Vanderbilt Law Review

Volume 76
Issue 7 *En Banc*

Article 2

2023

Committing to Agency Independence

Nicholas Almendares

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Law Commons

Recommended Citation
Nicholas Almendares, Committing to Agency Independence, 76 *Vanderbilt Law Review* 1 (2024)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol76/iss7/2

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

RESPONSE

Committing to Agency Independence

Nicholas Almendares[*]

THE ANTI-REMOVAL GAME

One of the enduring challenges in politics is that there is little in the way of binding commitments. It is not as if the president and the Speaker of the House can write an effective contract and it is hard to imagine any court ever enforcing it. A commitment by a political actor is therefore only as good as it is credible—that is, if it is in the interests of the actor to keep it, possibly due to mechanisms put in place to induce just those commitments. All this makes analytical tools like game theory well-suited to understanding politics, especially relationships between the parts of the government. This methodology is quite common in political science and economics, and has been used, in a rough way, by courts as well.[1]

• Associate Professor of Law, Maurer School of Law, Indiana University – Bloomington. I thank David Gamage, Andrew Hammond, Michael Mattioli, for their advice and comments. All errors and omissions are solely my own. I would also like to thank Chris Walker and Aaron Nielson for their encouragement in me setting down my own thoughts about their work. Thanks to Alison Rae and Madelyn Toole and the rest of the Vanderbilt Law Review for their valuable help editing this piece.

1. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 495-98 (2010); id. at 525-27 (Breyer, J., dissenting).

Game theory entails modeling the actors' goals and the institutional environment. One of its strengths is anticipating what others might do—"looking down the game tree" in the parlance of game theory: if one player does *x* that induces another player to do *y*, which in turn affects the initial decision to do *x*. These dynamics tell us what commitments would be credible as well as what we would need to change to make them so. Informed by game theory, Aaron L. Nielson and Christopher J. Walker propose a way that administrative agencies can remain independent regardless of the constitutional status of any statutes explicitly forbidding the president from removing their leadership.[2]

In recent years the Supreme Court has been increasingly hostile to restrictions on the president's power to remove the leadership of administrative agencies. The Court looks poised to strike down any and all limitations on the president's ability to fire agency policymakers. In the administrative state, "personnel is policy"[3] and constitutional rules outlawing so-called agency independence[4] would enhance the executive's control over the administrative state. The agency policymaker will do what the president wants to the extent they wish to keep their job. Moreover, they anticipate the president's response to their choices and that influences their decision-making. Incidentally, this is part of how elections work, too.[5]

The legal arguments on either side of the agency independence debate are extensive and varied. I will not review them here. There are plenty of reasons that Congress—the body that decides to implement removal protections—would want to make the agency independent from the president. Congress, by design, is an unwieldy institution, requiring a complex consensus to engage in its primary activity—legislation. Things become even more fraught when it disagrees with the president, who is

---

2. Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV 1 (2023).

3. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC APPOINTMENTS 27 (2008).

4. Typically, "agency independence" is used to denote fairly strict removal protections, i.e., the president cannot fire the agency leadership for policy disagreement. This is often conflated with independence from the political branches in general, including the legislature, making the agency function like the judicial branch. But agencies with removal protections can remain quite susceptible to congressional influence. See Nicholas Almendares and Catherine Hafer, *Beyond Citizens United*, 84 FORDHAM L. REV. 2755, 2791–92 (2016). Moreover, there are other institutional design features that foster agency independence, both from the executive and the legislature. See id.

5. This is typically referred to as retrospective voting, a kind of performance review for elected officials. Elections can be used to try and select the best candidates, as well.

armed with veto power. Therefore, any policy concessions Congress can win without going through the arduous process of legislation are attractive. While Congress has an array of tools at its disposal for controlling agencies,[6] like the budget, many of these require legislation and all its involved processes.

Short of impeachment, though, Supreme Court doctrine forbids Congress from being involved in agency removal.[7] So Congress cannot make the kind of threats to influence the agency that the president can. Moreover, impeachment is hardly a less cumbersome process than legislation. Appointments give Congress, namely the Senate, some control over the vast array of policies enacted by agencies. Removal protections buttress that power by protecting the appointee from a president threatening their position. With removal protections firmly in place Congress knows that they will get the policies the appointees, rather than the president, prefers. The president cannot use the threat of removal to change the appointee's mind. Indeed, it might even tip the balance of influence over the agency in the legislature's favor: the main tool of control the president has is removal, whereas Congress' tools remain intact (though the president does have a hand in these through veto power and some discretion over spending).

In light of the judicial trend against statutory removal protections, Nielson and Walker propose that Congress should use its *anti-removal power*, an "overlooked feature of the Constitution"[8] that discourages the president from removing an agency official. Rather than outright forbid the president from firing agency personnel, anti-removal power dissuades removal by making it more costly. One of their key examples is raising the number of votes needed to confirm a replacement for the fired official.[9] Making it more difficult to have a replacement confirmed, Nielson and Walker contend, affects the president's incentives to fire the agency official in the first place.

Nielson and Walker make an important contribution in bringing to the forefront Congress' anti-removal power. Their proposals take into account real-world considerations, notably the current judicial climate and the complex law around agency vacancies. Nielson and Walker also do an

---

6. *See, e.g.*, Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239, 255–59 (2012).

7. Bowsher v. Synar, 478 U.S. 714, 724–27 (1986).

8. Nielson & Walker, *supra* note 2 at 23.

9. *Id.* at 46.

admirable job setting the stakes for the debate about agency removal and independence,[10] which at times can seem overly conceptual and remote. The bulk of my comments here relate to game theory, taking up Nielson and Walker's implicit invitation to use it to understand the relationship between the branches and how that is shaped by constitutional law. Administrative law is a particularly apt application of game theory since so much of it deals with the relationship between the branches of government. I will point out some limits on Congress' anti-removal power, but that is not meant to detract from the importance of Nielson and Walker's proposal. I conclude with a few words about the modern removal doctrine.

