Established by Practice: The Theory and Operation of Independent Federal Agencies

Marshall J. Breger

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# ARTICLE

## ESTABLISHED BY PRACTICE: THE THEORY AND OPERATION OF INDEPENDENT FEDERAL AGENCIES

**Marshall J. Breger**

**Gary J. Edles**

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INTRODUCTION

The independent agencies of the United States government occupy a special, although perhaps ambiguous, constitutional place in the federal establishment. These multi-member boards and commissions, which are the prototype independent agencies, bring together individuals of diverse views, expertise, and backgrounds to tackle legally difficult, technically complex, and often politically sensitive issues. Many multi-member agencies have the full range of regulatory authority, i.e., they can issue regulations, take administrative action to enforce their statutes and regulations, and decide cases through administrative adjudication. They oversee either
INDEPENDENT FEDERAL AGENCIES

a specific area of the economy\(^1\) or have substantive responsibilities that cut across industry lines.\(^2\) In traditional theory, their stock-in-trade is the expert, apolitical resolution of regulatory issues. They are "independent" of the political will exemplified by the executive branch, yet they are also multi-member organizations, a fact that tends toward accommodation of diverse or extreme views through the compromise inherent in the process of collegial decisionmaking.

Justice Sutherland conceived of the independent, multi-member commission (at least in the 1930s) as follows:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.

\[\ldots\]

[It is] a body of experts who shall gain experience by length of service—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 or any department of the government.\(^3\)

The Brownlow Commission described independent agencies less charitably as a "headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."\(^4\)

Over the years numerous articles have surveyed the indicia of independence and the place of independent agencies within a separation of powers framework.\(^5\) In this article, we review the structure and internal operations

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of independent agencies, note several similarities and differences among them, and address various recurring issues affecting them. We further consider the future of this regulatory form as we enter the new millennium. We focus on agencies—whether multi-member or not—where at least one individual is appointed by the President to a full-time, fixed-term position with the advice and consent of the Senate and has protection against summary removal by some form of "for cause" restriction on the President's authority.6

6 A highly preliminary survey of the structure and workings of independent agencies was published in monograph form by the Administrative Conference of the United States (Conference) in 1991. The Conference received numerous requests for copies because it contained comparative information that was immediately useful to agency officials and administrative practitioners. Now that the Conference has been abolished, we receive telephone inquiries about these subjects from agency members, staff, and private practice lawyers. So, we have prepared a new survey of 32 independent agencies, including two that sit squarely in the executive branch. In the Appendix, we have attempted to be inclusive but the lack of comprehensive information makes the task difficult. We may have inadvertently omitted some agencies that qualify under our definition. Some agencies have been deliberately omitted. For example, some boards have members appointed by the President and confirmed by the Senate but the statute provides some mechanism for removal other than presidential removal for cause. See, e.g., 22 U.S.C. § 1622 (1994) (providing that members of Foreign Claims Settlement Commission appointed by President and subject to Senate confirmation do not have statutory term and may be removed by Secretary of State). Others have members appointed by the President but not confirmed by the Senate. For instance, members of the United States Commission on Civil Rights are appointed by the President, the President pro tempore of the Senate, and the Speaker of the House of Representatives. See 42 U.S.C. § 1975(b) (1994). Numerous boards and other components within agencies are staffed by career civil servants and empowered to undertake a wide range of agency functions affecting the public. The Departmental Grant Appeals Board of the Department of Health and Human Services, for instance, is composed of members appointed by the Secretary. See 45 C.F.R. § 16.5(a) (1999). The Board was originally created by regulation but later given added authority by Congress. See Pennsylvania v. HHS, 80 F.3d 796, 800 (3d Cir. 1996). Although members of employee boards frequently have decisional independence as a matter of agency practice, see John H. Frye, Ill, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 ADMIN. L. REV. 261, 343-44 (1992), they are not technically "independent" because their members ordinarily can be removed without cause by the appointing official, see Kalaris v. Donovan, 697 F.2d 376, 401 (D.C. Cir. 1983). Moreover, we do not include advisory boards that are components of agencies, such as the Social Security Advisory Board, see 42 U.S.C. § 903 (1994 & Supp. IV 1998), or other specialized government institutions, such as government corporations, government-sponsored enterprises, or congressional agencies, some or all of whose members may be appointed by the President with the advice and consent of the Senate and removable only for cause. See,
Each agency is different because its procedures and practices have evolved to facilitate the agency’s substantive mission. Yet some generalities about agency operations can be gleaned. Moreover, we believe that tradition matters. Lore can be as important as law. On one level, tradition matters because the evolution of agency custom, and its culmination in established practice, manifests a pragmatic adaptation of law to the needs of individualized administration. On another level, it matters because it reflects the integration of accountability and efficiency. Generally speaking, an evolving practice reflects a consensus (or at least an acceptance) among agency members and staffs, the private sector, and the politically accountable branches of government, of reasonable ways of doing business. Often, agency practice becomes embodied in law.

In order to understand the importance of the independent agency, it is imperative to examine how it developed. We begin this article with a review of the creation of the Interstate Commerce Commission (ICC), and focus on how the independent agency form evolved, not from institutional logic, but from historical contingency. Contrary to common belief, the ICC was not devised to be a new independent form of government located outside the tripartite system. Its resultant form was the product of political

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1. Indeed, one multi-member entity, the Railroad Retirement Board, is statutorily defined as an “independent agency,” 45 U.S.C. § 231f(a) (1994), although it is not an “agency” within the meaning of the Administrative Procedure Act (APA). See Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1)(E) (1994) (providing that an “agency” under the Act does not include “agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them”).

