need to defer to presidential opinion,[8] creating a "body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official . . . ."[9] The effectiveness of for-cause removal provisions in accomplishing this goal, however, remains unclear.[10] Because a president's assertion of cause has never been challenged in court,[11] the legal extent of this independence has never been tested. Thus, it is unclear what remedy, if any, would be available to an agency head who was discharged without proper cause. Such an agency head would likely seek redress in the courts, requesting either money damages or reinstatement. This Note explores the extent to which each of these remedies is either unavailable or ineffective in accomplishing Congress's goal of creating independence.

After examining the historical development of limitations on the President's removal power,[12] this Note explores possible remedies available to an improperly discharged agency head. Typical remedies

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6. An Act to Create a Federal Trade Commission, Pub. L. No. 203, ch. 311, 38 Stat. 717 (Sept. 26, 1914), codified at 15 U.S.C. § 41 (1994 ed.) (Federal Trade Commission enabling statute). Although the extent of "cause" has never been definitively determined, at the very least it requires a statement of the President's reason for discharge. In contrast, other administrative officers are understood to serve at the will of the President.

7. Congress also typically attempts to further the insularity of these agencies by organizing them around multi-member bipartisan commissions rather than a single agency head. Geoffrey P. Miller, *The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 Duke L. J. 215, 216 n.5.

8. Sidney A. Shapiro and Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L. J. 819, 849 n. 134 (citing Study on Federal Regulation, vol. 5, S. Doc. No. 91, 95th Cong., 2d Sess. 25, 28-43 (1977)).

9. *Humphrey's Executor*, 295 U.S. at 625-26.

10. See Emmette S. Redford, *The President and the Regulatory Commissions*, 44 Tex. L. Rev. 288, 311 (1965) (arguing that the lack of presidential authority in these agencies diminishes policy coordination by the President). For the opposing view, see Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L. J. Am. U. 461 (1994) (describing methods of presidential control over the regulatory process in independent agencies); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 943 (1980) (describing the role of the President in coordinating agency policy).

11. In the two major removal cases, *Myers v. United States* and *Humphrey's Executor v. United States*, the officials were not removed for a stated cause, nor did they seek reinstatement. In the recent case of *Swan v. Clinton*, 932 F. Supp. 8 (D.D.C. 1996), appeal docketed, No. 96-5193 (D.C. Cir. June 25, 1996) a removed member of the National Credit Union Administration ("NCUA") Board did seek reinstatement; however, President Clinton did not assert any cause for the discharge. Instead, Clinton asserted that there is no for-cause provision applicable to the NCUA.

12. See Part II.

for unlawful removals are money damages and equitable relief.[13] Part III concludes that because an award of money damages would not effectively constrain the President, it would not accomplish Congress's goal of assuring agency heads that they will remain in their positions. Part IV then examines the constitutionality of the equitable remedy of reinstatement, exploring the difficulties posed by the Appointments Clause and the doctrine of separation of powers. Part V then confronts the separate barriers presidential immunity and justiciability pose to reinstatement. Finally, Part VI considers equitable concerns relevant to the granting of reinstatement. All of these considerations suggest that a court either could not or would not reinstate an agency head.

This Note therefore concludes that money damages are ineffective and reinstatement is not available as a remedy for the invalid removal of an independent agency head. Consequently, the for-cause provisions in independent agencies' enabling statutes offer no practical, legal source of independence. More broadly, this absence of legal rights vesting in independent agency heads calls into question the efficacy of Congress's attempts to use for-cause provisions to insulate certain agencies from presidential control.[14]

II. HISTORICAL DEVELOPMENT OF LIMITATIONS ON THE PRESIDENT'S REMOVAL POWER

In 1887, Congress created the Interstate Commerce Commission ("ICC"), the first independent regulatory commission and subjected the President's control over ICC commissioners to a for-cause removal provision.[15] While Congress set up several other agencies in the same manner over the next few decades, their constitutionality was not questioned until the New Deal era.[16]

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13. Equitable relief includes reinstatement and declaratory relief. Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* § 6.10(5) (West, 2d ed. 1993). Declaratory relief consists of an "authoritative declaration of the parties' disputed rights." Id. § 2.1(2) at 60. Such relief is arguably available to discharged agency heads. This Note will only discuss the possibility of reinstatement, however, because much of the same equitable discretion involved in an order of reinstatement is also involved in an order of declaratory relief. Id. § 6.10(4).

14. As one scholar stated, "if independent agencies are not protected from unlimited removal by the Executive, the agencies' independence would be a sham." Hardie, 40 Vand. L. Rev. at 909 (cited in note 1).

15. Rosenberg, 57 Geo. Wash. L. Rev. at 657-58 (cited in note 5) (describing the creation of the ICC and the relationship between the independence of the executive and tenure).

16. Id.

The Supreme Court first addressed a constitutional challenge to constraints on the President's removal power in *Myers v. United States*.[17] Pursuant to statute, the United States Postmaster General was appointed by the President with the advice and consent of the Senate and removable only with senatorial consent.[18] In 1920, President Woodrow Wilson dismissed the Postmaster General without consulting the Senate. In upholding the removal, the Court held that any reservation of congressional control over the removal of an executive officer violated the separation of powers doctrine.[19] The Court explained that removal power was incident to appointment power. Thus, officers for whom the Constitution requires presidential appointment[20] are subject to removal at the pleasure of the President.[21]

Soon, however, in *Humphrey's Executor v. United States*,[22] the Supreme Court limited the *Myers* holding. The Court's opinion in *Humphrey's Executor* framed the debate over for-cause removals for the remainder of this century. Relying on the authority apparently recognized in *Myers*, President Franklin D. Roosevelt attempted to remove William E. Humphrey, a member of the Federal Trade Commission ("FTC"), without stating cause as required by statute. Commissioner Humphrey passed away, and his executor sued for back pay claiming that the removal was invalid.[23] The President argued that, under *Myers*, the for-cause provision was an unconstitutional interference with his executive function.[24] The Court rejected this argument and limited the holding in *Myers* to "purely executive" officers.[25] The Court classified the functions of the FTC as quasi-judicial and quasi-legislative rather than purely executive, and thereby found that the need for independence of agencies performing such functions outweighed the President's concerns regarding interference

17. 272 U.S. 52 (1926).
18. Id. at 107.
19. Id. at 176.
20. Under Article II, § 2, cl. 2 (the "Appointments Clause"), the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other puhlic Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . ." The Court bas interpreted this to mean that all "Principal Officers" of the United States must be appointed by the President, with the advice and consent of the Senate. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).
21. *Myers*, 272 U.S. at 122.
22. 295 U.S. 602 (1935).
23. Id. at 618-19.
24. Id. at 617.
25. Id. at 628. Paul R. Verkuil, *The Status of Independent Agencies After* Bowsber v. Synar, 1986 Duke L. J. 779, 783 (noting that the Court drew an "imaginary line" in distinguishing *Myers* from *Humphrey's Executor*).

with the executive function.[26] Because the agency's functions were not purely executive, removing these functions from executive control did not interfere with presidential duties.[27]

Presidential authority to remove executive officers was further restricted in *Wiener v. United States*.[28] In *Wiener*, the Court applied a for-cause removal requirement to members of the War Claims Commission despite the lack of such a provision in the enabling statute.[29] Citing *Humphrey's Executor*, the Court stated that the Commission's functions were largely quasi-judicial, and consequently Congress must have intended to protect the Commissioners from presidential control.[30] Thus the Court not only reaffirmed *Humphrey's Executor*, but also expanded the possible bases for finding such limitations on the President's removal power.

Despite the Court's apparent determination to preserve Congress's power of limitation,[31] the executive continued to challenge for-cause removal provisions.[32] The Court effectively ended the debate, however, in *Morrison v. Olson*.[33] In *Morrison* the Court heard a constitutional challenge to the Independent Counsel provision of the Ethics in Government Act of 1978.[34] Under that statute, the

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26. *Humphrey's Executor*, 295 U.S. at 628.

27. Id. at 629.

28. 357 U.S. 349 (1958).

29. Id. at 355-56.

30. Id. Because of the adjudicative nature of the Commission's activities, the Court felt it should operate outside the executive's domain. This decision contradicted the opinion of at least one lower court. In *Morgan v. Tennessee Valley Authority*, 28 F. Supp. 732, 737 (E.D. Tenn. 1939), the court read *Humphrey's Executor* to allow removal for cause only when Congress has explicitly expressed its intent to so limit the President's inherent power of removal.

31. The Court has made specific references demonstrating this intent, even in cases where it has ultimately adopted a rigid view of the separation of powers. See *Bowsher v. Synar*, 478 U.S. 714, 725 n.4 (1986) (expressly stating that the Court had no intent to cast doubt on the constitutionality of independent agencies).

32. Throughout the 1980s, the Reagan administration launched a series of challenges to the constitutionality of independent agencies in an attempt to increase the power of the executive. Lower courts consistently refuted these challenges. See *FTC v. American Nat'l Cellular, Inc.*, 810 F.2d 1511, 1514 (9th Cir. 1987) (upholding the prosecutorial function of the FTC, even though prosecution is an executive function); *FTC v. Engage-A-Car Service*, No. 86-3758, slip op. (D.N.J. Dec. 17, 1986) (denying a claim that the FTC's enforcement is unconstitutional); *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731, 740-42 (D.C. Cir. 1987) (refusing to hear a challenge to the for-cause provision in the FTC statute); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986) (holding that a challenge to the FTC was not properly briefed). For a thorough discussion of the Reagan administration's attempts to establish a unitary, powerful executive, see Rosenberg, 57 Geo. Wash. L. Rev. 627 (cited in note 5).

33. 487 U.S. 654 (1988).

34. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978). This Act allowed the appointment of an Independent Counsel to investigate and prosecute government officials for wrongdoing.

Independent Counsel is appointed by the Special Division[35] and removable for cause by the Attorney General.[36] The executive challenged this provision, arguing that the Independent Counsel, as a prosecutor, was a purely executive officer. As such, the Independent Counsel should be subject to appointment and at-will removal by the President.[37] The Court rejected the argument and reconceptualized the decision in *Humphrey's Executor*. The Court found that the President's ability to remove a purely executive officer could be conditioned, so long as the restrictions did not "impede the President's ability to perform his constitutional duty."[38] Under this standard, the Court determined that the restrictions on removal of the Independent Counsel did not unduly interfere with the President's executive functions or his duty to "take Care that the Laws be faithfully executed."[39] With the decision in *Morrison*, Congress won its long constitutional battle—its ability to limit the President's removal power over executive officials now seemed to be entrenched. The legal significance of this victory, however, is questionable.[40]

In theory, one who has the power to remove has the power to control.[41] Thus, in order to free independent agency heads from presidential control, Congress has sought to limit the President's removal power with for-cause provisions. Theoretically, if the officers themselves no longer fear for their jobs, the President's opinion will carry

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35. The Special Division consists of three federal judges temporarily assigned to the tribunal. *Morrison*, 487 U.S. at 661 n.3 (citing 28 U.S.C. § 49).

36. The Special Division also had removal power if the Independent Counsel had completed his or her task. Id. at 664 (citing 28 U.S.C. § 596(b)(2)).