Specifically, Nielson and Walker use spatial models to explicate their arguments. A spatial model depicts policies in space—a tax rate, ranging from 0% to 100% is a natural example, but in practice most policies can be depicted spatially. Each of the relevant actors, or "players," has an ideal policy, the one that makes them happiest, and departures from that policy make them less happy, which is measured in terms of the welfare or "utility" each actor derives.[11] The Figure below depicts a sample utility function for the president, where P denotes their ideal point. Policy *a* makes the president better off, yields greater utility, than policy *b* because it is closer to the ideal point of P. Note that my illustrations here are somewhat different than Nielson and Walker's: when presenting a spatial model the utility dimension is typically summarized in a utility function and not included in the graphs, I just include it here for the sake of clarity.[12]

10. *See, e.g.*, Nielson & Walker, *supra* note 2, at 19.

11. Typically players have utility functions that are single-peaked, so they have only one ideal policy, and symmetrical, so they are made equally unhappy from departures to the left or right. The latter assumption is for simplicity; nothing of substance changes if the utility function is skewed in one direction or another. Single-peakedness does tend to be an important quality, however.

12. An example of a common utility function would be Utility = -(P-a)2 where a is the policy enacted and P is the relevant player's ideal point.

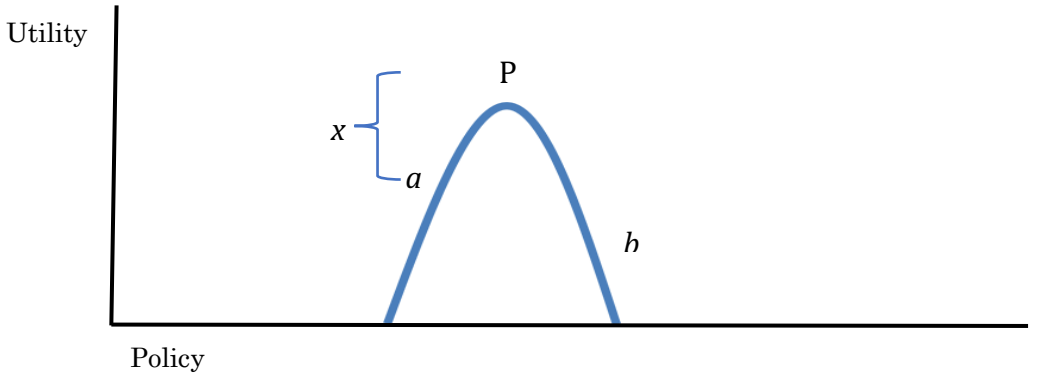

Figure 1: Anti-Removal Power Utility Functions

The central anti-removal power proposal is as follows. If removal and, crucially, replacement is entirely costless, then the president would never tolerate an agency adopting anything other than the president's own ideal point. If the agency enacted some other policy, the president would simply fire the relevant agency personnel and replace them with someone who would faithfully do their bidding. This threat is credible, since removal is costless there is no reason for the president not to carry it out. So following the logic of game theory, if the agency policymaker values their post enough, i.e., more than their distaste for enacting the president's preferred policy, they would do what the president wants. And if not, then in this idealized costless environment, the president will find someone who will.[13] Anti-removal power works by increasing those costs. Figure 1 illustrates how anti-removal power could work. Let a be the policy the agency implements and the difference between the president's utility between that policy and their ideal one is labeled x. If removing and replacing the agency costs more than x, then the president will not do it and the agency's independence is, to some degree, preserved. The independence secured by anti-removal power is not unfettered. If the agency selected a policy further away from P, like b, then at some point the disutility from that policy will exceed the costs of finding a replacement, making firing the agency leadership a credible threat. In such a scenario, assuming that the agency policymaker wants to keep their job, removal disciplines the agency and it picks a policy more

13. I am assuming such a replacement would be available.

palatable to the president.[14] Although that could still be considerably different from P depending on the costs of replacement.[15]

These models are, of course, abstractions. Both Nielson and Walker's article and my response abstract away from some things to highlight and clarify others. A map in full one-to-one scale with complete topographical details is not much use to a driver looking for a coffee shop.[16] Likewise, it is not much use here to worry about the committee system and White House palace intrigue. My one disagreement with the way Nielson and Walker set up their models is that they treat Congress, especially the Senate, as a different kind of political actor than the president or the agency. Rather than having a policy preference like they do—an ideal point as depicted in the Figure above—Nielson and Walker describe Congress, as an institution, as simply preferring policy stability, represented by continuity in office by agency leadership.[17] Characterizing anti-removal power this way lets Nielson and Walker connect to a venerable tradition embodied in the *Federalist Papers* and the early administration of the United States.[18] While I could imagine that senators have different time horizons than the president because they have longer terms and no term limits, that would not explain why legislators have fundamentally different types of preferences than everyone else. Why would they be uniquely sensitive to stability? But more critically why would they care about that rather than policy? It is especially odd to think of Congress as having different kinds of policy preferences than agencies given that they are the ones that create agencies and give them their statutory marching orders. Instead, I think Congress should be modeled as having policy preferences just like everyone else—like the president and the agency, Congress (primarily the Senate)[19] would have its own ideal policy.

Modeling Congress this way would not undermine Nielson and Walker's core observations and their proposal about anti-removal power. It does highlight that anti-removal power really comes into play only when

---

14. Tangentially, this implies that one underappreciated way to affect the agency's independence is the pay and perks of its leadership. Compare with Nielson and Walker, *supra* note 2, at 41.

15. *See* Nielson & Walker, *supra* note 2, at 34–36.

16. This is a version of the Mapmaker's Dilemma. See Daniel Shaviro, *The Mapmaker's Dilemma in Evaluating High-End Inequality*, 71 U. MIAMI L. REV., 83, 90–91 (2016).

17. *See*, *e.g.*, Nielson & Walker, *supra* note 2, at 23, 25, 38, 41, 43, 45, 59.

18. *Id.* at 25.