2. We undertake this article and survey for two reasons. First, these matters are the grist of the day-to-day operations of federal agencies. Second, these issues do not appear to command quite the same academic attention as doctrinal issues, and comparative data are often unknown to agency and private practitioners. We share Professor Cass Sunstein’s view that the next generation of administrative law scholarship should shift its focus from its “traditional preoccupation with the judiciary to a focus on congressional and bureaucratic processes[...][which] remain ill-understood despite the fact that they have far more important roles in government regulation.” Cass R. Sunstein, Administrative Substance, 1991 DUKE L.J. 607, 642.

3. “[T]he independent commission as an organizational form did not emerge full-blown with the passage of the Interstate Commerce Act. Rather, it evolved over the course of several decades, coming to maturity late in the Progressive Era.” MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 48 (1993).
negotiations responding to the need for efficient regulation of the railroad industry. In his authoritative work on independent agencies, Professor Robert E. Cushman stated:

In the thinking of those responsible for the Act, independence, if it meant anything, appears to have meant bipartisanship, as a guarantee of impartiality. Independence of executive domination seems not to have been thought of and was certainly not discussed, but independence of one-sided partisan control was a matter of great moment.  

Cushman also notes:

There was virtually no discussion of the commission’s relation to Congress. Congress was, of course, creating the commission and assigning its powers, but there is nothing to suggest that the legislative leaders looked upon the commission as having a relation to Congress different from that of any other administrative agency. . . . It was assumed that the commission would aid Congress directly by giving it expert information on railroad problems, and it was also assumed that the commission would remain under the supervision of Congress in the sense that its status and duties would be subject to legislative revision from time to time. 

It was not until many years after the establishment of the ICC that the notion of independence developed. In the 1930s, Professor Isaiah L. Sharfman, describing the agency form as manifested in the ICC, noted that “[t]he Commission is no more a part of the national administration—in the sense of being an instrument for furthering the particular political ends of the party in power—than is the Supreme Court, and executive influence is as manifestly out of place in the one case as it would be in the other.” Throughout the Progressive Era and the New Deal, a multitude of new agencies were established using the ICC as their prototype. As the independent agency form began to flourish, its constitutionality became an issue of considerable debate, and disputes over the issue of separation of

10. ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 61 (1972). This notion, reflected in a cap on the number of members from one political party on most boards and commissions, has endured. See also infra, Appendix.

11. Id. at 60.

12. “[T]he ICC was not independent, nor had Congress intended to give it complete independence. . . . Congress placed the ICC under direct supervision of the secretary of the interior . . . .” EISNER, supra note 9, at 48.


powers have continued since that time. Our review convinces us that Justice Sutherland's characterization of the *genus* independent agency is overly romanticized or, at least, outdated. On the other hand, the Brownlow Committee's comments are equally wide off the mark. The administrative process is not as unprincipled as the Committee portrays it. In our view, structural and organizational elements, along with agency traditions and practices, have evolved together to permit independent agencies to conduct their business fairly and effectively while keeping them somewhat above the political fray. Agency structures, procedures and practices have grown up pragmatically rather than theoretically to provide a reasonably impartial playing field for the resolution of factual and policy issues in discrete areas of government activity. They reflect the resolution of a tug-of-war between agency factions or the political branches and allow policy warfare to be waged subtly, away from "center court," where affected interests can jockey for dominance. The actual operations of independent agencies, if not the theory, are in effect, a sort of Marquis of Queensbury rules of engagement, and their continued future existence in one form or another will be necessary.

I. HOW DID THE INDEPENDENT AGENCY DEVELOP: THE CASE OF THE INTERSTATE COMMERCE COMMISSION

A. Introduction

The emergence of the modern independent regulatory agency at the federal level began in the late 19th century when Congress established the ICC to regulate the railroads. As a result, independence has come to be inextricably associated with multi-member tribunals. However, prior to the establishment of the ICC, the regulatory commission structure had been utilized by many states in their attempts to regulate the railroad industry.15

Furthermore, the concept of independence did not originate with the ICC.16 When Congress established the Department of the Treasury in 1789, the department possessed indicia of independence from the executive

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15. "Regulatory commissions were . . . the normal outgrowth of a broader state commission movement which dated back to the early nineteenth century." CUSHMAN, supra note 10, at 19. "[I]n 1887, ten states had set up 'strong' commissions . . . possessing actual rate-making powers." Id. at 26.

16. During the period before the Constitution, when there was no President, the Treasury was controlled by a series of congressional committees and was accountable exclusively to Congress. In 1784, Congress even experimented with a three-member Board of Treasury. See MARK WALSTON, THE DEPARTMENT OF THE TREASURY 29 (1989).
and indeed "was not referred to as an 'executive' department." For example, Congress required the Secretary to report to Congress\textsuperscript{18} and restricted the President's power to remove the comptroller of the department.\textsuperscript{19}

Recent commentators have also made clear the extent to which district attorneys (now called United States Attorneys) initially enjoyed some independence from the executive branch.\textsuperscript{20} The early Attorneys General understood the opinions clause of the Judiciary Act of 1789\textsuperscript{21} to be a limitation on their authority, "rather than [the basis for] a general power to control legal opinions throughout the executive branch."\textsuperscript{22} These Attorneys General used the limitation as a justification for refusing to advise the district attorneys in their prosecutions, which gave the attorneys a level of independence. This practice is evident in a letter from Attorney General Wirt written to President Monroe, dated October 20, 1823, in which Wirt expressed his opinion after being asked to review the merits of a particular case.\textsuperscript{23} In this letter, Wirt stated:

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17. GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 42 (1997). "In the Congress, the Secretary of Treasury was seen as an indispensable, direct arm of the House in the regard to its responsibilities for revenues and appropriations." Id. at 44. \textit{But see} Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 CASE W. RES. L. REV. 1451, 1480-81 (1997) (describing President Washington's firm control over Treasury Department during his presidency). The Calabresi and Yoo four-part history of "unitariness" promises to help reconceptualize the historical record and we look forward to the remaining "parts."