37. Id. at 688-89. The argument was premised upon the holdings in *Myers*, 272 U.S. at 52, and *Buckley*, 424 U.S. at 1. In *Buckley*, the validity of the Federal Elections Commission was challenged. 424 U.S. at 109. The commission consisted of six members: two appointed by the President, two by the President Pro Tempore of the Senate, and two by the Speaker of the House. All six commissioners were to be confirmed by a majority vote of both houses. Because officers of the United States can only be appointed in accordance with the Appointments Clause, the Court found these appointment provisions to be unconstitutional. The omission of Congress from the Constitution's list of institutions given power to appoint inferior officers prohibited Congress from appointing the Commissioners. *Buckley*, 424 U.S. at 126-27.

Thus, the argument in *Morrison* was that as an officer of the United States, the Independent Counsel must be appointed within the confines of the Appointments Clause. The *Morrison* Court got around the appointments clause problem posed in *Buckley* by finding the Independent Counsel to be an inferior officer whose appointment Congress could thus vest in courts of law. *Morrison*, 487 U.S. at 671.

38. *Morrison*, 487 U.S. at 691. For a thorough discussion of the separation of powers issues in this case, see Janene M. Marasciullo, *Removability and the Rule of Law: The Independence of the Solicitor General*, 57 Geo. Wash. L. Rev. 750, 755-58 (1989).

39. U.S. Const., Art. II, § 3; *Morrison*, 487 U.S. at 691-92.

40. Jonathan Entin has argued that because removal has little value as a political control, the long debate over removal power has been futile. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 Ohio St. L. J. 175, 200 (1990).

41. Marasciullo, 57 Geo. Wash. L. Rev. at 753 (cited in note 38).

less weight. This theory falls apart, however, if there is no mechanism for preventing the President from violating for-cause provisions. Such a mechanism can only be provided by effective enforcement of the for-cause requirement. In other words, if courts are unable to provide an effective remedy for violations of such provisions, this calls into question their effectiveness. The typical remedies for unlawful removal are money damages and equitable relief in the form of reinstatement.[42] The following sections will survey these possible remedies, concluding that even if a court granted judicial review of a removal for cause,[43] it could not constitutionally provide a satisfactory remedy.

III. THE INEFFICACY OF MONEY DAMAGES

Money damages are typically available to government employees whose treatment violates a statutory provision. The Civil Service Reform Act of 1978[44] provides an administrative and judicial scheme for addressing employment-related disputes involving federal employees. One form of relief under this scheme is the award of back pay, typically given when a federal employee receives unjustified discipline resulting in the loss of compensation.[45] Although the head of an independent agency is not covered by the Civil Service Act, a court would likely find the same monetary remedies to be available for an unjustified removal under the Tucker Act.[46]

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42. Dobbs, 2 *Law of Remedies* § 6.10(4) at 207-08 (cited in note 13).

43. This question itself is unresolved. For a presentation of the strong argument for allowing judicial review, see Verkuil, 1986 Duke L. J. at 795-796 (cited in note 25). See also *Service v. Dulles*, 354 U.S. 363 (1957) (establishing the authority of federal courts to review the claim of a discharged employee that the agency causing the discharge did not follow administrative regulations); *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 539-40 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Shurtleff v. United States*, 189 U.S. 311, 317-318 (1903); *Reagan v. United States*, 182 U.S. 419, 426 (1901) (all three establishing the right of an executive officer to seek judicial review of his removal). But see *White v. Berry*, 171 U.S. 366, 377 (1898) (holding that "a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee") (quoting *Morgan v. Nunn*, 84 F. Supp. 551, 553 (M.D. Tenn. 1898)).

44. Pub. L. No. 95-454, 92 Stat. 1111, codified in scattered sections of 5 U.S.C.

45. The Back Pay Act of 1966, 5 U.S.C. § 5596(b) (1994), has been held to "authorize retroactive recovery of wages whenever a federal employee has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the compensation to which the employee is otherwise entitled." *United States v. Testan*, 424 U.S. 392, 405 (1976). See also *Bush v. Lucas*, 462 U.S. 367, 385 n.25 (1983) (describing the Back Pay Act as extending back pay as a remedy to certain categories of employees affected by personnel actions which are found to be unjustified).

46. The Tucker Act, 28 U.S.C. § 1491 (1994 ed.), gives the United States Claims Court jurisdiction to adjudicate any claim (1) founded either on the Constitution, an Act of Congress,

The purpose of providing money damages is to compensate plaintiffs for legally recognized losses.[47] Indeed, it has been suggested that the provision of monetary relief is, or at least can be, as effective a remedy for wrongful discharge as any other remedy.[48] This is because the monetary relief serves to place plaintiffs in the same positions they were in before the unlawful behavior.

An award of money damages would indeed compensate a former agency head for any back pay or damages resulting from a removal for improper cause. But a court's remedy for the improper removal of an agency head should also serve a second purpose—deterrence.[49] In the case of for-cause provisions Congress intended to prevent the President from influencing agency policy by threatening to terminate agency heads. Any remedy provided to a discharged agency head would therefore have to punish the President for becoming involved and deter such involvement in the future. An award of money damages to an agency head removed for invalid cause would not serve this second objective.

The President is individually immune from damages based upon his or her presidential duties, and would therefore not be responsible for the payment of any judgment. Such immunity was found to exist even for a former president in *Nixon v. Fitzgerald.*[50] In *Nixon,* a former Air Force employee sued the President, charging that the President had unlawfully removed him in retaliation for his prior congressional testimony.[51] The Court found that the President was immune from any personal liability based upon his official acts, explaining that immunity is required by the unique nature of the President's office and by the notion of the separation of powers.[52]

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any regulation of an executive agency, or any express or implied contract with the government; or (2) seeking liquidated or unliquidated damages in cases not sounding in tort. Jon Craig, ed., 1 *Civil Actions Against the United States: Its Agencies, Officers, and Employees* § 1.16 at 37-38 (McGraw-Hill, 2d ed. 1992). The plaintiffs in both *Myers* and *Humphrey's Executor* brought actions for monetary damages against the United States for their dismissals in the Court of Claims. See *Myers,* 272 U.S. at 106 (describing the claim brought against the government); *Humphrey's Executor,* 295 U.S. at 618 (same).

47. Dobbs, 1 *Law of Remedies* § 3.1 at 281 (cited in note 13).

48. See *Sampson v. Murray,* 415 U.S. 61, 75 (1974) (suggesting that monetary relief would be as satisfactory a resolution as a preliminary injunction). See generally Robert Belton, *Remedies in Employment Discrimination Law* (John Wiley & Sons, 1992).

49. Courts frequently use money damages to serve such a deterrent function in other areas of the law. Dobbs, 1 *Law of Remedies* § 3.1 at 282 (cited in note 13).

50. 457 U.S. 731 (1982).

51. Id. at 733-40.

52. Id. at 744-58. It is interesting to note, however, that the Court reserved judgment on whether immunity would exist if Congress expressly created an action for damages against the President. Id. at 748 n.27.

Thus the President could not be held individually liable for any dismissal for improper cause. Any judgment entered against a President in his or her official capacity is paid by the government from treasury funds.[53] The President, therefore, faces neither personal liability nor monetary loss, and any judgment would not serve as a financial disincentive to any future removals. If a judgment does not deter the President from removing agency heads in the future, then it fails to accomplish Congress's goal of insulating agency heads from the policy concerns of the President.

The "independence" of agencies is premised upon the elimination of the risk that the President will fire an agency head over a policy disagreement.[54] If the only consequence to the President of such a removal is an award of money damages, the President is not deterred from removing such agency heads and the for-cause provision necessarily falls short of providing independence for the agency.[55] Regardless of the monetary compensation received, the decisionmaker would still face the possibility of being removed if he or she ignored presidential desires.[56] As a result, the President's policy agenda would still play a part in the decisionmaking process, and the for-cause provision would not achieve the desired independence. Accordingly, money damages fail to accomplish the goal of deterrence and thereby fail to effectuate the congressional purpose of limiting presidential control over certain agency functions.

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53. 31 U.S.C. § 1304 (1994 ed.) (establishing the "Judgment Fund," which is a permanent appropriation for the payment of judgments against the United States). See also Gregory C. Sisk, *Interim Attorney's Fees Awards Against the Federal Government*, 68 N.C. L. Rev. 117, 120-25 (1989) (discussing the requirements for payment of awards from the Judgment Fund).

54. This premise itself is questionable because the extent of what constitutes cause has never been fully determined. Verkuil, 80 Colum. L. Rev. at 955 n. 73 (cited in note 10). Some have argued that policy incompatibility could constitute proper cause for removal. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 615-16 (1984).

55. Backpay was the remedy sought in both *Humphrey's Executor* and *Wiener*. Verkuil, 80 Colum. L. Rev. at 955 n.72 (cited in note 10). These cases, however, do not address the efficacy of such an award (or for-cause provisions), just their constitutionality.

56. The possibility of a judgment entered against the President may, however, be a political disincentive.

IV. CONSTITUTIONAL DIFFICULTIES WITH REINSTATEMENT

Unlike money damages, the remedy of reinstatement would serve the deterrent function envisioned by Congress. By allowing courts to restore agency heads removed for improper cause to their previous positions, this remedy would assure such officials that policy decisions would not place their jobs in jeopardy. Although reinstatement would effectuate Congress's purpose, it is unlikely that this remedy is available to discharged agency heads. Some commentators have assumed the availability of reinstatement because this remedy is generally available to federal employees.[57] This assumption, however, fails to consider the inevitable constitutional difficulties posed by court-ordered reinstatements. Such a reinstatement would violate the spirit, if not the letter, of the Appointments Clause and would also likely violate the doctrine of separation of powers.

A. The Appointments Clause

As noted above,[58] Article II, section 2, clause 2 of the Constitution states that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may vest by Law the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[59]

The text of this clause dictates that principal officers of the United States be appointed not by courts but by the President with the advice and consent of the Senate.

Any interpretation of the Appointments Clause in the context of reinstating an agency head must therefore rely on the basic notions of separation of powers and checks and balances that underlie the Constitution. In drafting the Constitution, the Framers generally remained true to Montesquieu's maxim that the legislative, executive, and judicial departments ought to remain separate and distinct.[60]

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57. See, for example, Laurence H. Tribe, *American Constitutional Law* 250 n.20 (Foundation Press, 2d ed. 1988).

58. See note 20.

59. U.S. Const., Art. II, § 2, cl. 2.

60. *Buckley*, 424 U.S. at 120. Montesquieu based this theory on concerns that

Yet, in our constitutional design the three branches of government are not completely separate. Although the Framers believed that the basic realm of control of each branch should be jealously guarded, they recognized that complete separation would render the government unworkable.[61]

In order to provide a viable governmental scheme, the Framers created a system of checks and balances to act as a safeguard on the powers of each branch.[62] The Appointments Clause is one example of this system. In devising a method to ensure the quality of appointees, the Framers saw risks both in granting exclusive appointment authority to the executive and in conferring this power solely to the legislature.[63] Consequently, the Appointments Clause prevents legislative corruption by giving the power of appointment to the executive, and it imposes checks on any wrongdoing by the President by requiring senatorial approval. This scheme also provides accountability in appointment by making the President responsible for the initial choice of each officer.[64] The Appointments Clause therefore maintains

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> [w]hen the legislative and executive powers are united in the same person or body, . . . there can he no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner . . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

Id. at 120 (emphasis omitted) (citing Federalist No. 47 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 303 (Mentor, 1961)).