19. The House also has a potential role to play in anti-removal power. See Nielson and Walker, *id.* at 47–49.

Congress and the president disagree. If they are both united in disliking the agency's actions, then the Senate has every incentive to speed through a replacement or accept any reason the president offers for the firing; the threat of removal again disciplines the agency. Indeed, one way to characterize some of the anti-removal tools Nielson and Walker lay out is that it increases the scope of who needs to be appeased in order to appoint a replacement, which, in turn, weakens the president's ability to use removal to control the agency.[20]

One additional note before I go any further, in the anti-removal power toolkit Nielson and Walker include anti-evasion tools designed to prevent the president from simply circumventing anti-removal provisions.[21] Throughout I am going to assume that these are in place. Roughly speaking, I am going to assume that if the president seeks to replace an agency policymaker, they will need to get approval from Congress.[22]

I. VACANCIES AS WARS OF ATTRITION

The anti-removal power Nielson and Walker describes comes in several varieties—Congress' power is made up of or supported by an array of tools.[23] The key idea is that "Congress has the power to *increase* the president's removal costs."[24] So while the president might formally have the power to remove the agency official, the costs are sufficiently high to induce them not to. I think these removal costs can be conveniently subdivided into *direct removal costs* and *replacement costs*. For the first category, Congress could increase the costs for firing an agency official. Put another way, Congress could *punish* the president for it. That would, in theory, be very effective: Congress could shut down the government, slash budgets across the board, and hold the president's pet projects hostage.[25] It is hard to

---

20. The dynamic here is similar to the Krehbiel's gridlock interval, where lawmaking can be stymied by "veto pivots" that have to prefer the proposed legislation to the status quo. *See* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

21. Nielson & Walker, *supra* note 2, at 51–53.

22. These provisions also play an additional role in Nielson and Walker's argument. They cite them, and the judicial acceptance of them, as evidence that the Supreme Court would tolerate the usage of anti-removal power.

23. *See, e.g.*, Nielson & Walker, *supra* note 2, at 57.

24. *Id.* at 37.

25. *See id.* at 63.

imagine a president would care so much about a single agency that the legislature could not find some way to deter them.[26]

There would be costs to Congress for doing any of this, a recurrent theme in this section, not the least of which would be political costs—the voters may be less than pleased to see their government paralyzed and unable to deliver services.[27] Those costs make these fairly extreme scenarios unrealistic.[28] Although the politics around things like the debt ceiling may make this tactic more commonplace. The high costs of these sanctions underscore the problem of how Congress could credibly commit to meting out this (severe) punishment. But durable, and thus credible, commitments to most of the anti-removal tools Nielson and Walker list are hard to come by. Anti-removal tools almost all operate at the level of norms or can be changed by legislation.[29] One other observation, a lot of these punishments bring in policy areas distinct from the agency at hand. In threatening to punish the president for dismissing the heads of the Securities and Exchange Commission Congress might end up threatening policies unrelated to securities regulation. Nielson and Walker recognize the potential for a kind of "logrolling" affecting agency personnel.[30]

What I have called direct removal costs largely overlap with Nielson and Walker's category of soft tools.[31] As Nielson and Walker explain, Congress could mandate that the president provide reasons for removal or haul White House officials in for hearings. These impose costs on the president—the time and effort it takes to answer Congress could be spent elsewhere. These costs are modest, though. The exception would be impeachment, which Nielson and Walker classify as a hard tool. But the costs to Congress for impeachment are akin to holding policy hostage or government shutdown. Given the limits on the kinds of direct removal costs likely to be inflicted on a president, what I am calling "replacement costs" become especially important. (These are also the more interesting suggestions in Neilson and Walker's Article). In this category, I include the mechanisms that make getting a replacement for the removed official more

---

26. An exception might be an agency that was investigating the president or their close allies. If threatened with impeachment, jail, or similar consequences, then even the severe policy costs Congress can inflict would not be enough.

27. *See also* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV 1, 47–53 (2020).

28. Nielson & Walker, *supra* note 2, at 63.

29. *Id.* at 47, 51.

30. *Id.* at 38–39.

31. *Id.* at 43–45.

difficult. Increasing the cloture threshold for confirming a replacement is the main example as it forces the president to appease more of the Senate.[32] At first blush, using replacement costs also looks less costly for Congress to implement—cloture thresholds are lower profile than government shutdowns. Replacement costs also highlight the centrality of game theory to anti-removal power: increasing replacement costs substitutes for removal protections because the president anticipates the difficulty of getting their preferred replacement confirmed and decides the removal is not worth it. They are willing to "love the one they are with" because getting someone "better" is not worth the cost Congress has imposed.

Replacement costs encourage us to think about what it means to leave an agency policymaking position vacant. For replacement costs to have any bite, vacancies must be costly to the president. Otherwise, the president would just leave the post empty and whatever the Senate thinks does not matter. There are reasons to believe the president would want to avoid vacancies. A "headless" agency is normally weaker and less effective than one with a complete leadership.[33] The president is held specially, indeed uniquely, responsible for the overall functioning of the administrative state. George W. Bush famously paid a heavy political price for the botched Federal Emergency Management Agency (FEMA) response to Hurricane Katrina, and ineffectual agencies make failures like that more likely. In addition, appointments and the threat of removal are the main ways presidents steer agencies. Vacancies, therefore, leave a president unable to direct the agencies to focus on their own priorities.[34] Presidential terms are limited, so there is a genuine opportunity cost to vacancies—each day a position is left open is one less day that could be spent pursuing the administration's goals. Rulemaking, especially, is a challenging, time-consuming task, as are some adjudications.[35]

---

32. *Id.* at 46.

33. There is some evidence that too many political appointees can undermine agency competence. LEWIS, *supra* note 3, at 204. But that is a somewhat different issue from leaving glaring vacancies in the agency as it is currently constituted.

34. On what policies an agency might pursue absent political appointees and the implications of vacancies on policymaking, see Nicholas Almendares, *Empty Desks: The Political Economy of Vacancies* (working paper).

35. *See, e.g.*, Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROBS. 180, 186 (1994); Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983); Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) (*Cotton Dust*).