19. \textit{See} 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 45 (3d ed. 1994); \textit{see also} Lawrence Lessig, Readings by Our Unitary Executive, 15 CARDOZO L. REV. 175, 183-84 (1993). Although he did retain the power to remove the comptroller, the President did not have dominion over the comptroller's decisions regarding enforcement of payment of debts due to the federal fisc. \textit{See id. at} 184-85.

20. \textit{See} Lessig, supra note 19, at 183 (quoting Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U. L. REV. 59, 74-75 (1983)). The district attorneys conducted federal prosecution free from the control and jurisdiction of the Attorney General, whose "function was merely to advise the President and the Cabinet." Lessig, supra note 19, at 183 (internal quotation marks and citation omitted).

21. \textit{See} Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93 (authorizing Attorney General to provide legal opinions and advice to President and department heads).

22. Lessig, supra note 19, at 188 (emphasis omitted).

23. Wirt believed that the President could not review the decisions of the accounting officers of the Treasury Department without express authorization from Congress. \textit{See} 1 Op. Att’y Gen. 624, 625-30 (1823). But in response to a request made by President Andrew Jackson’s Secretary of State, Attorney General Roger B. Taney determined that the President could order a district attorney to terminate a prosecution. \textit{See} 2 Op. Att’y Gen. 482, 491-92 (1831). Taney reasoned that this was a proper use of the President’s power to execute the laws. For an alternative view of Wirt see Calabresi & Yoo, supra note 17, at 1520.
To interpret [the Take Care] clause of the constitution so as to throw upon the President the duty of a personal interference in every specific case of an alleged or defective execution of the laws, and to call upon him to perform such duties himself, would be not only to require him to perform an impossibility himself, but to take upon himself the responsibility of all the subordinate executive officers of the government—a construction too absurd to be seriously contended for.  

The antebellum administrative state only fitfully recognized the need for executive direction and control. At the same time, it found little use for judicial review of administrative action, believing that executive direction was a largely unreviewable act. The post-Civil War administrative state was a different matter entirely. It faced the challenge of regulating potential economic monopolies, in particular the railroads, which were “a central, if not the major, element in the political, economic, and social development of the United States.” The administrative commission form of regulation had earlier been employed in Britain and at the state level in the United States. The creation of the Interstate Commerce Commission in 1887 was the natural derivation of these experiments. These earlier predecessors explain the historical context in which the independent agency developed.

B. Regulation in Britain

The House of Commons took its first comprehensive look at railroads as early as 1839, in response to shipper complaints of monopoly practices. A

27. In discussing regulation in Britain, we have relied on three principal sources. The first is a book by historian Henry Parris. HENRY PARRIS, GOVERNMENT AND THE RAILWAYS IN NINETEENTH-CENTURY BRITAIN (1965). The book is a revised version of Dr. Parris’s Ph.D. thesis at the University of Leicester. At the time of writing, he was a Lecturer in Politics at the University of Durham. The second is a book by economist C.D. Foster. C.D. FOSTER, PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY (1992). Sir Christopher Foster held a chair at the London School of Economics, was a British civil servant, and is a senior partner of Coopers and Lybrand. At the time of writing during John Major’s Administration, he was special adviser to the U.K. Secretary of State for Transport on railway privatization. The third source is an 1886 report by the Senate Committee on Interstate Commerce that preceded passage of the Act to Regulate Commerce of 1887. S. REP. No. 49-46, pt. 1 (1886).
28. See CUSHMAN, supra note 10, at 19 (noting that more than 20 states had already established commissions).
select committee was appointed to investigate the veracity of the allegations. The committee became convinced that competition was—and would be—insufficient to protect the public, and that intermittent remedial legislation (such as laws that required rate reductions if railroad profits exceeded a fixed amount) could be easily evaded. Therefore, the select committee proposed that Britain adopt some form of railroad regulation. 29

Parliament followed that recommendation and in 1840 enacted the Railway Regulation Bill that delegated to a government department, the Board of Trade, powers that were the forerunner of modern railroad regulation. 30 The board immediately created a Railway Department, which was an early effort to establish a regulatory bureaucracy. 31 Given that its power was limited, the board proved to be ineffectual. 32

In 1844, when a parliamentary committee again reviewed railroad regulation, it proposed that the government acquire the railroads, and recommended a twenty-one-year transition period. 33 The board’s powers were substantially reduced and the void was filled, to some extent, by the Railway Department, which was now under the personal direction of the President of the Board of Trade. 34 When the Whigs came to power in 1846, Parliament enacted new legislation that established, for the first time, an

29. See PARRIS, supra note 27, at 8-9.
30. See id. at 28, 30.
31. See id. at 31-35 (describing the early staffing and duties of department).
32. Railroads had to submit copies of their existing and future bylaws. The Board had the discretion to disapprove them if it wished. See id. at 30. Although the bill also required that railroads give the Board of Trade notice before opening a new line it lacked power to prevent operation. See id. at 30, 37. The Board entertained complaints against railroads but lacked power to act on them. See id. at 42. Perhaps the most important power was the right to comment on private bills, PARRIS, supra note 27, at 57-60 (describing Department’s participation in legislative process), which were Parliament’s principal method of regulation until the latter part of the nineteenth century. See FOSTER, supra note 27, at 17-18, 20 (describing use of private bills as regulatory devices). Private bills are advanced by groups or bodies that seek special powers or authority above and beyond that conferred by the general law. See DONALD SHELL, THE HOUSE OF LORDS 176 (1988). Each new railway line or extension was the subject of a separate bill in Parliament, FOSTER, supra note 27, at 17-18, 20, and these bills, also called “parliamentary contracts,” were effectively licenses, conferring operational rights on railways, with conditions, such as a limit on dividends. Id. at 18. As contracts involving private property, they were generally immune from subsequent legislation. See id. at 18. Overall, Parris describes the Board’s powers as “neither numerous nor extensive,” PARRIS, supra note 27, at 30, and concludes that the private bill system “did more to protect private interests than to promote the public interest.” Id. at 57. Foster agrees that, until the 1880s, Parliament resisted any attempt to appoint commissioners with significant power and status. See FOSTER, supra note 27, at 21.
34. See PARRIS, supra note 27, at 89.
independent tribunal (which was independent of the Board of Trade) known as the Commissioners of Railways. This Whig reform responded to the criticism that the Board of Trade had lacked sufficient stature and that its work had been performed essentially by clerks. Under the new system, however, effective control of the commission rested with Parliament. As it turned out, the Commissioners of Railways were no more effective than the Board of Trade and, when the President left and was replaced by the former President of the Board of Trade, even the independence of the Commissioners soon flagged. In 1851, in an economy move, Parliament shifted responsibility for the railroads back to the Board of Trade. In Parris’s view, “[t]he transfer of responsibility to the Commissioners was an experiment which failed.”