61. Id. at 121-22.

62. Id. at 122.

63. *Weiss v. United States*, 510 U.S. 163, 183-85 (1994) (Souter, J., concurring). The danger in both of these schemes lies in the possibility of corruption. The executive branch could consolidate its power or facilitate reelection by appointing friends or allies. The legislature would have not only the power to fill existing positions, but also the power to create new offices in which to instate its allies. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 904 (1991) (Scalia, J. concurring).

64. *Weiss*, 510 U.S. at 186 (Souter, J., concurring). Jurists and commentators have articulated other views of the purpose behind the Appointments Clause. One view, expressed by the majority in *Freytag*, 501 U.S. at 884, is the desire to retain the appointment power in the hands of a few politically accountable actors. Another view is that the Appointments Clause is meant solely as a limitation on Congress. Id. at 904 (Scalia, J., concurring). A final theory is that the Appointments Clause was a compromise between those who wanted the appointments power vested in Congress and those who desired that the power be given to the President in that both the executive and the legislature participate in the appointment process. Alexander I. Tachmes, Comment, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?*, 42 U. Miami L. Rev. 735, 746 (1988). These views lead to the conclusion that court appointment of an agency head would be contrary to the Framers' goals. Although court appointment would eliminate Congress from the appointment process, two additional concerns remain: A court is not politically accountable, and court appointment would not logically serve as the same type of compromise between vesting the appointment power in the President or in Congress.

the separation of the governmental branches yet allows for some commingling to ensure accountability.[65] The preservation of these benefits requires an assurance that no branch will aggrandize its appointment power or abdicate its role.[66] This analysis, coupled with the text of the Appointments Clause, demonstrates that if a court did attempt to reinstate a dismissed agency head, it would effectively usurp the President's prerogative to choose principal government officers.[67]

The Supreme Court's separation of powers cases involving the power of the President are somewhat disjointed.[68] In some cases, the Court has adopted a formalist approach and maintained a strict separation between the branches.[69] In other cases, however, the Court has taken a more functional approach and allowed some commingling of governmental powers.[70] Scholars and jurists have advanced several theories explaining how the Court chooses one of these methodologies over the other.[71] Justice Kennedy suggested one such framework in

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65. The requirements for the appointment of inferior officers were apparently relaxed out of a concern for efficiency. *United States v. Germaine*, 99 U.S. 508, 509-10 (1878). Congress, however, has no role to play in the appointment of inferior officers. They can be appointed either in the same manner as principal officers, by the President alone, by the heads of departments, or by the courts of law. This may be one reason that removal cases have consistontly denied any congressional role in the removal of executive officers.

66. *Weiss*, 510 U.S. at 187-89 (Souter, J., concurring).

67. The President's appointment power is in no way diminished by the "cause" requirement for removal of the heads of independent agencies. Despite the diminution of the President's removal power in regard to these agency heads, the Court has been explicit in its preservation of the President's power to appoint. *Humphrey's Executor*, 295 U.S. at 619.

68. Entin, 51 Ohio St. L. J. at 176 (cited in note 40).

69. See generally *Buckley*, 424 U.S. at 136-43 (stating that members of a governmental body not appointed in accordance with the Appointments Clause may not exercise traditionally executive functions); *Chadha*, 462 U.S. at 956-57 (using a formalist approach to separation of powers in striking down a legislative veto provision); *Metropolitan Washington Airports Authority v. Noise Abatement Citizens*, 501 U.S. 252 (1991) (striking down a provision granting a Board composed of members of Congress a veto power over decisions made by the Airport Authority); *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97, 105 (D.C. Cir. 1994) (striking down an amended version of the above Board); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993) (finding the presence of the Secretary of the Senate and the Clerk of the House on the Federal Elections Commission unconstitutional); *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) (striking down a statute that vested executive powers in a "legislative actor").

70. See, for example, *Humphrey's Executor*, 295 U.S. at 631 (using a functionalist approach to uphold a for-cause removal provision); *Nixon v. Administrator of General Services*, 418 U.S. 683 (1974) (allowing a subpoena requiring the President to testify).

71. See *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 484-85 (1989) (Kennedy, J., concurring) (suggesting that the Court chooses either a formal or functional approach to separation of powers cases depending upon whether the power in question is textually committed); Rosenberg, 57 Geo. Wash. L. Rev. at 685 (cited in note 5) (adopting this theory). But see Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 489 (1987) (stating that the Court has utilized both the functional and formal approaches inconsistently in deciding cases); Cass R. Sunstein,

Public Citizen v. Department of Justice,[72] explaining that the Court employs a more functionalist, balancing approach to separation of powers cases when the governmental power in question is not textually committed to any one branch.[73] In such cases, the Court will balance the intrusion on one branch's powers against the need to promote a governmental objective.[74] In cases where the disputed power is textually committed, it is thought that the Framers have already gone through the balancing process. Thus it is not the prerogative of the Court to change this allocation of power. In Justice Kennedy's mind, the President's appointment power is textually committed and thus inviolate.[75]

Under this theory, any examination of an appointments clause problem would call for a formalist approach and therefore consist solely of a determination as to whether the act in question violates the text of the Appointments Clause.[76] Court appointment of an agency head might prove unconstitutional under such a textual analysis. Under the Appointments Clause, a court has no authority to appoint an officer of the United States who is not considered inferior. Such power lies solely in the hands of the President.[77] An independent agency head will likely be considered a principal officer by the court[78] and therefore can be appointed only by the President, with the advice and consent of the Senate. Thus a court appointment of an agency

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Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 492-500 (1987) (attributing the fluctuation between formal and functional approaches to the evaluation of independent agencies, at least in part, to a move away from the New Deal concepts of constitutionalism).

72. 491 U.S. 440 (1989).

73. Id. at 484-85 (Kennedy, J., concurring). See also Rosenberg, 57 Geo. Wash. L. Rev. at 685 (cited in note 5) (stating that courts will evaluate an alleged violation of separation of powers using a two-part balancing test in the absence of a specific textual commitment). Although *Bowsher*, 478 U.S. at 714, and *Myers*, 272 U.S. at 52, may seem to contradict this theory, under close examination they do not. The Court, in both cases, seemed to adopt a formalist approach, yet neither of the powers in question was textually committed. The Court may, however, have been applying a functional analysis in these cases and merely decided that the risks outweighed the benefits of the law. In a functionalist approach, the risks of aggrandizement and encroachment are weighed against the need for the law. In both *Bowsher* and *Myers*, Congress had reserved power for itself. This is a clear case of encroachment. Functionalism is a balancing approach, and the Court seems to have drawn the line such that it precludes Congress from playing any role in the removal process.

74. An example of this approach can be seen in the removal cases, specifically in *Morrison*, 487 U.S. at 691-92 (deciding that restrictions on the President's ability to remove the Independent Counsel did not unduly interfere with the President's duties, and that there was a strong need for an independent investigation of executive officers). This is logical because the power to remove, other than by impeachment, is not discussed in the Constitution.

75. *Public Citizen*, 491 U.S. at 484-85 (Kennedy, J., concurring).

76. Id. at 487-88 (Kennedy, J., concurring).

77. *Buckley*, 424 U.S. at 132.

78. For a discussion of the status of an agency head as a principal officer see Parts IV.A.2-3.

head would be unconstitutional. This section argues that a court-ordered reinstatement of an agency head has the same practical, if not constitutional, effect as a court appointment. By reinstating an agency head, therefore, a court would in effect be appointing an officer who, according to the Constitution, can only be selected by the President.

1. Reinstatement as an Appointment

In order for the Appointments Clause to apply to a court-ordered reinstatement, a reinstatement must be deemed similar enough to an appointment to fall within the strictures of this constitutional provision. Although the relatedness of these terms has never been squarely addressed, the two actions are by nature similar. Reinstatement involves inserting individuals into jobs from which they have been discharged.[79] Reinstatement strives to place such individuals in the positions they would have been in but for unlawful termination.[80] In essence, though, the court is ordering the employer to choose the plaintiff rather than someone else to fill a vacant position. A court ordering reinstatement effectively chooses which individual will become an agency head.[81] Logically, therefore, a court-ordered reinstatement would constitute an appointment for the purposes of constitutional analysis.

One may draw the same conclusion from the language used by courts in describing the two actions. In *Collins v. United States*,[82] an Army officer challenged the manner of his discharge from the service. In response to this challenge, Congress authorized the President to reappoint Collins and to retire him at the proper pay for an officer of his rank. The Treasury Department then refused to pay Collins. The department considered his reappointment invalid because the President had authorized it without the advice and consent of the Senate. Although the court upheld the reinstatement, it did so under the reasoning that Army officers are properly classified as inferior officers under the Appointments Clause and consequently may be appointed by the President alone.[83] The court thereby applied an

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79. *Black's Law Dictionary* 1287 (West, 6th ed. 1991).

80. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 799 n.41 (1976).

81. *Black's Law Dictionary* defines appointment for an office or public function as "[t]he selection or designation of a person . . . to fill an office or public function and discharge the duties of the same." *Black's Law Dictionary* at 99 (cited in note 79). Thus, the power to appoint necessarily includes the power to choose.

82. 14 Ct. Cl. 568 (1878).

83. Id. at 574.

appointments clause analysis to the reinstatement of an executive officer.[84] It must therefore have considered the reinstatement equivalent to an appointment for the purposes of constitutional analysis.[85]

One may draw a similar inference from *Steffan v. Perry*.[86] In *Steffan*, a midshipman from the Naval Academy was discharged from the Academy after admitting his homosexuality. Graduates of the Naval Academy are typically commissioned as officers in the Navy immediately following graduation. All naval officers are to be appointed by the President and confirmed by the Senate. Thus, the Secretary of the Navy argued that a court-ordered reinstatement to, and graduation from, the Academy would constitute an appointment in violation of the Appointments Clause.[87]

The issue of reinstatement was not addressed by the majority of the court because Steffan's discharge was upheld. Judge Wald's dissent, however, did raise the issue.[88] Because the only relief available to the court would have been an order of re-enrollment and graduation—not an order of appointment—and because the President had not yet refused to appoint Steffan, Judge Wald found an appointments clause challenge to be premature.[89] In coming to this conclusion, however, Judge Wald at least preliminarily must have subjected reinstatement to an appointments clause analysis. Judge Wald must therefore have reached the conclusion that reinstatement constituted an appointment for constitutional purposes.

Additionally, the fact that an award of reinstatement is subject to the discretion of the court in both Title VII and Civil Service cases[90]

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84. Id. at 575.

85. Other courts have reached the same conclusion. See *Parks v. Brennan*, 389 F. Supp. 790, 793 (N.D. Ga. 1974) (equating reinstatement and appointment when discussing the adequacy of remedies for a federal employee in a Title VII case); *Eberlein v. United States*, 53 Ct. Cl. 466, 472 (1918) (equating reinstatement and appointment when discussing who had the authority to reinstate a customs employee); *Madigan v. United States*, 142 Ct. Cl. 641, 642-43 (1958) (referring to a reinstatement as an appointment).

In addition, the National Labor Relations Act has been read to include a requirement to hire a victim of discrimination, despite the fact that the statute only speaks to "reinstatement." See *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 188 (1941) (stating that requiring the rehiring of a victim of discrimination furthers the priniciples of the Act). If hiring and reinstatement are considered equivalent under this statute, it is logical to equate appointment and reinstatement.

86. 41 F.3d 677 (D.C. Cir. 1994).