Much of the foregoing applies to Congress as well. While a legislator is not "widely viewed as something like the CEO of the administrative state,"[36] they will often care about its functioning. They might care a lot—a senator from Florida or Louisiana might view an effective FEMA as quite a pressing issue.[37] Likewise, Congress might prefer what the agency would do *without* presidential direction, since the legislature has such a hand in shaping the incentives of agencies through their institutional structure as well as authorizing statutes.[38] Members of either House of Congress are bound to vary in how much weight they put on the work of any particular agency. One of the interesting consequences of anti-removal tools like high cloture thresholds is that it makes more of those idiosyncratic preferences relevant. If 70 rather than 60 senators are needed for an appointment, that is 10 more senators that need to appeased.[39]

Vacancies thus seem costly to both the president and Congress, even if that cost is simply preventing someone from pursuing a policy agenda. As the Prince in *Romeo and Juliet* laments "all are punished." Agency appointments thus resemble another game theory concept: *a war of attrition*. The classic war of attrition resembles the game of chicken.[40] The first player to quit the contest concedes the prize to their opponent, but fighting is costly. Both players pay the costs associated with fighting, so the winner's payoff is the value of the prize less their costs of fighting and the loser's payoff is simply the cost of the conflict. The strategy for each player in a war of attrition is how long or how hard to fight. This game has numerous applications, including market entry, lobbying, innovation, and jury deliberations.[41] Moreover, bargaining can also be modeled as a war of

---

36. LEWIS, *supra* note 3, at 56.

37. These concerns are becoming increasingly widespread and increasingly federalized. See Andrew Hammond, *On Fires, Floods, and Federalism*, 11 CALIF. L. REV. (forthcoming).

38. Almendares, *supra* note 6, at 257–59. The president mostly has to use appointments and the threat of removal. That might make the president more sensitive to vacancies than Congress. But the president also has a role in legislating through the veto power.

39. This insight has been well-explicated through spatial models. *See, e.g.*, KREHBIEL, *supra* note 19; Thomas R. Gray & Jeffrey A. Jenkins, *Unpacking Pivotal Politics: Exploring the Differential Effects of the Filibuster and Veto Pivots*, 172 172 PUB. CHOICE 359 (2017) (https://cpb-us-e1.wpmucdn.com/sites.usc.edu/dist/2/77/files/2018/01/unpacking-2lox1sf.pdf).

40. DREW FUDENBERG & JEAN TIROLE, GAME THEORY 150 (1991)..

41. *See* Jeremy Bulow & Paul Klemperer, *The Generalized War of Attrition*, 89 AM. ECON. REV. 175 (1999); Moritz Meyer-Ter-Vehn, *A Conversational War of Attrition*, 85 REV. OF ECON. STUD. 1897 (2018).

attrition,[42] so it should capture the conflict between the president and Congress over appointments even if we set aside the time and opportunity cost narrative outlined above.

I am not sure hooking up a full war of attrition game to the spatial models Nielson and Walker use to explicate anti-removal power would yield much insight. The results of a war of attrition depend on its specific structure and even the simplest versions of the game have many equilibria, some with surprising qualities.[43] Evaluating what war of attrition might best capture the appointments process, including one shaped by anti-removal power tools, is best left to future research. Seeing appointments through the lens of a war of attrition does, however, highlight the pervasiveness of the commitment problem at the heart of Congress' anti-removal power. For anti-removal power to work, there needs to be a credible threat that Congress will actually carry it out. If sanctioning the president—either directly through punishment or indirectly with replacement costs—is too hard for Congress, then it cannot credibly commit to it. This problem is something that enshrining removal protections in statute does help solve.[44] Nielson and Walker recognize this problem and rely mostly on norms to make these commitments sticky.[45] The same general reasons we think it is unrealistic for Congress to paralyze the government over agency removal—the costs—can make it unrealistic for Congress to hold out and refuse to confirm a replacement. It is a lot to ask for norms to stand in the way of the tangible costs that fighting with the president over an appointment entails.

We might worry that the costs of exercising anti-removal power lead it to have a "Goldilocks problem" where it only works when the conditions

---

42. *See* George Gerogiadis et. al, *The Absence of Attrition in a War of Attrition Under Complete Information*, 131 GAMES & ECON. BEHAV. 171, 171–172 (2022) (https://www.kellogg.northwestern.edu/faculty/georgiadis/WarOfAttrition.pdf); German Gieczewski, *Evolving Wars of Attrition* (2020) (working paper) (https://scholar.princeton.edu/sites/default/files/germang/files/warofattrition-0420-rs.pdf); Dilip Abreu & Faruk Gul, *Bargaining and Reputation*, 68 ECONOMETRICA 85 (2000) (https://pages.nyu.edu/debraj/Courses/NewRes05/Papers/AbreuGul.pdf); Janusz Ordover & Ariel Rubinstein, *A Sequential Concession Game with Asymmetric Information*, 101 QUARTER J. OF ECON. 4 (1986) (https://arielrubinstein.tau.ac.il/papers/22.pdf); *see also* FUDENBERG & TIROLE at 217 (likening war of attrition to auction where the bids are costly).

43. FUDENBERG, *supra* note 41, at 119–20, 216–19.

44. *But see* Nielson and Walker on the unenforceability of removal protections in practice. Nielson & Walker, *supra* note 2, at 50–51. To the extent they are right, then it falls back on impeachment, which would raise similar commitment problems.

45. *Id.* at 51, 61.

are "just right." This is true to some degree, but it always is; one of the great strengths of game theory is that it can tell us what those conditions precisely are. Nielson and Walker acknowledge that there are limits of anti-removal power. Despite the ambition of their proposal they are careful not to overpromise. They note that when it comes to positions that the president thinks are especially important, they would be willing to pay whatever costs Congress imposes to ensure the agency shares their policy preferences.[46] As they put it: "In the real world, this means that the president likely will not try to remove more technocratic, less politically charged positions, but will do so for the weightier positions."[47] I take Nielson and Walker to mean that for less significant positions the president will not pay the costs associated with removal—it is not worth the candle, so they leave will leave the recalcitrant bureaucrat in place. But, for an essential position or one central to their policy agenda, the removal costs will not deter the president.

To the extent that conflict over agency appointments resembles a war of attrition, with costs on both sides, the limits on anti-removal power are a bit different than those Nielson and Walker identify. It will depend not just on how essential the agency is to the president, but also how much it matters to Congress because that will determine the replacement costs that Congress can feasibly impose. This, in turn, affects a similar dynamic between the president and agencies related to whether removal is a credible threat. As a critique, a Goldilocks problem would mean that the specific conditions are unusual and rarely hold. Anti-removal power would not be much of a substitute for statutory removal protections if the costs it relies on can never be inflicted. The president would simply ignore Congress' empty threats. Given the sheer variety within the administrative state, not to mention the diverse policy priorities across presidential administrations and legislators, it defies imagination that there would not be a number of cases where Congress could effectively use replacement costs to deter agency removal. These observations do, I think, undercut one of the big appeals of anti-removal power—the possibility that it can be calibrated rather than the blunt on-off switch of removal protections.[48] The ideal removal costs might simply be something Congress cannot commit to inflict (and thus cannot threaten the president with, either). Although there is real value in simply identifying the possibilities. Game theory does reveal a

46. *Id.* at 60, 42-43.
47. *Id.* at 60.
48. *Id.* at 62.

substantial limitation on anti-removal power, though, which I turn to in the next section.