In 1872, Parliament established yet another committee—a Joint Committee on Railways—to undertake a thorough study of the past forty years of government regulation. As had its predecessors, the Joint Committee concluded that competition had resulted in monopolies and required legislative regulation. What it saw as the chief anti-competitive evils were discriminatory prices between long-haul and short-haul traffic and unduly high rates. But it concluded that a statutory remedy for these perceived abuses was impracticable. Its solution was a new tribunal “to take supervision of the transportation interests of the kingdom . . . with authority to enforce the laws relating to railways and canals, to hear complaints and adjust differences, and to advise Parliament upon questions of railway legislation.” In response to the committee’s recommendations, Parliament

35. See id. at 103.
36. See id. at 107 (“One of the criticisms had been that the policy of the Board was decided by mere clerks.”).
37. See id. at 103. The Commission was to have five members, but only three of them would be paid. It was assumed that the Commission’s President and the unpaid members would be members of Parliament. Quorum requirements reflected parliamentary control—only two members were required to constitute a quorum for the conduct of business. The powers earlier exercised by the Board of Trade were transferred to the Commission but the 1846 legislation gave the commissioners no new powers.
38. See id. at 105-06.
39. See id. at 129. The Board continued to superintend the railroads until 1873. See S. Rep. No. 49-46, pt. 1, at 58 (1886) (stating that new railway Commission was created in 1873).
40. PARRIS, supra note 27, at 112. In 1865, a royal commission recommended against government acquisition. See S. Rep. No. 49-46, pt. 1, at 56 (“[I]t is not expedient for the Government to avail itself of its reserved right to purchase railways.”).
41. See S. Rep. No. 49-46, pt. 1, at 57; see also PARRIS, supra note 27, at 221.
transferred the board’s powers to a newly created Railway Commission, with the additional power to deal with complaints from the public.\textsuperscript{43}

The commission scheme emerged from several, essentially practical considerations. The joint committee believed that the courts, although lacking in expertise, had historically coped reasonably well with issues surrounding the reasonableness of rates, but were simply too expensive a forum. On the other hand, the Board of Trade had the expertise but was seen as insufficiently “judicial.” Committees of Parliament were ruled out as an effective regulatory mechanism because their membership was constantly shifting.\textsuperscript{44} Thus, the solution was an expert, relatively permanent body with the adjudicatory power.\textsuperscript{45}

The new railway commission’s initial charter was for five years.\textsuperscript{46} But, in 1886, Parliament introduced legislation that renamed the agency the Railways and Canal Commission, made it permanent, required railroads to submit certain traffic tables and tariffs,\textsuperscript{47} and gave the Commission additional power to control rates.\textsuperscript{48} The bill passed in 1888.\textsuperscript{49} It was the result of nearly a half century of various efforts in Britain to develop a workable regulatory framework.

\textsuperscript{43} See id. (stating that new Commission had “jurisdiction over all matters in relation to the interchange of traffic, and to all contracts between railway companies, as well as complaints of undue preferences and other violations of railway laws”).

\textsuperscript{44} See Foster, supra note 27, at 46 (quoting the joint committee as saying that “a committee of the Houses of Parliament would have no permanence”).

\textsuperscript{45} See id. at 46. The new Commission was to be made up of at least three members, including “an eminent lawyer,” and another “acquainted with railway management.” Id. at 46. There was little parliamentary discussion about the procedures the Commission was to employ. The Commission’s procedures were to be “as simple and inexpensive as is consistent with giving due notice and hearing questions openly and fairly.” Id. at 46 (internal quotation marks omitted). When established, the Railway and Canal Commission was actually composed of a judge and two non-lawyer assessors. See id. at 48. It adopted legal procedures and rules of evidence, and its cases were presented by barristers. See id.

\textsuperscript{46} See S. Rep. No. 49-46, pt. 1, at 58. The Commission was continued beyond this initial charter period. See id.

\textsuperscript{47} See Parris, supra note 27, at 223-24; Foster, supra note 27, at 47-48.

\textsuperscript{48} See Foster, supra note 27, at 48 (stating that new Commission “had the authority of a high court”).

\textsuperscript{49} See Parris, supra note 27, at 223; Foster, supra note 27, at 47. By and large, the Board of Trade had attempted to regulate by encouraging railroads to lower rates in exchange for protection from competition. The Commission, in contrast, was essentially an expert, adjudicatory tribunal that simply decided complaints brought before it. See Foster, supra note 27, at 48.
C. State Regulation in America

Railroad regulation in the United States emerged at about the same time as in Britain. The intellectual impetus for government oversight, including the form that it should take, was the brainchild of Charles Francis Adams, Jr., the latest in a distinguished family line that included two U.S. Presidents. Between 1866 and 1878, Adams wrote several influential articles about the economics of railroad operation. He argued that the railroads, if unsupervised, would become natural monopolies, but at the same time believed that government operation or regulation would stifle efficiency and innovation. In his view, the state legislatures were ill-equipped to effectively regulate the industry because politicians lacked the market knowledge required. Legislatures also made political decisions to appease constituents that stifled the market. By contrast, industry experts who understood the economics of the industry would render efficient regulation. His proposal was the creation of a so-called "sunshine commission," i.e., an impartial body of experts that would investigate, examine, and report on railroad activities but would not have enforcement power.