87. Id. at 720-21 n.27 (Wald, J., dissenting).

88. Id.

89. Id. Even had the issue been reached, the Secretary's argument would likely have failed. Naval officers are considered inferior officers under the Appointments Clause, see *Collins v. United States*, 14 Ct. Cl. 568, 576 (1879), and thus can be appointed by the court.

90. See Part VI; *Castle v. Bentsen*, 872 F. Supp. 1055, 1059 (D.D.C. 1995) (stating that under Title VII, the judiciary has the discretion to grant the equitable relief that it deems to be appropriate); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (holding that equitable relief should be available to government employees whose first amendment rights have been violated); *Bullo*

implies that the initial discharge has been given effect by the court and that reinstatement is in fact a rehiring or a reappointment. If reinstatement were merely the determination of a continuing right to the position in question, it would logically be mandated upon a finding of wrongful discharge rather than being dependent on the discretion of the court. By allowing individual judges to weigh the effects of an order of reinstatement and to determine whether such an award would be equitable, the law impliedly gives effect to the initial discharge.[91]

In summary, because any order of reinstatement mandates that the employer choose the discharged employee instead of anyone else, reinstatement has all the essential characteristics of a court appointment. At the very least, a court order of reinstatement would give the impression of usurping presidential power and create tension between the executive and the judiciary. The reinstated agency head would be sitting with only the approval of the court—not that of the President. Hence, for purposes of constitutional analysis, a reinstatement should be treated as an appointment and should be subject to the strictures of the Appointments Clause.

2. An Independent Agency Head as an Officer of the United States

The first question to ask in applying the Appointments Clause in this context is whether the agency head is indeed an officer of the United States. If so, the agency head must be appointed under the terms of the Clause. The Court most recently defined the characteristics of an officer of the United States in *Buckley v. Valeo*.[92] In *Buckley*, the court examined the constitutionality of the appointment of members to the Federal Election Commission. As a part of its appointments clause analysis, the Court held that "any appointee

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v. City of Fife, 50 Wash. App. 602, 749 P.2d 749, 753 (1988) (noting that the trial court had the authority to reinstato a government worker if proper proceedings by the state would have prevented her discharge).

91. But see *West v. Board of County Commissioners, Monroe County*, 373 So.2d 83, 87 (Fla. Ct. App. 1979) (holding that a discharged employee who has later been reinstated should be regarded as having been continuously employed from the time of his supposed discharge to his judicially compelled reinstatement).

92. 424 U.S. 1 (1976). See also *Germaine*, 99 U.S. at 512 (holding a surgeon retained on an intermittent basis not to be an officer of the United States); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding a merchant appraiser not to be an officer of the United States); *United States v. Smith*, 124 U.S. 525, 531 (1888) (holding a customs clerk not to be an officer of the United States).

exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.' "[93]

Applying this definition to independent agency heads, it must first be noted that agency heads are often granted powers to investigate, prosecute, and enact rules, all pursuant to enabling statutes, which are "laws of the United States."[94] In addition, such agency heads are free to pursue any matters that fall within the confines of their enabling statutes.[95] Possessing these powers gives independent agency heads "significant authority pursuant to the laws of the United States" and thereby places them within the *Buckley* definition of an officer of the United States. Consequently, independent agency heads must be appointed by the procedures delineated in the Appointments Clause. This does not, however, answer the question as to whether courts have the authority to appoint such agency heads.

3. An Independent Agency Head as a Principal Officer

The Appointments Clause grants Congress the authority to vest the appointment of "such inferior officers, as they think proper, in the . . . Courts of Law."[96] This language effectively divides all executive officers into two classes.[97] Principal officers may be appointed only by the President, with the advice and consent of the Senate. Inferior officers, on the other hand, may be appointed in any of four ways: by the President with advice and consent, by the President alone, by the heads of departments, or by the courts of law.[98] Therefore court appointment of an agency head is constitutional only if the agency head is considered an inferior officer.[99] If the heads of independent agencies are considered principal officers under the Appointments Clause they may be appointed only by the President with the advice and consent of the Senate.[100]

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93. *Buckley*, 424 U.S. at 126.

94. Enabling statutes for independent agencies are enacted pursuant to Article I, § 8 of the United States Constitution and are thus proper laws of the United States.

95. Donald J. Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. Mich. J. L. Ref. 45, 60-61 (1982) ("[Heads] of a department . . . [are] free to pursue any matter within the broad confines of executive power.").

96. U.S. Const., Art. II, § 2, cl. 2.

97. *Germaine*, 99 U.S. at 509.

98. *Buckley*, 424 U,S. at 132.

99. Such an appointment may still be unconstitutional as an interbranch appointment. See Part IV.B.1.

100. *Morrison*, 487 U.S. at 670-71.

As the Court has noted, "[t]he line between 'inferior' and 'principal' officers is one that is far from clear."[101] Even so, the Court provided some guidance in *Morrison v. Olson*. In that case, the Court did not draw a clear distinction between the two types of officers because it found the Independent Counsel obviously to be an inferior officer.[102] The Court did, however, enumerate four factors which led to this determination, and these factors can be used as a guide in determining whether an agency head is a principal or an inferior officer.[103]

Alternatively, scholars have suggested that principal officers are limited to those actually listed in the Appointments Clause. Any officer not named in this clause is thereby considered inferior.[104] Under either approach, the head of an independent agency can be considered a principal officer. Thus court appointment, and arguably reinstatement, would be unconstitutional.

a. The Morrison *Factors*

The Court in *Morrison* looked to four factors in its determination that the Independent Counsel was an inferior officer: tenure, jurisdiction, removal, and duties.[105] An examination of these factors may shed light on the question of whether agency heads are principal or inferior officers.[106]

The *Morrison* Court explained that the office of Independent Counsel, although not subject to a time limit, ended with the accomplishment of a single task and was thus an office of limited tenure.[107] This served as evidence that the Independent Counsel was an inferior officer. In contrast, the tenure of an independent agency head is not limited in the same sense. Although each individual commissioner

101. Id.
102. Id.
103. Id. For a discussion of these factors, see Part IV.A.3.a.
104. Tachmes, 42 U. Miami L. Rev. at 748 (cited in note 64); Simon, 16 U. Mich. J. L. Ref. at 60 (cited in note 95).
105. 487 U.S. at 671-72. The Court developed this approach in conjunction with its past cases on the issue. Id. at 672-73. See *United States v. Eaton*, 169 U.S. 331, 343-44 (1898) (finding a "vice-consul" in the State Department to be a subordinate officer); *Ex Parte Siebold*, 100 U.S. 371, 398 (1880) (finding "supervisors of elections" to be inferior officers); *Go-Bart Importing v. United States*, 282 U.S. 344, 352-53 (1931) (finding United States Commissioners, who performed various judicial and prosecutorial powers, to be inferior officers); *United States v. Nixon*, 418 U.S. 683, 694, 696 (1974) (referring to the Special Prosecutor as a subordinate officer).
106. *Weiss*, 510 U.S. at 192 (Souter, J., concurring) (applying the *Morrison* factors to the argument that military judges are principal officers).
107. 487 U.S. at 672.

serves for a limited time period,[108] the office of an independent agency head continues beyond the service of any one commissioner. In this sense, the office is no more temporary than that of President.

The Court in *Morrison* also looked to the fact that an independent counsel was limited in his or her jurisdiction.[109] The Independent Counsel Act itself was limited in applicability to certain federal officers suspected of specified crimes. In addition, the Independent Counsel's investigation was limited in its jurisdiction to the scope defined by the Special Division.[110] In contrast, the jurisdiction of an independent agency is limited only by the scope of its enabling act, and these grants of power are notoriously broad.[111] An agency with prosecutorial powers typically has jurisdiction over any violation of its enabling act, regardless of the perpetrator, and those agencies with rulemaking authority enact rules that apply equally to everyone in the country. In addition, many independent agencies are given both rulemaking and prosecutorial power. Thus, the jurisdiction of an agency head is not limited in the sense discussed by the Court in *Morrison*.

The *Morrison* Court also considered the manner in which an Independent Counsel was removed.[112] Because the Independent Counsel was removable for cause by a higher executive branch official (the Attorney General), the Court inferred that he or she was an inferior officer.[113] No such removal provision exists for independent agency heads. They are subject to removal only by the President, and for-cause limits on this removal power do not diminish these commissioners' status as principal officers.[114]

The final factor to which the *Morrison* Court looked in determining the status of the Independent Counsel under the Appointments Clause was the limited nature of his or her duties.[115] The Court pointed to the fact that the Independent Counsel had no

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108. Commissioners usually serve terms of four to seven years. For example, members of the NCUA Board serve six-year terms. 12 U.S.C. § 1752a (1994 ed.). Board members of the FDIC serve six-year terms. 12 U.S.C. § 1811 (1994 ed.). Members of the FTC serve seven-year terms. 28 U.S.C. § 288 (1994 ed.).

109. 487 U.S. at 672.

110. Id.

111. See Simon, 16 U. Mich. J. L. Ref. at 60-61 (cited in note 95) (distinguishing the special prosecutor from the head of a department because the head of a department "is free to pursue any matter within the broad confines of executive power").

112. *Morrison*, 487 U.S. at 663, 671.

113. Id. at 671.

114. The debate as to whether Congress could limit removal power demonstrates the prominence of these officials in the government.

115. *Morrison*, 487 U.S. at 671-72.

authority to make policy decisions or to perform any administrative duties outside those necessary to run his or her office.[116] The head of an independent agency, on the other hand, does make policy decisions and does perform many administrative duties.[117]

Thus, under the *Morrison* factors, it is clear that the head of an independent agency is a principal officer for the purposes of the Appointments Clause.

b. Enumeration in the Appointments Clause

The conclusion that the head of an independent agency is a principal officer is also supported by the theory that any officer of the United States who is not otherwise mentioned in the Appointments Clause is an inferior officer.[118] Under this theory, only officers specifically listed in the Appointments Clause are considered principal officers.

Among others, "Heads of Departments" are listed in the Clause.[119] Thus, if independent agency heads are considered heads of departments, they should be treated as principal officers for the purposes of the Appointments Clause.[120] Although some have argued that for the purposes of the Appointments Clause, only cabinet level officials should be considered heads of departments,[121] arguments for the inclusion of the heads of independent regulatory commissions are strong. Most convincing, perhaps, is Justice Antonin Scalia's argument in *Freytag v. Commissioner of Internal Revenue.*[122] Justice Scalia points out that Congress has not only historically conferred

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116. Id.

117. Peter L. Strauss, *Administrative Law* 35-36 (Foundation Press, 1995).

118. See Simon, 16 U. Mich. J. L. Ref. at 61-62 (cited in note 95) (explaining that the special prosecutor is an inferior officer because his or her position is not enumerated in the Appointments Clause); Tachmes, 42 U. Miami L. Rev. at 747-48 (cited in note 64) (stating that all officers whose appointments are not provided for by the Appointments Clause are to be considered inferior officers). See also *Germaine*, 99 U.S. at 511 (referring to inferior officers as those subordinate to officers already mentioned in the Appointments Clause); *Collins*, 14 Ct. Cl. at 574 (referring to inferior officers as any officers inferior to the courts of law or the heads of departments).

119. U.S. Const., Art. II, § 2, cl. 2. Officers mentioned in the clause include ambassadors, public ministers, consuls and judges of the Supreme Court, all of whom must be appointed by the President. The clause also includes the President, courts of law, and heads of departments, all of whom have the authority to appoint inferior officers.