II. PROPOSAL POWER – ANTI-REMOVAL'S COUNTERWEIGHT

The president and Congress have distinct roles in the appointments process, which implicates another game theoretic model: the *agenda setter model*. Suppose there is a designated agenda setter that makes proposals; many institutions are organized this way, with committees or other specialists as agenda setters.[49] The ideal policy for the setter is labeled S and the ideal point for a majority of the body is labeled M. In simple majority rule M will be the ideological median. (We can complicate the body's decision-making procedure, but that does not alter the main insights of this model). Suppose the setter proposes a policy they like, something very close to S. If amendments are a possibility, someone will simply amend the proposal to point M and that will carry the day. Freely available amendments rob the setter of any special power in this model—it is as if everyone is the setter.

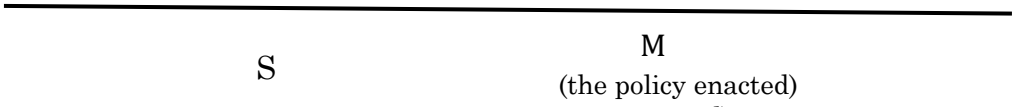

Figure 2: Agenda Setter Model with Amendment or Open Rule

But, if amendments are not allowed, under "closed rule," the setter has monopoly power over the agenda, transforming their proposals into take-it-or-leave-it offers.[50] Closed rule can confer expansive power to the setter. It all depends on the position of the status quo (Q) or reversion point, i.e., what happens if the majority rejects the setter's "offer."[51] The worse the status quo is for the majority—signified by it being further away from M in

49. Referenda also often function this way.

50. Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 27–28 (1978).

51. *Id.* at 35–36.

this spatial model—the greater the concessions the setter can extract. Note this is distinct from anchoring, the bully pulpit, or similar effects. The setter knows any proposal that is even slightly closer to M than Q the majority will accept.

The figures below illustrate this situation, with *y* being the setter's equilibrium proposal—the best, from its perspective, it can propose that will be passed by the majority. In both Figures 3 and 4 the setter gains considerable leverage over the majority. Rather than having to live with M, what it would get if amendments were available (i.e., "open rule"), it gets its own ideal point enacted or a point far closer to its preference that the majority would ordinarily reject out of hand.

Figure 3: Agenda Setter Model with Closed Rule

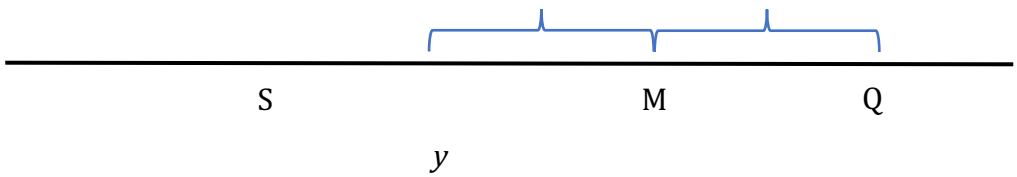

Figure 4: Agenda Setter Model with Closed Rule

In appointments, the president is the agenda setter. Outside of *A Clockwork Orange* and *The Manchurian Candidate* people cannot be readily amended the way bills can, so appointments are like closed rule, handing the president a lot of power. How much power in any given instance depends on the status quo—what happens if there is no appointment—and how Congress feels about it. The main point I want to make here is that even with a high cloture threshold in place to enhance Congress' anti-removal

power, there are circumstances where anti-removal power will have little effect. As Nielson and Walker point out, the president will anticipate the congressional response and weigh the pros and cons of removal.[52] If the president knows that they can get their preferred nominee appointed, or something close to it, then removal remains an attractive option and credible threat to be used against agencies.

To demonstrate, consider what I take to be one of the leading examples of the anti-removal tools: increasing the Senate cloture threshold for confirming an agency replacement. This means that a larger proportion of the Senate must consent to the appointment, moving the relevant decision point away from the president, and so the relevant policy point becomes M′ rather than M.[53] Some of the other tools Nielson and Walker list, like reasons-giving and signals of agency independence, could have a similar effect by increasing the political costs of confirming the nominee, meaning that the Senate will demand greater policy concessions,[54] especially if those tools rally political opponents. Depending on the policy preferences of the players and the status quo, increased cloture can have no effect; ironically because the president is still able to extract their ideal appointee by virtue of their agenda-setter power. In other cases, increased cloture can reduce the president's agenda-setter power by effectively reducing the space between the status quo and the relevant Senate decisionmaker. These scenarios are depicted in Figures 5 and 6, below, replacing P for S since the president is the agenda setter in these cases and with *y* still representing the equilibrium proposal.

---

52. Nielson and Walker assume complete information, so the president will know where Congress stands. Nielson & Walker, *supra* note 2, ta 41 n. 206. This is a useful simplifying assumption, especially for an Article like theirs that illustrates a novel approach to a problem. Even if we include some uncertainty, the main consequences should still hold.

53. *See, e.g.*, KREHBIEL, supra note 20; Charles Cameron & Nolan McCarty, *Models of Vetoes and Veto Bargaining*, 7 ANN. REV. OF POL. SCI. 409, 412 n.2 (2004) (https://scholar.princeton.edu/sites/default/files/ccameron/files/cameron.mccarty.arps_.2004.pdf).

54. An alternative would be the cross-issue logrolling mentioned above. The president could trade a policy concession on some other issue to get this appointment through. The key observations is that the president is possibly making some policy concessions, the magnitude of which depending on, inter alia, their agenda setter power.