The Massachusetts Board of Railroad Commissioners, established in 1869, reflected Adams' influence. It had three well-paid, nonpartisan

50. Adams' father served as Minister, i.e., Ambassador, to Great Britain during the Civil War. Raymond Seitz, appointed by President Bush as the only career diplomat ever to serve as U.S. ambassador to Britain, considers Adams, Sr., the best U.S. ambassador to Britain in history. "Largely through his own wits, Adams stopped the British from recognizing the Southern Confederacy. Had London done so, transatlantic history would have been profoundly and permanently transformed." RAYMOND SEITZ, OVER HERE 61 (1998).

51. The most famous of which is his muckraking book entitled CHAPTERS OF ERIE AND OTHER ESSAYS (1871), which he co-authored with Henry Adams. See also CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGIN AND PROBLEMS (1878).

52. "The legislative branch could not do the job of intelligent regulation. 'Knowledge cannot possibly creep into the legislature, because no one remains in the legislature long enough to learn.' In order to close the gap between public and private interests, analytical expertise must somehow be made a permanent part of the government." THOMAS K. McCRAW, PROPHETS OF REGULATION 15 (1984) (quoting and summarizing argument of Charles Francis Adams, Jr.).

53. See RICHARD J. STILLMAN, II, CREATING THE AMERICAN STATE: THE MORAL REFORMERS AND THE MODERN ADMINISTRATIVE WORLD THEY MADE 54-55 (1998) ("Adams understood the importance of the application of long-term expertise to public issues . . . . Nonetheless, he distrusted giving too much authority to a permanent set of government officials who could, in the long run, abuse their power by operating beyond the boundaries of community control or accountability."). Adams carefully evaluated Britain's inability—as of the mid-1870s—to create a commission with effective power. See FOSTER, supra note 27, at 227-28.
members with overlapping terms.\textsuperscript{54} It had the right to investigate high rates and publicize its findings, but had no enforcement power.\textsuperscript{55} The Illinois Railroad and Warehouse Commission, established in 1871, was the first commission with the power to establish reasonable maximum rates.\textsuperscript{56}

By 1886, state railroad regulation in general, and the commission form of regulation in particular, were widespread. Of the thirty-eight states then in existence, twenty-eight had some form of railroad regulation.\textsuperscript{57} Of these, twenty-four states had adopted a commission form.\textsuperscript{58} Only four relied on judicial enforcement.\textsuperscript{59} Despite the prevalence of regulation at the state level, the constitutional and geographic limitations on state agencies prevented their regulatory control of large, interstate railroads.\textsuperscript{60} A consensus on the need for a federal approach began to emerge.

Between 1868 and 1886, more than 150 railroad regulation bills were introduced into Congress.\textsuperscript{61} Two competing approaches emerged. The House, led by Representative John H. Reagan of Texas, viewed the commission structure as a substitute for action rather than an effective remedy\textsuperscript{62} and urged legislation that provided for judicial enforcement.\textsuperscript{63} In contrast,

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\textsuperscript{54} See Stillman, supra note 53, at 57. Indeed, Adams served as one of the first three Massachusetts commissioners. See id. at 57.

\textsuperscript{55} See 1 I. L. Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure 15 (1931). New Hampshire had established the first railroad commission in 1844. See S. Rep. No. 49-46, pt. 1, at 65 (1886). However, until 1884 it lacked the power to establish rates and, in this respect, was typical of other New England commissions of the era that followed the Adams model. See id. at 116.

\textsuperscript{56} See S. Rep. No. 49-46, at 71-72. The rate fixed was prima facie evidence of reasonableness in court actions for overcharges, and the burden of proof was on the railroad to demonstrate that any higher rate was reasonable. See id. The Illinois model was followed by several Midwestern states. See id. at 71; Sharfman, supra note 55, at 15.

\textsuperscript{57} See S. Rep. No. 49-46, at 65.

\textsuperscript{58} See id. at 64.

\textsuperscript{59} See id. at 65.

\textsuperscript{60} See Angel Manuel Moreno, Presidential Coordination of the Independent Regulatory Process, 8 ADMIN. L.J. AM. U. 461, 463 n.2 (1994) ("The growth of interstate railways transportation promptly surpassed the operational resources and constitutional powers of the states, especially after Wabash St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886).")


\textsuperscript{63} See id. at 292, 308 (citing prohibition of pooling of revenues and long-haul/short-haul discrimination). Railroad companies frequently entered into pooling agreements to divide the existing railway market and to prescribe rates, which stymied competition. Many shippers and merchants, especially those competing in their local markets, complained of

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the Senate legislation, sponsored by Shelby M. Cullom, a Republican from Illinois, provided for the establishment of an administrative oversight commission. Through the early 1880s, Congress was deadlocked between these structural options. Ultimately, on March 17, 1885, Senator Cullom effectively wrested congressional leadership from the House. The Senate established a select committee of five senators to investigate and report on the subject of railroad regulation.

Less than a year later, the Senate Committee on Interstate Commerce, chaired by Senator Cullom, issued a 216-page report covering virtually all issues affecting transportation regulation. The committee examined the long-haul/short-haul discrimination. Railroad companies often charged disproportionately more for short conveyances than for longer hauls on the same line.