120. Tachmes, 42 U. Miami L. Rev. at 747 (cited in note 64).

121. *Burnap v. United States*, 252 U.S. 512, 515 (1920) (stating in dicta that the head of a department must be in charge of a "great division" of government such as the cabinet departments). But see *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 886 n.4 (1991) (expressly reserving the question as to whether independent regulatory commissioners qualify as heads of departments).

122. *Freytag*, 501 U.S. at 915-22 (Scalia, J., concurring).

appointment power on non-Cabinet level officials,[123] but also continues to do so frequently.[124] A determination that independent agency heads are not the heads of departments would call into question the constitutionality of all of these appointments. In addition, some have suggested that in order to determine the status of an officer for the purposes of the Appointments Clause one should look to congressional intent.[125] The conferral of appointment power referred to by Justice Scalia shows clear congressional intent to include independent agency heads as heads of departments under the Appointments Clause.

Furthermore, even if agency heads were not considered heads of departments, they might nonetheless fall within the language mandating that the President appoint all "public Ministers and Consuls." Indeed, the language "public Ministers and Consuls" in the Appointments Clause[126] has been read to include the head of a department *or* an agency.[127] If this approach were taken, heads of independent agencies would be considered principal officers who must be appointed by the President with the advice and consent of the Senate. Any judicial appointment of the head of an independent agency would therefore violate the Appointments Clause. As shown above, a court reinstatement would have the same practical effect as a court appointment. Therefore, it too would arguably violate the Appointments Clause.

B. Reinstatement as a Functional Violation of Separation of Powers Principles

As discussed above,[128] courts apply either a formal approach or a more permissive functional approach to separation of powers questions. The above analysis illustrates that under a formalist analysis, court reinstatement of an agency head arguably violates the Appointments Clause and underlying separation of powers concepts. This Section argues that even if the Court applied the more liberal

123. In 1792, Congress created the Postmaster General and conferred upon him the power to appoint subordinate officers. Id. at 917-18.

124. Many heads of regulatory commissions have the authority to appoint subordinates. Id. at 918 (citing 47 U.S.C. § 155(f) (1994 ed.)) (FCC may appoint a managing director); Federal Trade Commission Act, 15 U.S.C. § 42 (1994 ed.) (FTC may appoint a secretary); Securities Acts Amendments of 1990, 15 U.S.C. § 78d(b)(1) (1994 ed.) (SEC may appoint such officers as may be necessary); Commodity Exchange Act, 7 U.S.C. § 4a(c) (1994 ed.) (Commodity Futures Trading Commission may appoint a general counsel)).

125. Tachmes, 42 U. Miami L. Rev. at 750-52 (cited in note 64).

126. U.S. Const., Art. II, § 2, cl. 2.

127. Simon, 16 U. Mich. J. L. Ref. at 60 n.96 (cited in note 95).

128. See notes 68-78 and accompanying text.

balancing approach to this issue, court appointment of an independent agency head would violate the separation of powers doctrine. In applying a functional analysis, courts have focused on the existence of checks and balances, asking whether one branch has encroached on the powers of another branch.[129]

1. Reinstatement as an Unconstitutional Interbranch Appointment

The appointment by one branch of government of an officer of another branch has been challenged as violating the separation of powers doctrine.[130] Although cases have interpreted the Constitution to allow some interbranch appointments,[131] the Court in *Morrison* spoke of a constitutional limitation on interbranch appointments that are "incongruous" with the functions of the appointing branch.[132] Under this analysis, the appointment of an officer—such as an agency head—charged with making political decisions appears incongruous with the independent, nonpolitical nature of a court. In fact, the *Morrison* Court used court appointment of an agency head as an example of an incongruous interbranch appointment.[133] Thus even if a court reinstatement of an independent agency head were not considered a violation of the Appointments Clause, it might still be considered an unconstitutional interbranch appointment.

2. Interference with the President's Duties

Even if court reinstatement of an agency head did not technically qualify as an interbranch appointment, it might nonetheless fail functional separation of powers analysis as an unconstitutional court interference with the President's duties. Cases using the functional approach have looked at whether an intrusion into the President's

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129. Entin, 51 Ohio St. L. J. at 188 (cited in note 40).

130. *Morrison*, 487 U.S. at 676.

131. *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1879) (holding that court appointment of election supervisors, who are considered executive officials, is constitutional); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (upholding court appointment of commissioners of extradition); *Hobson v. Hansen*, 265 F. Supp. 902, 902 (D.D.C. 1967) (upholding court appointment of members of the District of Columbia Board of Education); *United States v. Solomon*, 216 F. Supp. 835, 840-43 (S.D.N.Y. 1963) (upholding court appointment of temporary United States Attorneys).

132. *Morrison*, 487 U.S. at 677. See also *Freytag*, 501 U.S. at 883 (1991) (pointing out that the appointments clause issues in that case would be different if it were an interbranch appointment).

133. *Morrison*, 487 U.S. at 676 n.13 ("This is not a case in which judges are given power to appoint an officer in an area in which they have no special knowledge or expertise, as in, for example, a statute authorizing the courts to appoint officials in the Department of Agriculture or the Federal Energy Regulatory Commission.").

power prevents him from "accomplishing his constitutionally assigned functions" and whether the intrusion is justified by the need for the provision in question.[134] The Court set the standard by which it typically measures the constitutionality of encroachment upon executive functions in *Nixon v. Administrator of General Services.*[135] In *Nixon*, the Court set out a two part analysis.[136] First, a court must determine whether the action in question threatens to prevent another branch from accomplishing its constitutional functions.[137] If so, the court must ask if this potential for disruption is justified by an overriding need to promote objectives within the constitutional powers of the acting branch.[138]

Applying the first prong of that analysis, court appointment of an agency head poses a clear danger of limiting the President's ability to perform his constitutional functions. At issue is the President's duty to "take Care that the Laws are faithfully executed."[139] In this day of extensive reliance on administrative agencies, independent agency heads are often instrumental in making and implementing law and policy in key areas of national concern. In such areas, the President, as the head of the government, arguably needs the ability to act quickly.[140] In addition, the President serves an important role as the one central influence among all administrative agencies, many of which have overlapping spheres of activity. Virtually every independent agency operates within a sphere that not only intersects with executive policies, but also overlaps with the jurisdiction of executive

134. *Public Citizen*, 491 U.S. at 484 (quoting *Morrison*, 487 U.S. at 443).

135. 433 U.S. 425 (1977).

136. Id. at 443.

137. Id.

138. Id. See also the discussion of *Nixon* in Rosenberg, 57 Geo. Wash. L. Rev. at 638 (cited in note 5).

139. U.S. Const., Art. II, § 3.

140. This approach is premised on a theory of a unitary executive. Under such a theory, the President, as the head of government, "should be able to determine policy for the administrative agencies and should have the authority to dictate agency action—subject, of course, to the limits imposed by the Constitution and to the limits on substantive action contained in the authorizing legislation." Geoffrey P. Miller, *The Unified Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 Cardozo L. Rev. 201, 205 (1993). This theory has been advanced by many scholars as the proper role of the President within the Executive Branch. See generally Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1155 (1992); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23 (1995); David B. Riuken, *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 Admin. L. J. Am. U. 309 (1993). Other scholars, however, argue that Congress should be able to limit the President's actions in this respect. See generally Thomas O. McGanity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 Am. U. L. Rev. 443 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

agencies. For example, the banking industry is concurrently regulated by the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of Currency ("OCC"), the Office of Thrift Supervision ("OTS"), the Federal Reserve Board, and the National Credit Union Administration ("NCUA").[141] Although some of these agencies are independent,[142] others are pure executive agencies, ultimately responsible to cabinet level officials.[143] Effective presidential implementation of any policy in the banking industry therefore depends on the President's ability to resolve conflicts and to encourage cooperation among the various regulating bodies.[144] It is thus crucial to the President's duty under the Take Care Clause to have some form of working relationship with these agency heads.[145] Such a relationship would not be possible if the official were reinstated by a court over presidential opposition.

This disruption of presidential function is not outweighed by independent agencies' need for independence.[146] As further discussed below,[147] these agencies are no longer mainly quasi-judicial in nature, and their growing authority suggests a need for accountability. Thus, it is likely that judicial reinstatement of such an agency head would violate the doctrine of separation of powers under a functional analysis as well.

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141. 12 U.S.C. §§ 1811, 1828 (1994 ed.) (creating and enumerating the powers of the FDIC); 12 U.S.C. §§ 1-11 (1994 ed.) (creating and enumerating the powers of the OCC); 12 U.S.C. §§ 1462(a), 1464 (1994 ed.) (establishing the OTS and enumerating its powers); 12 U.S.C. § 248 (1994 ed.) (describing the powers of the Federal Reserve Board); 12 U.S.C. §§ 1751-1766 (1994 ed.) (establishing and enumerating the powers of the NCUA).

142. 12 U.S.C. § 1752(a) (establishing the NCUA as an "independent agency within the executive branch"); 12 U.S.C. § 1811 (creating the FDIC with a multimember board and stating that no more than three of the five board members may be of the same political party); 12 U.S.C. §§ 241, 242 (establishing the Federal Reserve Board as an independent agency).

143. 12 U.S.C. § 1 (establishing the OCC within the Department of the Treasury); 12 U.S.C. §§ 1462(a), 1464 (establishing the OTS within the Department of the Treasury and subjecting its Director to the general supervision of the Secretary of the Treasury).

144. See Sunstoin, 101 Harv. L. Rev. at 450-51 (cited in note 71) ("[W]ithout unitary control, it is difficult to coordinate agency decisions or to redirect national policy."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667-72 (1952) (Vinson, C.J., dissenting) (describing the President's role as the only national official charged with coordinating a mass of legislation).

145. This same argument could be used to challenge the constitutionality of for-cause provisions themselves. The threat to policy coordination is not as great, however, in the initial appointment stage because the President has specifically chosen the agency head as someone with whom he or she can work. By removing that official the President is effectively stating an inability to continue this working relationship, and therefore there is a greater threat to the President's power if an agency head were reinstated.

146. Even if the disruption of presidential function is not thought to be so severe as to rise to the level of a functional violation of the separation of powers principle, it might weigh heavily in a judge's discretionary decision as to whether to grant the equitable remedy of reinstatement. For a discussion of these concerns, see Part VI.A.

147. See notes 222-25 and accompanying text.

V. OTHER BARRIERS TO REINSTATEMENT

Separation of powers principles present two further difficulties in reinstating a discharged agency head. Both the doctrine of presidential immunity from injunction and that of justiciability are efforts by courts to function within constitutional limits. Presidential immunity is grounded in the notion that a court should not extend its authority to the questioning of the President's conduct while in office.[148] Similarly, courts find cases non-justiciable when they consider the actions in question to be within the province of another branch of government. An examination of both of these doctrines produces several constitutional arguments against court-ordered reinstatement of a discharged agency head.

A. Presidential Immunity

Presidential immunity forms perhaps the most significant hurdle to the reinstatement of a discharged agency head. Reinstatement is a form of injunction,[149] and in general, courts do not have jurisdiction to enjoin the President in the performance of his official duties.[150]

Under federal law, a writ of mandamus is the vehicle through which the President would be compelled to reinstate a discharged agency head.[151] Mandamus is considered an extraordinary remedy, however, and it is only issued in very limited circumstances.[152] It is well settled that courts can issue writs of mandamus against most executive officers only to compel the performance of purely "ministerial" duties—not to mandate the performance of discretionary duties.[153] Even for performance of ministerial duties, however, the

148. Laura Krugman Ray, *From Prerogative to Accountability & the Amenability of the President to Suit*, 80 Ky. L. J. 739, 757 (1992); *Cobegrove v. Green*, 328 U.S. 549, 556 (1946) ("The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion.").