Figure 5: Presidential Appointments with Increased Cloture, no effect

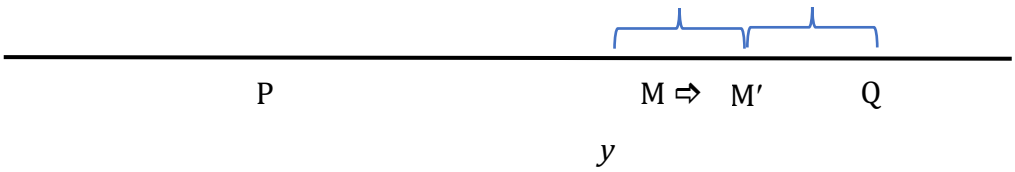

Figure 6: Presidential Appointments with Increased Cloture, limits president's power

The agenda-setter model reveals some of the limits to Congress' anti-removal power, especially anti-removal tools that focus on replacement. These tools can be consequential, depending on the relative positions of the status quo and the ideal policies of the political actors. In Figure 6 the agenda-setting president's equilibrium proposal, the best candidate from their perspective that they can get confirmed by the Senate, has policy preferences closer to the majority of that body; the president can extract less of a concession from the Senate than the agenda setter can in Figure 4. The cloture rule changes the pivotal senator to one that does not mind the status quo as much, so if the president sends too extreme a nominee, the Senate is willing to reject them and live with the status quo. One way to think about it is that heightened cloture rules empower a smaller group of senators to hold up the nomination. So long as there are even a few members of that body who would reject that offer, the president must take them into account and moderate his choice of nominee.

Anti-removal tools can matter, but they are certainly less comprehensive than the admittedly blunt, and increasingly unlawful, removal protections. One way to look at it is that the president has so much power in appointments that any interventions at that stage will be tricky. It is hard to use replacement costs to rein the president in. To recap, anti-removal power works in part by making it difficult for the president to appoint their favored replacement. This feeds back into the presidents' decision to remove the official in the first place. This, in turn, affects the relationship between the president and the agency. If removal is a credible threat, then the president can use it to control the agency's decisions. The

agenda setter model shows that even with something like a high cloture threshold the president may be undeterred from removing the agency official because they will be able to install the replacement they want. In the spirit of Nielson and Walker's proposals there might be a way to mitigate the president's agenda setter power by turning appointments into something more like open rule. It is the fact that the nominees cannot be "amended" that gives the agenda setter its power, it gets to make take-it-or-leave-it offers (compare Figure 2 with Figures 3 and 4). Anti-removal power that depends on changing someone's psychological character is not of much practical use, but suppose that statements in confirmation hearings were somehow binding. If nominees could commit to policy positions, perhaps on grounds of impeachment (which would create commitment problems of its own) or some other punishment, then that could check the president's influence over appointments and enhance anti-removal power.[55] Alternatively, Congress could clearly enact certain policies by law, thereby tying the agency's hands, which would, in effect, modify some of the nominee's policy positions.

III. ASYMMETRIC ANTI-REMOVAL POWER

I argued that vacancies were costly to both the president and Congress. But those costs need not be evenly distributed. A president disinterested in the administrative state might not care that much about vacancies. If they are all too happy to leave the post open despite the problems that might cause, then that short circuits any anti-removal power based on replacement costs. Such a president might be exactly the type that Congress most wants agencies to be independent from; the legislature authorized the agency in the first place, after all.[56] As Nielson and Walker put it:

---

55. A prominent recent example that has raised these considerations would be the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*. *See* John A. Farrell, *Alito Assured Ted Kennedy in 2005 of Respect for Roe v. Wade, Diary Says*, NY TIMES, (Oct. 24, 2022), https://www.nytimes.com/2022/10/24/us/politics/alito-kennedy-abortion.html; Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He 'Misled' Her*, NY TIMES, (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html; Sahil Kapur, *Collins and Manchin Suggest They Were Misled by Kavanaugh and Gorsuch on Roe*, NBC NEWS, (June 24, 2022), https://www.nbcnews.com/politics/supreme-court/collins-manchin-misled-kavanaugh-gorsuch-abortion-rights-rcna35230.

56. *See* Almendares, *supra* note 6, at 248.

> some may argue against grounding independence in Congress's anti-removal power by observing that the attractiveness of regulatory power is asymmetric; some presidents are much more willing to disempower an agency than the others, so the threat that the Senate will refuse to confirm a replacement nominee is, if not empty, at least [less] meaningful as it would be to a president that places a higher value on the agency.[57]

Nielson and Walker acknowledge this concern, but they point out that deregulation requires concerted agency effort.[58] Rescinding a rule, for example, has the same legal requirements as enacting a new one,[59] and we can guarantee that the rule's current beneficiaries will go to court to force the agency to justify its decision.

There is a kind of narrow deregulation, for lack of a better term, that can come from agency vacancies. To the extent the agency is disorganized and has fewer resources it simply will not be able to do as much. That means fewer investigations, fewer permits being issued, and so on. But this must be balanced against sacrificing control. Appointees are the main way a president directs agencies, so without them, the agency—while generally weaker—is free to set its own priorities, which may not be the president's.[60] While I agree with Nielson and Walker's general point about deregulation and vacancies, the games discussed above show that there is something to the concern that anti-removal power binds deregulatory presidents less. This is due not so much to anti-removal power itself but a combination of things, which the agenda setter model explains most clearly. The issue is what constitutes the status quo, what happens if Congress rejects the president's "offer" in the form of their nominee. The status quo in these instances tends to skew toward less powerful agencies. Agencies without leaders or key personnel will be less organized, with different parts possibly working at cross purposes. Morale can suffer, and at a basic level any responsibilities of the vacant positions must be either reallocated or left undone. Finally, agency leaders are usually the agency's best advocates,

---

57. Nielson & Walker, *supra* note 2, at 73 (word inserted for clarity).

58. *Id.* at 61–62.

59. Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983).