65. Congressman Reagan introduced a bill that passed the House in 1878, but it failed to make it out of a Senate committee. See 1 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES 18 (Bernard Schwartz ed., 1973). Senator Cullom introduced a bill that passed the Senate in 1885 but did not pass in the House. See id.

66. See SHELBY M. CULLOM, FIFTY YEARS OF PUBLIC SERVICE: PERSONAL RECOLLECTIONS OF SHELBY M. CULLOM 314 (Da Capo Press 1969) (1911) (describing introduction of Cullom’s resolution providing for establishment of Senate committee to study and report on railroad regulation). Shelby Moore Cullom had a lengthy, if not distinguished, political career. He was a Republican from the earliest days of the party’s founding, and was proud to observe that “at the opening of the Congressional campaign of 1858, I followed [Abraham Lincoln] firmly and without mental reservation into the ranks of the Republican party.” Id. at 28. He was elected to the first of three terms in the U.S. House of Representatives in 1865, became a member of the Illinois House of Representatives in 1871, was elected Speaker of the House in 1873, and, as speaker, appointed the committee that drafted the legislation creating the Illinois Railroad and Warehouse Commission in 1871. See 2 APPLETONS’ CYCLOPEDIA OF AMERICAN BIOGRAPHY 27 (James Grant Wilson & John Fiske eds., 1898). That commission was the first in the country to possess effective rate-setting power. See S. REP. NO. 49-46, pt. 1, at 71-73 (1886) (describing and analyzing Commission). He served as governor of Illinois before coming to the U.S. Senate in 1883. APPLETONS’ CYCLOPEDIA, supra. Following passage of the Act to Regulate Commerce in 1887, the Senate established a permanent Committee on Interstate Commerce. Senator Cullom chaired that committee for many years. See CULLOM, supra, at 327-28. He also chaired the Illinois delegation to the Republican national conventions in 1872, 1884, 1892 and 1908. See 4 DICTIONARY OF AMERICAN BIOGRAPHY 589 (Allen Johnson & Dumas Malone eds., 1930).

67. See CULLOM, supra note 66, at 314-15. As Senator Cullom tells it, one of his Senate colleagues suggested that the lack of detailed information about the railroad industry hampered the Senate’s consideration of Cullom’s legislation to regulate interstate commerce. See id. at 314.
British history of regulation and provided a state-by-state summary of state statutes and the work of state commissions.

With the release of the Committee Report on January 18, 1886, the Senate was now armed with the necessary intellectual firepower to command the debate. In the same year, the Supreme Court decided the *Wabash* case, holding that a state regulatory agency could not regulate the rates of interstate railroads, a decision that encouraged the burgeoning demand for federal legislation.

By 1886, establishment of a commission form of federal regulation seemed inevitable. First, as the Committee had found, with justification, efforts by individual states to control railroads by statute or court enforcement had been hampered by constitutional and geographic constraints. Breyer and Stewart pointed out:

In the 1840s and 1850s, the states attempted to control railroads through detailed statutory specification of rates and practices. But this proved impractical, and the states resorted to creation of administrative commissions to investigate and make recommendations to the legislature (the model in Massachusetts and many eastern states), or themselves regulate the railroads (the model in many Midwestern states).

Congress was also familiar with the similar experience in Britain that led to the establishment of a permanent railway commission pursuant to the

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69. See id. at 63-137.
70. Senator Cullom notes that the railroads declined to participate in the committee's investigation. In his view, they did not consider that legislation would be forthcoming. However, once it appeared that a bill was likely to pass, they registered their complaint that the railroads had not been adequately consulted. But it was too late. See CULLOM, supra note 66, at 319.
72. See *Wabash*, 118 U.S. at 577 (effectively overruling *Peik v. Chicago & North-western Ry.*, 94 U.S. 164 (1877), which had sanctioned state action over intrastate shipments that incidentally affected interstate commerce until such time as Congress sought to establish uniform, interstate regulation).
73. See KOLKO, supra note 26, at 33. Professor Kolko asserts that, by the time the *Wabash* decision was handed down in October 1886, Congress had already determined that regulation was needed. See id. at 33. The Senate had approved a revised version of the Cullom bill (S. 1532) in May 1886, and although there was still debate between the House and Senate over certain provisions, the decision to regulate was foreordained. See id. at 33. Although Professor Cushman alludes to this as well, he surmises that the decision did have some effect upon Congress's efforts to enact the legislation. The *Wabash* decision's "precise and immediate effect upon Congressional leaders remains in doubt; but it made federal regulation clearly imperative, and the Interstate Commerce Act of 1887 was passed within a few months." CUSHMAN, supra note 10, at 38.
INDEPENDENT FEDERAL AGENCIES

Regulation of Railways Act of 1873. Although there was some concern in Congress over conferring direct authority on the President to regulate what was, at the time, the most significant aspect of the American economy, bipartisan control of the commission was the main concern of the members of Congress. A minority of members in the House also seemed prepared to accept the commission approach because they envisioned any new legislation as experimental.

The railroads' support for, or at least acquiescence in, national regulation by a commission as a matter of self-protection eliminated any remaining obstacle. Even Senator Cullom, long the advocate of the commission approach, acknowledged: "Every one knows that the railroad companies

75. See 17 Cong. Rec. 7292 (1886) (statement of Rep. Caldwell) (discussing British commission). There were clearly some members of Congress who believed that Britain's efforts at railroad regulation had been ineffectual. See id. ("England has passed many hundred statutes in the abortive attempt to regulate these matters, and the greatest failure of all the thirty-three hundred has been her commission."). Cushman argues, however, that the British Railway Commission of 1873 influenced the movement toward creation of the ICC but had "a much better American reputation than it deserved." Cushman, supra note 10, at 512.


77. The limitation that not more than three members of the Commission could be from the same political party evidenced their concern. Cushman states that "[i]mpartiality, or at least neutrality, was looked upon as more important than expertness." Cushman, supra note 10, at 63.