149. Dobbs, *Law of Remedies* § 2.9 at 163 (cited in note 13).

150. *Mississippi v. Johnson*, 71 U.S. (4 Wallace) 475, 501 (1866).

151. A writ of mandamus is by definition an extraordinary writ issued by a court commanding an executive, administrative, or judicial officer to perform a ministerial act clearly owed the complainant under law. *Black's Law Dictionary* at 961 (cited in note 79). 28 U.S.C. § 1361 (1994 ed.) gives federal district courts original jurisdiction over any action of mandamus to compel an officer, employee, or agency of the United States government to perform a duty owed to the plaintiff. See *Wilbur v. United States*, 281 U.S. 206, 218 (1930).

152. Craig, 1 *Civil Actions Against the United States* § 1.13 at 34 (cited in note 46); *Whitehouse v. Illinois Central Railroad Co.*, 349 U.S. 366, 373 (1955).

153. *Ganem v. Heckler*, 746 F.2d 844, 852-53 (D.C. Cir. 1984) (issuing a writ of mandamus against the Secretary of Health and Human Services for the administration of the Social Security Act); *Haneke v. Secretary of Health, Education and Welfare*, 535 F.2d 1291, 1296 (D.C. Cir. 1976) (issuing a writ of mandamus against the Secretary of Health, Education, and Welfare

Supreme Court has reserved the question of whether a court could enjoin the President himself.[154] The Court apparently based the distinction between the President and other executive officers on separation of powers principles, reasoning that lawsuits against other executive officers do not raise separation of powers questions as significant as those posed by suits against the President.[155] Courts are concerned not only that deference to the President is necessary to ensure the effective performance of presidential duties,[156] but also that it is not the place of a court to question the official actions of the President.[157] These separation of powers concerns wonld arguably preclude a court from issuing a writ of mandamus ordering the President to reinstate an improperly removed agency head.

Even if a court did allow mandamus against the President to perform a ministerial duty, these same separation of powers concerns would prevent an injunction against any executive officer—including the President—for the performance of a discretionary act.

A ministerial duty is one "in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."[158] Courts use three criteria in determining whether a duty is ministerial: (1) the claim must be clear and certain; (2) the duty of the officer must be plain, clearly defined and obviously owed to the plaintiff; and (3) the plaintiff must lack an adequate remedy other than mandamus.[159] The bur-

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for the classification of the plaintiff's wage under the Civil Service laws); *Wilbur*, 281 U.S. at 218-19 (stating that a writ of mandamus can be had against an executive officer to perform a ministerial duty).

154. *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Johnson*, 71 U.S. at 498-99.

155. Despite the Supreme Court's reservation of this question, several lower court decisions have allowed mandamus against the President for ministerial duties. *Franklin*, 505 U.S. at 826 (Scalia, J., concurring); *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. 1983) (enjoining the removal of Civil Rights Commissioners), vacated as moot, 732 F.2d 949 (D.C. Cir. 1983); *National Wildlife Federation v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) (stating that the court's power to issue a writ of mandamus for an executive officer to perform a ministerial duty is not altered if the officer is the President); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 602-03 (D.C. Cir. 1974) (stating that mandamus can be issued against the President for the performance of ministerial duties). See also *United States v. Nixon*, 418 U.S. 683, 707 (1974) (holding that the President can be compelled to produce documents in an ongoing criminal investigation); *United States v. Burr*, 25 F. Cases 30, 34 (C.C.D. Va. 1807) (finding that a subpoena may be issued for the President in a criminal investigation).

156. Ray, 80 Ky. L. J. at 780 (cited in note 148).

157. Id. at 757.

158. *Johnson*, 71 U.S. at 498.

159. *Public Citizen v. Kantor*, 864 F. Supp. 208, 212 (D.D.C. 1994). See also Craig, 1 *Civil Actions Against the United States* § 1.13 at 34 (cited in note 46) (noting the three requirements for mandamus relief).

den of proving a task to be ministerial rests on the party seeking mandamus.[160]

The removal of an independent agency head does not meet these criteria. First, the claim of a discharged agency head is far from clear and certain because courts have never explicitly determined the meaning of "for cause."[161] Similarly, the President does not have an obvious duty to reinstate the agency head. A for-cause provision leaves the President some discretion as to what constitutes cause sufficient for removal. It therefore gives the agency head no unfettered right to maintain his position.[162] The President's discretion to determine cause would likely prevent a plaintiff from ever showing the President's duty to reinstate to be plain, clearly defined, and obviously owed.

In addition, the availability of a remedy other than reinstatement weighs against the issuance of a writ of mandamus. As discussed above, money damages would likely be available to the plaintiff in such a case. Although these damages may not effectuate the intentions of Congress, they are adequate to redress the harm done to an agency head discharged for invalid cause. Thus, all three of the criteria used to determine if a task is ministerial weigh toward a determination that the President's reinstatement of an agency head is a discretionary act. Accordingly, the issuance of mandamus seems highly unlikely.

The recent case of *Swan v. Clinton*[163] demonstrates the above difficulties. The plaintiff, Mr. Robert Swan, was appointed in 1990 for a six-year term as a member of the NCUA Board. This agency was created as an "independent agency" by the Federal Credit Union Act in 1934, and its Board promulgates rules and regulations in order to supervise and regulate federal credit unions.[164] When Swan's term expired in 1996, his successor had yet to be confirmed by the Senate. As a result, pursuant to statute, Swan continued to serve on the Board in a holdover capacity. On April 8, 1996, President Clinton informed Swan that he had decided to terminate his service on the Board effective the following day. The Senate was adjourned until

160. *Haneke*, 535 F.2d at 1296 n.15.

161. See note 54.

162. As the Court stated in *Wilbur v. United States*, "Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself." 281 U.S. at 220.

163. 932 F. Supp. 8 (D.D.C. 1996), appeal docketed, No. 96-5193 (D.C. Cir. June 25, 1996).

164. 12 U.S.C. §§ 1751-1795K (1994 ed.).

April 15, and on April 12, President Clinton issued a recess appointment designating Yolanda Wheat to succeed Swan on the Board.

Swan filed an action seeking an injunction ordering President Clinton to reinstate him in his position on the Board and to enjoin the President from removing him as a member of the Board.[165] The district court found the President's ability to remove Board members to be discretionary rather than ministerial and thus refused to order mandamus.[166]

Notably, Swan's circumstances differ from those of many independent agency heads because the Federal Credit Union Act does not contain an express for-cause removal provision. Despite the express language of the statute in naming the NCUA an independent agency and despite the nature of the agency's functions, the court refused to imply a for-cause provision under *Wiener*.[167] The court reasoned that any restriction on presidential authority must be clearly stated, especially when the federal balance of power is at stake.[168] Despite this distinction from the typical case, however, *Swan* demonstrates that the President's relative immunity from mandamus will provide a substantial hurdle to any discharged agency head seeking reinstatement.[169]

B. Justiciability

Justiciability poses another constitutional difficulty to an improperly discharged commissioner seeking relief.[170] The doctrine of justiciability dictates that a court should not decide "political questions" or other issues over which the court has no authority.[171] A removal by the President under a for-cause provision has never been challenged, and thus the justiciability of such a question has never been tested. Challenges to presidential appointments, however, have been found non-justiciable, and the same reasoning may apply to de-

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165. *Swan*, 932 F. Supp. at 9.

166. Because the court found the duty in question to be discretionary, it refused to comment on the issue of whether mandamus is available against the President. Id. at 11 n.2.

167. Id. at 12-13.

168. Id.

169. This case is currently on appeal to the Circuit Court of the District of Columbia. *Swan v. Clinton*, 932 F. Supp. 8 (D.D.C. 1996), appeal docketed, No. 96-5193 (D.C. Cir. June 25, 1996).

170. This would comport with the view of some commentators that the Court should refrain from speaking on most separation of powers issues. See, for example, Entin, 51 Ohio St. L. J. at 209-22 (cited in note 40) (suggesting that the judicial resolution of separation of powers issues hinders the ability of Congress and the President to resolve these disputes).

171. See *Baker v. Carr*, 369 U.S. 186, 201 (1962) (describing the political question doctrine).

termining the availability of reinstatement after the converse act—a presidential removal.

In *Americans United for the Separation of Church and State v. Reagan,*[172] a controversy arose surrounding the appointment of an ambassador to the Vatican. The plaintiffs contended that the Establishment Clause precluded the President from appointing an ambassador to the Vatican and thereby recognizing it as a sovereign state.[173] The Third Circuit answered this challenge by stating that only the President had the power to appoint ambassadors. It held that as appointment and recognition decisions were constitutionally committed to another branch, their propriety was a non-justiciable political question.[174]

Under this same analysis a court might find reinstatement to be nonjusticiable because appointments are textually committed to a branch other than the judiciary. As explained above, the Appointments Clause clearly states that principal officers of the United States shall be appointed by the President with the advice and consent of the Senate.[175] If one views reinstatement as a re-appointment[176] and agency heads as principal officers,[177] the decision to reinstate is textually committed to a branch other than the judiciary.[178]

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172. 786 F.2d 194 (3d Cir. 1986).

173. Id. at 197.

174. Id. at 202. The court relied on the enumeration of the factors relevant to determining whether an issue is a non-justiciable political question in *Baker v. Carr.* These factors are: (1) a textually demonstrable commitment of the issue to another branch of government; (2) a lack of judicially discoverable or manageable standards for resolving the issue; (3) the impossibility of deciding the issue without making an initial policy determination; and (4) the impossibility of the court's resolving the issue without showing disrespect to a coordinate branch. 369 U.S. at 217. The *Americans United* court found the appointment issue non-justiciable only after it had already determined that the challenge suffered from serious standing problems. Assuming arguendo that the plaintiff had established standing to challenge the appointment, the court addressed the issue of justiciability. *Americans United for the Separation of Church and State,* 786 F.2d at 208-37.

The Tenth Circuit followed this precedent in *Phelps v. Reagan,* 812 F.2d 1293 (10th Cir. 1987). The court stated that the power to appoint an ambassador and to recognize a foreign government was vested in the Executive Branch and thus was not an issue for the court to decide. Id. at 1294. It is unclear how much these decisions were based upon the President's power in the foreign affairs field. This distinction, however, does not render the comparison here untenable. Just as the President's power to appoint ambassadors and recognize foreign governments is specifically listed, so is his authority to appoint officers of the United States.

175. U.S. Const., Art. II, § 2, cl. 2. For a discussion of the problems the Appointments Clause poses for reinstatements, see Part IV.

176. See Part IV.A.1.

177. See Parts IV.A.2-3.

178. The *Myers* Court found the power of removal to be a necessary corollary to the power to appoint. 272 U.S. at 119. Thus removal is textually committed to the President as well. Although Congress has limited the removal power with a for-cause provision in some cases, the removal power still lies solely in the executive. It is therefore possible that any judicial review of a for-cause removal would be found a political question. This is not likely, however, in light of

Thus, it is possible that a court would find the issue of reinstatement to be a non-justiciable political question.