60. Almendares, *supra* note 34; Sean Gailmard & John Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007).

pressing Congress and the White House for support and funds. Since the federal budget has to be regularly reauthorized,[61] an agency can easily find itself without resources if it does not have well-connected people to lobby for it. All this together makes anti-removal power asymmetric—it has more bite against presidents that care about agency action. Figures 7 and 8 illustrate this, where P represents the president's ideal point and the president is the agenda setter, M is the ideal point for the relevant congressional decisionmaker (e.g., the Senate confirming a nominee), M′ is that decisionmaker if an anti-removal tool like heightened cloture is applied,[62] Q is the status quo reversion point, and *y* is the equilibrium proposal. For the reasons above, Q is located near "weak agency," which it is worth keeping in mind is not the same as durable deregulation like rescinding rules.[63]

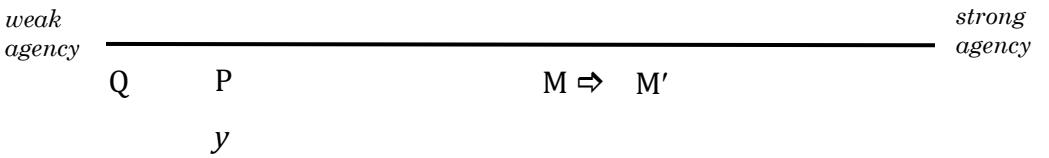

Figure 7: Presidential Appointment – Deregulatory President

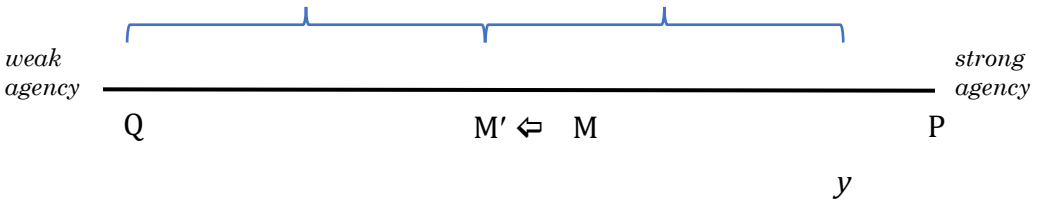

Figure 8: Presidential Appointment - Invested President

61. The current pattern of budgeting and appropriations means that must be done even more frequently than in the past. *See* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1092–96 (2021).

62. Note that the effect of the heightened cloture rule is to shift the relevant decisionmaker away from the president's ideal point. In these examples M' is located further away from P than M is.

63. Nielson & Walker, *supra* note 2, at 62, n. 293.

These Figures were constructed to show cases where anti-removal power constrains a president who is invested in a strong agency, whereas it does little to a president who is not. In Figure 7 the deregulatory president is still able to obtain their ideal nominee—as we have already seen the anti-removal tool of heightened cloture ends up having no effect, the results would be the same even without M′. In Figure 8, with a president who wants a strong agency, the cloture rule constrains. This president would have done better without it and would have been able to appoint a nominee more invested in strong agency action, contrary to Congress' wishes.64

What does all this say about anti-removal power? Is it a cudgel only against presidents that desire a vigorous administrative state? The agenda setter results depicted in this Section are a function of the all-important status quo point. Therefore, anti-removal power could be paired with something like guaranteed funding, and perhaps some rule that automatically adds personnel so that the agency does not end up understaffed in the face of extended vacancies. That would affect the location Q in these simple models. These should be added to the toolkit Nielson and Walker propose. Sources of revenue other than appropriations are a longstanding way of ensuring the agency is independent not only from the president, but also from Congress.[65] Such independent agency funding arrangements might run into constitutional problems of their own as the Fifth Circuit recently cast some doubts on agency funding that does not pass through the ordinary appropriations process.[66] Setting all that aside, in this

---

64. We might be able to make analogous observations with wars of attrition. The multiplicity of equilibria, not to mention game structures, preclude an overarching statement. In some wars of attrition there is an equilibrium where the player who places a lower value on the prize being fought overstays, in expectation, longer than the one with a higher valuation. There is something more than a little unrealistic about this equilibrium, however. *See generally*, Lewis Kornhauser, Ariel Rubinstein, & Charles Wilson, *Reputation and Patience in the 'War of Attrition,'* 56 ECONOMETRICA 15 (1988) (https://arielrubinstein.tau.ac.il/papers/31.pdf **);** Jeremy Bulow & Paul Klemperer, *The Generalized War of Attrition*, 89 AM. ECON. REV. 175 (1999).

Suffice to say here that the key is the ratio of the value of the prize to the cost of fighting. If a player in a war of attrition's value for winning the conflict doubles, but so does their cost, then their position is just the same, no stronger or weaker, with respect to the war of attrition.

65. Nicholas Almendares & Catherine Hafer, *supra* note 4.

66. Consumer Financial Services Association of American, Ltd. V. CPPB, USDC No. 1:18-CV-295 (5th Cir. 2022) (https://aboutblaw.com/5mY). A curious feature of this decision is that the constitutional problem must be that Congress does not periodically *reauthorize* the agency's funding. Congress, of course, enacted the statutes that set up the funding scheme, and they are always subject to revision by that body through new legislation. The Fifth Circuit touched on this, but concluded that a decision on it was not necessary because the agency's "funding scheme—including the perpetual funding feature—is so egregious that it clearly runs afoul of the Appropriations Clause's requirements." *Id.* at 31–32 n. 14.

instance independent agency funding would have the surprising additional consequence of strengthening Congress' hand in agency appointments. It is possible that removing one of Congress' main tools of agency control—budgets—might ultimately enhance its ability to preserve agency independence, especially if de jure removal protections are off the table. Further, by making the status quo more palatable to anyone who values the agency's work,[67] these measures would help balance anti-removal power, ensuring it has bite against both regulatory and deregulatory administrations.

IV. UNITARY EXECUTIVE FUNCTIONALISM

I will admit that I do not find the formalism/functionalism dichotomy particularly illuminating. I am not alone.[68] Further, I worry that these labels have just become proxies for the results of a case: a case is "formalist" just because it strikes down something on separation of powers grounds, "functionalist" just insofar as it upholds it.[69] That is clearly unsatisfying; surely some institutional arrangements must be permitted even under the strictest formalism. To try and give these nebulous terms some definition, formalism is associated with a categorical approach to the separation of powers.[70] The key question is what kind of power is being exercised—legislative, executive, or judicial—and then whether it is lodged in the appropriate department. Functionalism is more fact and context-specific, "taking a more flexible, cost/benefit approach."[71] Alternatively, functionalism sees some overlap between the government departments as inherent in the constitutional scheme, so the question becomes whether the

---

67. In Figures 7 and 8 this would have the effect of moving Q rightward, closer to "strong agency."

68. *E.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634–36 (2000); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–62 (2011).

69. *See*, Ronald J. Krotoszynski, Jr. et. al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 951 (2015).