78. See, e.g., 19 Cong. Rec. 8576 (1888) (statement of Rep. Crisp) (stating that some members considered the law establishing the ICC to be "largely experimental"). However, the minority of the House committee that was prepared to accept a Commission form of regulation preferred a regulatory entity within an existing cabinet department. See 17 Cong. Rec. 7285 (1886) (statement of Rep. O'Neill) (quoting from the minority report).

79. Kolko claims that the railroads desired regulation to stop the rate wars that had drastically driven rates down over the years and to regulate those companies who refused to enter into, or abide by, pooling agreements. See Kolko, supra note 26, at 30-31. Senator Van Wyck of Nebraska argued that corporations sought national commissions as a lawful method of self-protection. See 17 Cong. Rec. 3825 (1886) (statement of Sen. Van Wyck) ("[C]orporations are becoming earnest advocates for a national commission, expecting it to prevent them from being too severely squeezed in the tender embraces of each other . . . ."). Congressman Reagan had a similar view. "The Senate bill is . . . preferred by the railroad corporations," he claimed, "because under it they see greater chances for trickery and evasion; with whatever chances there may be for their controlling . . . the commission . . . ." 17 Cong. Rec. 7283 (1886) (statement of Rep. Reagan). "Indeed, the railroads, not the farmers and shippers, were the most important single advocates of federal regulation from 1877 to 1916. Even when they frequently disagreed with the details of specific legislation, they always supported the principle of federal regulation as such." Kolko, supra note 26, at 3.
themselves have finally become reconciled to some national legislation, because they have not been able to protect themselves, one from another \textsuperscript{80}. Ultimately, the final product was a typical legislative compromise containing provisions from both the Cullom and Reagan bills.\textsuperscript{81}

\textbf{D. Place in the Executive Branch}

Review of the original structure of the ICC helps to debunk the myth that there was a tie between the commission form and independence. Sections 18 and 21 of the original ICC Act placed the agency within the control of the Secretary of the Interior.\textsuperscript{82} ICC staff hires, salaries, and expenditures were subject to the Secretary's approval; the Secretary was also responsible for furnishing the Commission with suitable offices and necessary office supplies.\textsuperscript{83} The Commission's annual report had to be submitted to the Secretary who was, in turn, required to transmit it to Congress.\textsuperscript{84}

\textsuperscript{80} 18 CONG. REC. 171 (1886) (statement of Sen. Cullom).
\textsuperscript{81} See KOLKO, supra note 26, at 44. Congress opted for a multi-member commission within the Department of the Interior. Professor Kolko observes that the Senate had long been an obstacle to railroad regulation and that, during the House-Senate conference, Congressman Reagan was successful in retaining the central element of the House bill, namely the anti-pooling provision (the Senate bill had no comparable provision). See id. at 43. However, in doing so, he was forced to concede substantially to Senator Cullom's views on other matters. See id. at 43; see also CULLOM, supra note 66, at 321-22 (noting that Reagan yielded on nearly everything but the anti-pooling provision). Senator Cullom notes that "[t]here was a great fight in the Senate to secure the adoption of the conference report." CULLOM, supra note 66, at 322.
\textsuperscript{83} See Act of Feb. 4, 1887, § 18. The office space provision was not unusual. The Act of June 22, 1870, establishing the Department of Justice, required the superintendent of the Treasury building to provide office space for the new department. See Act of June 22, 1870, ch. 150, § 13, 16 Stat. 162, 164. That arrangement lasted until the present Justice Department building was constructed. See Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 DUKE L.J. 561, 620 n.188. Even today, such arrangements are used. See, e.g., 42 U.S.C. § 7412(r)(6)(P) (1994) (requiring EPA Administrator to “provide . . . such support and facilities as may be necessary for operation of the [Chemical Safety and Hazard Investigation] Board.”). The original ICC initially, and briefly, had two rooms in a building also occupied by the Geological Survey, but the Commission was soon given more substantial quarters in what was then the tallest privately owned building in Washington and one of the first to have an elevator. The Commission moved again in 1917 as its need for space increased, and moved again in 1934 into the building it occupied until the agency's demise. See FRANK N. WILNER, COMES NOW THE INTERSTATE COMMERCE PRACTITIONER 58-59 (1993).
\textsuperscript{84} See Act of Feb. 4, 1887, § 21.
There appears to have been little concern expressed over this arrangement by the members of Congress, and "whatever independence the new commission was supposed to have was not incompatible with the location of the commission in the Department of the Interior." 85

Two years later, the Secretary's authority over the commission was eliminated by statute and the commission became functionally independent of the executive branch. 86 That decision was not without controversy. Although supported by both the commission and the Secretary of the Interior, 87 several members of the House and Senate opposed the change. 88

The statute was enacted two days before the inauguration of President Benjamin Harrison, a Republican, and it has been argued that it was passed by a Democratic Congress, in part, to free the commission from presidential influence. 89 However, the initiative to separate the ICC from the Interior Department was prompted by both the commission, where Republican

85. CUSHMAN, supra note 10, at 62. Cushman observes that placement of the ICC in the Interior Department was essentially for housekeeping purposes, "a sort of carry-over from earlier proposals and a reflection of the idea that the new agency ought not to be left in a vacuum." Id.

86. Section 7 of the 1889 Act eliminated the requirement that the Secretary approve salaries and expenses, and Section 8 authorized the Commission to submit reports directly to Congress. See Act of Mar. 2, 1889, ch. 382, §§ 7-8, 25 Stat. 855, 861-62.

87. See 19 CONG. REC. 6001 (1888) (statement of Sen. Cullom) (noting that both Commission and Secretary supported removal of ICC from Interior Department); see also H.R. EXEC. DOC. No. 50-1, pt. 5, at 57 (1887) (Report of Secretary of Interior) (requesting removal of the ICC).