VI. EQUITABLE CONCERNS RELEVANT TO THE GRANTING OF REINSTATEMENT

Should a court find reinstatement constitutional, a discharged agency head would nevertheless face an additional hurdle arising from the fact that reinstatement is one form of injunction, and therefore subject to the rules governing equitable relief.[179] Typically, discretionary power is given to courts in fashioning equitable relief—although this discretion is limited in certain areas of law, such as employment discrimination and civil service laws.[180] This discretion presents a substantial barrier to a discharged agency head's request for reinstatement.

A. Discretion in Employment Discrimination Law and the Presumption in Favor of Reinstatement

The traditional discretion of courts to deny reinstatement is the most limited in the arena of employment discrimination law. Even under these principles, however, it is unlikely that an agency head would be reinstated after an improper removal. The Supreme Court has identified two theories under which judges' discretion is directed in employment discrimination suits. First, relief must be aimed at making victims of discrimination whole after injuries suf-

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the fact that executive removals have been reviewed in *Myers, Humphrey's Executor,* and *Wiener.*

179. Dobbs, 1 *Law of Remedies* § 2.4(1) at 90 (cited in note 13). This can be seen in most aspects of employment law. For example, under ERISA, reinstatement is viewed as an equitable remedy. *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (1980). Similarly, under Title VII, "[t]he Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement* or hiring of employees . . . ." 42 U.S.C. § 2000e-5(g) (1994 ed.) (emphasis added). Such proceedings are considered equitable. Dobbs, 2 *Law of Remedies* § 6.10(7) at 237 (cited in note 13).

180. Courts have specifically employed this discretion in determining whether to issue mandamus against an executive officer. See *National Wildlife Federation v. United States*, 626 F.2d 917, 924-27 (D.C. Cir. 1979) (denying mandamus under the court's equitable discretion despite finding that the duty in question was ministerial). The court stated that serious questions about standing and justiciability led to its decision to exercise its discretion not to issue mandamus. Id. at 924-25. See also *13th Regional Corp. v. United States Dept. of the Interior*, 654 F.2d 758, 762-63 (D.C. Cir. 1980) (exercising the court's discretion to deny mandamus despite finding that the duty in question was ministerial). Courts weigh the same equitable considerations before issuing declatory relief.

fered through employment discrimination.[181] Second, relief must be fashioned as an attempt to restore victims to the positions they would have held if not for the unlawful discrimination.[182]

Reinstatement is a logical consequence of the application of these principles. Reinstatement is designed to recreate the employment relationship that existed before the unlawful discharge.[183] Thus, there is a strong presumption in favor of reinstatement in employment discrimination cases.[184] This presumption may be overcome, however, by the existence of certain exceptional circumstances. Two such exceptions are particularly applicable to the case of a discharged agency head.

Courts do not traditionally grant reinstatement if there is "animosity or hostility between the parties such that a . . . productive working relationship would be impossible."[185] Hostility sufficient to overcome the presumptive reinstatement rule can occur in the circumstance of particularly bitter litigation or when the plaintiff would be reinstated into a high level, unique, or sensitive position.[186] Following the discharge of an agency head, enough hostility would likely be present to preclude reinstatement. The agency head's removal indicates that tensions had risen to such a level that the President was willing to risk the political damage that could result from the public discharge of an agency head. If an agency head were

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181. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420-21 (1975). See also Belton, *Remedies in Employment Discrimination Law* at 85-87 (cited in note 48) (discussing the impact of *Albemarle* on employment discrimination cases).

182. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 779 n.41 (1976) (stating that district courts should start at "the presumption of rightful-place seniority relief" and continue with analysis from that point).

183. Belton, *Remedies in Employment Discrimination Law* at 219 (cited in note 48).

184. See *Garza v. Brownsville Indep. School Dist.*, 700 F.2d 253, 255 (5th Cir. 1983) (concluding that under Title VII, reinstatement is to be granted "in all but the unusual cases"); *In re Lewis*, 845 F.2d 624, 630 (6th Cir. 1988) (holding that "[o]nce discrimination is found, reinstatement should be granted absent exceptional circumstances"); *Coston v. Plitt Theatres*, 831 F.2d 1321, 1330-31 (7th Cir. 1987) (citing *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986)) (concluding that under the ADEA, "reinstatement is usually the preferred remedy"); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985) (asserting that reinstatement is to be granted in all but the most unusual cases). See also Belton, *Remedies in Employment Discrimination Law* at 222-26 (cited in note 48) (discussing the presumptive reinstatement rule).

185. Belton, *Remedies in Employment Discrimination Law* at 236 (cited in note 48).

186. Id at 252. *Ross v. William Beaumont Hosp.*, 678 F. Supp. 680, 682-83 (E.D. Mich. 1988) (denying reinstatement to a surgeon because of the disharmonious relationship between the parties); *McKnight v. General Motors Corp.*, 908 F.2d 104, 115-16 (7th Cir. 1990) (remanding the issue of reinstatement and holding that hostility between the parties is an adequate reason to deny reinstatement); *Coston*, 831 F.2d at 1331 (denying reinstatement to a position with public responsibilities because of the hostility between the parties); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 846-47 (W.D. Okla. 1976) (denying reinstatement to a television anchor because of the uniqueness of the position and the hostility between the parties).

reinstated, disagreement at this high level would destroy any productive working environment and thereby affect the smooth running of government.[187]

A second, similar exception to the general presumption in favor of reinstatement is equally applicable to the proposed reinstatement of an agency head. Regardless of predicted hostility, a court's willingness to grant reinstatement often depends on the level of the position in which the plaintiff seeks to be reinstated.[188] In the case of business executives, courts regularly deny reinstatement.[189] Reinstatement of a policymaking employee is thought to destroy the harmonious working relationship necessary for the defendant's business because a high level employee is likely to be in a position of discretion, for which he or she must be trusted by the employer.[190] The same approach applies to professional employees. Courts often deny reinstatement to professionals because their duties include client or public contact in which they are asked to act as representatives of their employers. Courts predict that suspicion and conflicts between the plaintiff and others will undercut the working relationship and lower the quality of services offered to the public.[191]

These principles render an agency head unlikely to be reinstated. A harmonious working relationship between the President and such an officer and between the discharged officer and other agency heads[192] is necessary for the efficiency of government.[193] This is especially true because the independent agencies no longer perform solely quasi-judicial or quasi-legislative functions. These agencies function in essentially the same manner as executive agencies and are often responsible for making policy decisions that affect large seg-

187. Despite the fact that these agencies are "independent," the President still interacts frequently with agency heads in order to mediate on matters of executive policy. For that reason, a productive working relationship is needed. See notes 140-45 and accompanying text.

188. Belten, *Remedies in Employment Discrimination Law* at 260 (cited in note 48) (discussing the sliding-scale approach to presumptive reinstatement based on the "hierarchy of jobs").

189. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982) (denying reinstatement te a vice president for stores and operation, a divisional merchandise manager, and a sportswear buyer); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y 1983) (denying reinstatement to the chief labor counsel).

190. Belton, *Remedies in Employment Discrimination Law* at 262 (cited in note 48).

191. Id. at 263 (citing *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.2d 919, 926-27 (S.D.N.Y. 1976) (denying an advertising executive reinstatement)); *Combes*, 421 F. Supp. at 846-47 (denying reinstatement to a television news anchor).

192. As discussed above, independent agency heads are often members of multi-member commissions and have to work closely with the other commissioners. See note 7.

193. See notes 140-45 and accompanying text.

ments of the population.[194] In addition, independent agency heads' responsibility for a great deal of public contact makes their positions unique. They not only represent the President to the public but also are often responsible for explaining policy decisions to Congress. Thus, under the exceptions for hostility and level of position in employment discrimination law, a court would likely deny reinstatement for independent agency heads.

B. The Improbability of Reinstatement Under Civil Service Laws

Just as employment law generally directs courts to consider any hostility that may result from a reinstatement, in the specific area of fashioning relief for discharged civil service employees, courts weigh the effect of a given type of relief on the workplace.[195] The Supreme Court's reasoning in *Sampson v. Murray*[196] clearly displays the nature of this consideration. *Sampson* involved the discharge of an employee of the Public Buildings Service of the General Services Administration. The employee claimed that the agency had not afforded her the proper statutory procedure before her removal, and she sought an injunction staying her removal until her appeal was complete. The Court held that although a federal court may have the jurisdiction to enter an order staying removal, the use of this authority is subject to judicial discretion.[197] In exercising this discretion, a court "is bound to give serious weight to the obviously disruptive effect" such a stay would have on the administrative process,[198] and to the traditional rule that the government should be given wide latitude in conducting its own affairs.[199]

As discussed previously, reinstating an agency head would result in a large disruptive effect.[200] In addition, if the government is given wide latitude in governing its internal affairs with respect to a low level agency employee, as in *Sampson*, surely such latitude would be granted in the case of a high-level official with policy-oriented

194. See notes 222-25 and accompanying text.

195. See, for example, *Lewis v. Carter*, 436 F. Supp. 958, 961-62 (D.D.C. 1977) (denying a preliminary injunction te a federal employee because the injunction would unduly interfere with the executive). But see *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193-95 (1978) (refusing to balance the equities of enforcing an injunction allowed under the Endangered Species Act). *Hill*, however, is distinguishable from the present case because the act in *Hill* provided no alternative remedies and specifically called for an injunction. Id. at 168-69.

196. 415 U.S. 61 (1974).

197. Id. at 80.

198. Id. at 83.

199. Id. (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

200. See notes 140-45 and accompanying text.

responsibilities. Thus, when an analogy is made to civil service remedies, an agency head is likely to be denied reinstatement.

Despite the above militating factors, Professor Laurence Tribe has argued that the President could be ordered to reinstate an agency head subject to a for-cause provision[201] because courts have ordered the reinstatement of federal employees in the past. Professor Tribe's argument, however, fails to recognize the clear role of these agencies in the policymaking process and therefore the likelihood that agency heads will not be reinstated. The cases in which federal employees have been reinstated in the past have involved low-level employees or those subject to civil service protection, none of whom was originally appointed by the President.[202] Thus the factors that argue against the reinstatement of an agency head are not present in such cases. Rather, the discharged employees in the cases Professor Tribe cites are not high-ranking officials with discretion in matters of policy or duties to represent the agency to the public, and their reinstatement would therefore not implicate the same policy considerations raised by the reinstatement of an agency head. Thus, under the discretion given courts under civil service laws, a discharged agency head is unlikely to be reinstated.

C. Balancing the Equities

Outside the specific spheres of employment discrimination and civil service laws, courts determine whether to grant equitable relief by balancing the equities of awarding such relief under the theory that a remedy more costly than beneficial may not be an efficient way of redressing the invasion of the plaintiff's rights.[203] Considerations

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201. Tribe, *American Constitutional Law* at 250 n.20 (cited in note 57).

202. Specifically, Professor Tribe cites the case of *Vitarelli v. Seaton*, 359 U.S. 535 (1959). Vitarelli was an Education and Training Specialist in the Education Department which was within the Department of the Interior. He was a low-level employee who could have been dismissed by the Secretary. Id. at 539. The Court reinstated Vitarelli only because the Secretary of the Interior had purported to discharge him for security reasons without following the proper procedure for security risk cases. Id. at 539-40. Additionally, the court specifically limited Vitarelli's reinstatement, noting that he would still be subject to "any lawful exercise of the Secretary's [unfettered] authority hereafter to dismiss him from employment." Id. at 546. Another crucial distinction arises from the fact that Vitarelli was likely an inferior officer for purposes of the Appointments Clause, and thus no constitutional problems would arise from his reinstatement. In contrast, the reinstatement of an agency head implicates constitutional concerns. See Part IV.