70. *Id.* ("To be clear, from a formalist perspective, real-world adverse effects on the President's ability to oversee and direct an administrative agency need not be proven to establish the existence of a separation of powers violation; formalists view prophylactic efforts to police the separation of powers as necessary to avoid the evils of undue concentrations of government power (whether or not such concentrations would likely come into existence in the absence of such prophylactic efforts).").

71. *Id.*

institution unduly upsets the overall balance of power between them.[72] The Roberts Court has been considered markedly and consistently formalist.[73]

If the Supreme Court is using formalism in these cases, it is of a funny sort. Kent Barnett describes *Free Enterprise Fund* as melding both functional and formalist analyses.[74] The abandonment of *Humphrey's Executor* represents a formalist turn by rejecting the "quasi-judicial" and "quasi-legislative" categories for strict ones.[75] There are formalist elements to be found throughout the Supreme Court's recent agency independence decisions.[76] If the Court were embracing full-throated formalism, though, we would expect these opinions to be dominated by questions about what kind of power an agency was exercising. These questions are challenging, to say the least, and thus would be worthy of sustained discussion by the Court. Yet we still lack an adequate account of each of the three powers of government and their contours, which would be needed to figure out whether there has been an impermissible trespass.[77]

It seems to me that what really animates the Roberts Court is a particular political theory that the Court is extending to an increasing number of agencies. The modern removal jurisprudence looks to be best explained by the principle that all agencies must be accountable to the president. *Free Enterprise Fund* held that the president's power includes: "the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[78] This political theory is itself supposed to be justified by democratic accountability.[79] Orthogonally, I think one could make out a functionalist argument for this same principle. Democratic accountability could certainly

---

72. Magill, *supra* note 68, at 609.

73. Krotoszynski, *supra* note 69, at 952.

74. Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1367 (2012). "[T]he Court's foray into formalism only renders its functional/formal analysis murkier still. *Id.* at 1368.

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

76. I have in mind *Free Enterprise Fund*'s seeming indifference to the actual effects of the institutional arrangement on presidential control or *Collins*' ruling that any executive power, and not just "significant executive power" was enough to create a separation of powers problem. *See* Nielson & Walker, *supra* note 2, at 18-19; Collins v. Yellen, 141 U.S. 1761, 1800-01 (2021) (Kagan, J., concurring).

77. Magill, *supra* note 68, at 612–13.

78. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14, (2010).

79. *See, e.g.*, *id.*

be a normative criteria and figure into cost/benefit analysis, which might explain my own difficulties with the formalist/functionalist heuristic.[80]

Nielson and Walker argue persuasively that Congress flexing its anti-removal power muscles is constitutional.[81] They point to the Senate's clear role in appointments enshrined in Article II[82] and the ways that the Supreme Court has, perhaps unwittingly, strengthened Congress' anti-removal power.[83] Yet anti-removal power runs directly counter to the presidential accountability principle the Court has articulated. To the extent anti-removal power is effective it lessens the president's control over the agency. That is rather the point. The president retains some control, anti-removal power is not absolute, but then again, neither is statutory removal protection.[84] Moreover, the Supreme Court has said recently that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[85] Given the current pattern in the caselaw, I see little reason why the Court would not extend this logic to multimember agencies. The Court went on to argue that the president must be able to remove agency personnel for any reason, including, crucially, "different views of policy."[86] I just wonder if a Supreme Court truly committed to such complete presidential control of agencies might balk at Nielson and Walker's proposal.[87] There is no question that reducing presidential control is the very goal of the anti-removal tools Nielson and Walker lay out. In this way, anti-removal power is a "wolf [that] comes as a wolf."[88]

---

80. There is a sense in which public welfare and democratic accountability collapse—the people will want what is best for them given their own goals and values. I have argued elsewhere that this is normatively relevant. Almendares, *supra* note 6, at 239; Nicholas Almendares, *The Undemocratic Class Action*, WASH. UNIV. L. REV. (forthcoming). *But see*, Krotoszynski, *supra* note 69, at 1017 n.36 ("Professor Huq asks and answers a question that would not necessarily occur to a formalist (like Chief Justice Roberts)-- namely, whether the absence of judicial enforcement of separation of powers principles would cause actual harm to the President's ability to supervise and control the executive branch.").

81. Nielson & Walker, *supra* note 2, at 58.

82. *Id.* at 58, 60.

83. *Id.* at 23.

84. Barnett, *supra* note 74, at 1352 (2012) (identifying different types of removal protections); Nielson & Walker, *supra* note 2, at 42 ("It is also debatable whether a court can even order reinstatement of an unlawfully removed official.").

85. Collins v. Yellen, 141 U.S. 1761, 1787 (2021).

86. *Id.* (internal citations omitted).

87. Curiously, democratic accountability running through Congress, another democratic institution, tends to drop out of these discussions. We could achieve the goal of clear democratic accountability without relying solely on the president.

88. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

CONCLUSION

Nielson and Walker propose a way Congress could preserve some agency independence despite the Supreme Court's stand against statutory removal protections. By exercising its anti-removal power, Congress could dissuade the president from firing agency officials even if the president has the formal power to do so. At the heart of Nielson and Walker's argument is a game theoretic insight. Removal matters because it helps the president control agencies. By raising the costs of removal or of getting a replacement confirmed, Congress can give the agency some leeway to act, i.e., some independence. With those costs in place the president will tolerate some apostasy. Anti-removal power thus holds a lot of promise.

Anti-removal power is hardly self-executing, though. There are no legally enforceable commitments. Indeed, on some views the very purpose of a separate judiciary is to enforce the political bargains set down in statute,[89] but anti-removal power naturally cannot rely on that. The lack of easy, effective means to enforce agreements makes game theory such an important tool to understanding politics and its relationship to law. Nielson and Walker's proposal is based on a game theoretic insight, and looking to game theory myself I have shown when we would expect Congress to successfully be able to wield this anti-removal power. That is, when Congress can successfully commit to imposing these costs on the president and the ways the president can resist it. Despite the abstract nature of the games, these observations have straightforward policy recommendations, such as buttressing anti-removal tools with guaranteed agency funding. It is my hope that Nielson and Walker's Article encourages more creative, and nuanced, thinking about the relationships between the branches of the government.

89. William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, ECON. ANALYSIS POL. BEHAV. 875, 879–901 (1975).