203. Dobbs, 1 *Law of Remedies* § 1.9 at 35 (cited in note 13). One traditional area in which equitable relief is denied is in cases involving employment contracts. This hesitance on the part of courts stems from a perceived inability to supervise the conduct of parties in a long term employment relationship, the lack of objective standards by which to measure compliance with

relevant to this decision include the risk that a court will err in ordering this coercive relief, the availability of other remedies, the hardship that an order of injunctive relief would cause the defendant, and the interests of the public and third parties.[204]

If there is a high risk that a court will be in error, the court may decline to offer equitable relief. All forms of equitable relief are considered coercive, and a court may wish to avoid forcing action upon the parties if such coercion may be unjustified.[205]

The coercive nature of equitable relief also discourages courts from using it if other remedies are available. This coercion may be especially acute in reinstating an agency head. If an agency head who was removed for valid cause were reinstated, he or she would not only be in a policymaking position without presidential approval but might also be unqualified to make policy decisions. A court will decline to order the parties to act affirmatively if it feels that the harm can be adequately redressed by monetary relief. As discussed above, the consequences of an error in reinstating an agency head may be particularly grave. In addition, the availability of money damages might cause a court to decline to reinstate a discharged agency head.[206]

In addition, as explained above,[207] severe tensions in the everyday functioning of government could be created by retaining a high-ranking official whom the President clearly does not care to work with or trust. This would result in the President's inability to implement policy effectively. Even if this disruption could not render reinstatement unconstitutional,[208] a court might consider the cost these inefficiencies imposed on the President and the government as a whole and decide to deny reinstatement.

Finally, a court will weigh the public interest against the purpose behind the statute.[209] The public interest may include not only public policy concerns with maintaining at least a semblance of independence for some agencies, but also the structural interests of sepa-

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the order, and the traditional doctrine of at-will employment. Belton, *Remedies in Employment Discrimination Law* § 7.2 at 220-21 (cited in note 48).

204. Dobbs, *Law of Remedies* § 2.4(5) at 78-85 (cited in note 13).

205. Id. § 2.9.

206. See Part III for a discussion of the availability of money damages.

207. See notes 140-45 and accompanying text.

208. For a discussion of the argument that reinstatement is a functional violation of the separation of powers principle, see Part IV.B.

209. See *Romero-Barcelo*, 456 U.S. at 328 (Stevens, J., dissenting) (citing *Hecht v. Bowles*, 321 U.S. 321, 331 (1944) (stating that judicial discretion "must be exercised in light of the large objectives of the Act . . . [because] the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases")).

ration of powers.[210] The strength of the public interest can be seen in *Weinberger v. Romero-Barcelo.*[211] In *Weinberger*, citizens sought to enjoin the Navy from continuing air-to-ground weapons training near Puerto Rico. This training led to occasional discharge of ordnance into the water, allegedly violating the Federal Water Pollution Control Act. The Court stated that unless Congress specifically delineates a particnlar form of relief for a statutory violation, the relief remains subject to the trial court's equitable discretion.[212] The *Weinberger* Court pointed out that in using this discretion, the trial court should pay particular attention to the public consequences of issuing an injunction.[213] Here, the importance of the sight as a training ground for the military outweighed any interest in enjoining the Navy's activity.[214] Like the Federal Water Pollution Control Act, for-cause removal provisions do not state a particular form of relief. Thus, as in *Weinberger,* the court will weigh the public interest in its consideration of the reinstatement of a discharged agency head.

Substantial public interest arguments favor denying reinstatement. Chief among these is the public interest in maintaining the separation of powers. The court in *National Wildlife Federation v. United States*[215] was asked to decide whether to issue mandamus against the President to provide certain explanations of his 1979 budget in light of the Forest and Rangeland Renewable Resources Planning Act. The public interest weighed heavily in that decision. The court refused to issue mandamus because it felt that to do so would "intrude on the responsibilities . . . of the coordinate branches."[216] Similarly, the court in *National Treasury Employees Union v. Nixon*[217] declined to issue mandamus against the President in order to "show the utmost respect to the office of the Presidency and to avoid, if at all possible, . . . any clash between the judicial and

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210. Dobbs, 1 *Law of Remedies* § 2.10 at 178 (cited in note 13). Belton, *Remedies in Employment Discrimination* Law at 4(1) (cited in note 48); *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1993) (explaining that a court will balance the public interest in deciding whether or not to award equitable relief); *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 556 (1964) (awarding money damages instead of equitable relief because the public interest weighed in that direction).

211. 456 U.S. 305 (1982).

212. Id. at 322 (citing *United Steelworkers of America v. United States*, 361 U.S. 39, 54-59 (1959)).

213. Id. at 312. But see id. at 327-29 (Stevens, J., dissenting) (arguing that there is a public interest in upholding the statute by quickly ending any violations).

214. Id. at 310. It is important to note that other nonequitable remedies were available under the statute and that no appreciable harm to the quality of the water had been found.

215. 626 F.2d 917 (D.C. Cir. 1980).

216. Id. at 924.

217. 492 F.2d 587 (D.C. Cir. 1974).

executive branches of the Government."[218] These concerns apply equally to the reinstatement of an independent agency head. By ordering such a reinstatement, the court would enter a realm constitutionally reserved to the President. Thus, the same separation of powers concerns which may lead a court to hold the President immune from injunction will be considered again in the court's weighing of the public interest. Even if these concerns do not lead a court to go so far as to find the President immune, they may cause the court to exercise its discretion and deny equitable relief.

One could argue, however, that the public interest argument leads to the opposite conclusion. This argument emphasizes the public interest in maintaining the independence of certain agencies from presidential control. Professor Tribe focuses on this independence, contending that the usual hesitancy of courts to order specific enforcement of employment contracts[219] is irrelevant in the case of an independent agency head because of such agency's independence from the executive.[220] Professor Tribe argues that because an agency head cannot be removed at will by the President, he or she is essentially independent from presidential control. Consequently, Professor Tribe hypothesizes, the normal tension between employer and employee which causes courts to hesitate to reinstate would not be present.[221] Reinstatement would therefore not pose any risk of hardship to the President.

Professor Tribe's contention, however, does not hold true in light of the current functions of independent agencies. This might be a compelling argument if independent agencies were truly quasi-judicial and quasi-legislative actors, as discussed in *Humphrey's Executor,* and therefore did have functions that intersected with those of the executive. But such is not the position of most current agency heads. Any distinction between the functions of independent and executive agencies has largely been eradicated. Independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission no longer perform largely adjudicatory functions.[222] Instead, they engage in extensive rulemaking.[223]

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218. Id. at 616.

219. The presumption in favor of reinstatement discussed above, see Part VI.A, only applies in cases of employment discrimination, not in employment contract disputes.

220. Tribe, *American Constitutional Law* at 250 n.20 (cited in note 57).

221. Id.

222. See Verkuil, 80 Colum. L. Rev. at 954 n.70 (1980) (cited in note 10) (noting that the FTC was granted rulemaking authority in 1975); *National Petroleum Refiners Ass'n v. FTC,* 482 F.2d 672, 698 (D.C. Cir. 1973) (upholding the substantive rulemaking authority of the FTC);

The executive agencies now often adjudicate claims as well.[224] Thus, the heads of independent agencies play at least as vital a role in the administration of government policy as do the heads of executive agencies.[225] It would therefore seem that the public interest in insulating these leaders from presidential control has diminished.

Additionally, in such a role, independent agency heads are forced to work with the President, even if only indirectly.[226] The sort of disruption of the agency policymaking process that would result from reinstating an agency head would trigger courts' traditional hesitance to reinstate. When the problems caused by reinstating such a high level official—and the resulting inefficiencies—are weighed against this arguably diminished public interest in independence, reinstatement may simply be too costly.

In sum, under the more limited discretion in employment discrimination cases, under traditional applications of equitable discretion applied in the Civil Service context, or under a general balancing of the equities, a request for reinstatement would likely be denied. Thus, even if reinstatement were found constitutional, justiciable, and did not violate presidential immunity, a court would likely still deny it as a remedy for a discharged agency head.

VII. CONCLUSION

For the better part of this century, Congress has battled to establish the constitutionality of for-cause removal provisions in an effort to diminish presidential control over certain agencies. Although the Supreme Court has repeatedly upheld for-cause provisions, no constitutional remedy for an invalid for-cause removal appears to exist that will effectuate Congress's purpose.

FTC v. American National Cellular, Inc., 810 F.2d 1511, 1514 (9th Cir. 1987) (upholding a prosecutorial function for the FTC).

223. See Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L. J. 1766, 1770 (1985) ("The increased and widely accepted use of rulemaking, with its balancing of political considerations, has deliberately reduced agency insulation from external political debate.").

224. Sunstein, 101 Harv. L. Rev. at 497 n.352 (cited in note 71) ("Both types of [agencies] undertake the basic tasks of adjudication, rulemaking, and prosecution.").

225. See *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 472 n.198 (D.C. Cir. 1982) ("Executive agencies perform the same adjudicatory and rulemaking functions as do independent agencies."); Strauss, 84 Colum. L. Rev. at 584-86 (cited in note 54) (discussing the functional similarities between independent and executive agencies).

226. See notos 140-45 and accompanying text.

Assuming that judicial review is available for such a dismissal, an award of money damages could likely be made. Despite the compensatory value of such an award, however, money damages do not ensure the security of an agency head's job, nor do they effectively deter presidential action. Reinstatement of the discharged officer would effectuate the congressional purpose of creating agencies independent of presidential control. It is possible, however, that reinstatement would violate the Constitution.

Even if a court overcame the constitutional obstacles, it is quite plausible that the court would refuse to hear a claim for reinstatement. Even if the claim were heard, it is unlikely that reinstatement would be awarded. First, the court may not have authority to issue an injunction against the President. Even if such an injunction could be issued, under the discretion granted courts in fashioning equitable remedies, many attributes of the office of agency head would weigh against reinstatement.

The consequent lack of an effective remedy leaves for-cause removal provisions unenforceable and therefore impotent as a source of legal rights for the heads of regulatory agencies. If this conclusion is accurate, then one begins to wonder what function, if any, for-cause provisions serve. One possibility is that for-cause provisions serve as a political disincentive for the President to remove independent agency heads. These provisions do require that the President publicly state a reason for such a discharge and thereby call attention to his or her actions. The effectiveness of this requirement in providing significant independence, however, is questionable.

The press and public arguably may demand a reason for the dismissal of any cabinet official. Indeed, it is possible that the removal of an agency commissioner would receive less public attention than that of the head of a department. And because of the confusion over the meaning of "cause," it is unclear whether the reason for the discharge of an independent agency head must differ at all from the reason given for the removal of a cabinet member. Consequently, not only do for-cause provisions fail to provide any legal independence, they may be ineffective as a source of political independence as well.

If this is the case, where do independent agencies derive independence? One possible source of independence is the structure of many agencies as multi-member commissions, with party limitations placed on the appointment of commissioners. These party limitations, however, may suffer from constitutional problems similar to those posed by for-cause provisions. To the extent that party specifications limit the President's power to choose principal officers, they may

impose unconstitutional congressional restrictions on the appointment process.

In summary, then, we are left wondering whether independent agencies are independent at all, and, in light of current agency functions, whether they should be.

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