88. See, e.g., 19 CONG. REC. 6001 (1888) (statement of Sen. Teller). Senator Teller voiced concern that removing the Commission from the Department of the Interior would bestow some independence upon it:

I do not think the objection that supervision is an annoyance to the Secretary of the Interior or anything of that kind is sufficient. I do not think a body of this kind should make its report to Congress. I think the report should be made to some Department of the Government, and by it be transmitted to Congress.

Id.

89. Brownlow states that "Mr. Reagan of Texas, the author of the interstate commerce bill, said that since a railroad lawyer named Ben Harrison had been elected President, he did not trust the President any more with this matter, so he invented the idea of an independent commission." Establishment of a Commission on Ethics in Government: Hearings Before the Subcomm. to Study Senate Concurrent Resolution 21 of the Senate Comm. on Labor and Pub. Welfare, 82d Cong. 213 (1951) (statement of Louis Brownlow); MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 23 (Greenwood Press 1977) (quoting Brownlow); see also Paul R. Verkuil, The Purposes and Limits of Independent Agencies, 1988 DUKE L.J. 257, 259 & n.7 (describing argument that Congress created independent agencies to expand its own influence while diminishing presidential influence) (citing 1 SENATE COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION: REGULATORY ORGANIZATION, S. DOC. NO. 95-91, at 31 (1977)).
Thomas Cooley was chairman and its most influential member, and the Secretary of the Interior. Moreover, it was supported by Senator Cullom, a Republican, and a chief architect of both the original statute and the 1889 changes. He argued that the Interior Secretary's oversight was "purely formal," and subjected both the commission and the Secretary to unnecessary administrative burdens without any countervailing benefits. Although the change may have accorded with railroad objectives, it is unlikely to have been prompted by partisan considerations. Such a significant structural change could not have taken place without Senator Cullom's consent or at least acquiescence. Regardless, the intent was not to make the commission independent and thereby vest it with authority to wield power outside the domain of the executive branch.

In 1906, influenced by the Progressive movement, Congress passed the Hepburn Act, which empowered the ICC with rate-making authority, making it a very powerful agency. Until this time, the agency, with little discretionary power, had been rather weak and ineffectual, but the Progressives saw the value in an entity removed from politics and promoted the independent form.

The Progressive movement emerged at the turn of the century. In response to the growing number of corporate trusts and conglomerations, and increasing distrust in government, legislation was enacted to "eliminate or

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91. It is worth noting that like Sherlock Holmes' "curious incident of the dog in the night-time" none of the recent histories of the ICC that we have reviewed discuss this structural change—one that to our modern understanding would be very significant indeed. A. CONAN DOYLE, THE MEMOIRS OF SHERLOCK HOLMES 34 (1902) ("'The dog did nothing in the night-time.' 'That was the curious incident,' remarked Sherlock Holmes"). See, as but one example, ARI & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE 17-31 (1976). Among those who point it out, when discussing independent agencies in general, are Paul R. Verkuil, The Status of Independent Agencies After Bowsher v. Synar, 1986 DUKE L.J. 779, 780 n.7, and Strauss, supra note 5, at 609 n.140. Professor Strauss notes that the ICC's evolution reflects "efforts to improve its practical workability after the lessons of experience, not the result of a new theory about the proper ordering of executive (or administrative) government; that came later." Strauss, supra note 5, at 609 n.140 (citations omitted).
92. Some commentators believe that this distrust in government encompassed the judicial system as well. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 225 (1992) ("As the Progressive disenchantment with the competence of courts to perform social engineering tasks combined with a loss of faith in the sensitivity of judges to questions of social justice, the effort to replace courts with administrative experts became more pronounced."). Others suggest that the reform movement's focus on expertise reflected the conquest and assertion of social status by collectively self-defined experts. See MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 138-47 (1977). In her view, the ideology of
prevent those forms of industrial organization and corporate behavior, which threatened to undermine market mechanisms. . . . The new regulatory regime was, in essence, market-corrective." The Progressives saw the independent regulatory commission as an important conduit through which market correction was administered. It was essential that the independent regulatory commissions be staffed by expert administrators with technical competence in the various areas of regulation. "It was envisioned as an institution capable of compensating for the shortcomings of the 'political' institutions of American government." As one commentator has noted about the Progressive movement, "they honestly believed in the almost unlimited potential of science and administration." Reliance on these experts coupled with independence from the political melee was thought to safeguard the commissions from partisan politics, which would enable the experts to make logical decisions based on empirical data.


93. EISNER, supra note 9, at 27-28; see also WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900 82 (1982) ("Reformers in the last third of the nineteenth century turned to science to accomplish their reconstructive task.").

94. EISNER, supra note 9, at 44. The use of expertise as a neutral contrast to the 'political' was most advanced in municipal politics, as with the Bureau of Municipal Research in New York. See KENNETH FINEGOLD, EXPERTS AND POLITICIANS: REFORM CHALLENGES TO MACHINE POLITICS IN NEW YORK, CLEVELAND, AND CHICAGO 22-24 (1995).


96. See BERNSTEIN, supra note 89, at 36 ("The Progressives had an abiding faith in regulation, expertise, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."). They believed that one can find "harmony through technological order." DAVID W. NOBLE, THE PROGRESSIVE MIND 1890-1917 37 (rev. ed. 1981). Cf. RICHARD ABRAMS, THE ISSUE OF FEDERAL REGULATION IN THE PROGRESSIVE ERA 50 (Richard Abrams ed., 1963) (asserting that concern for resource conservation "grew out of the political implications of applied science"). Conservation was considered an issue better left for experts to address rather than politicians. Id.

Since resource matters were basically technical in nature, conservationists argued, technicians, rather than legislators, should deal with them. . . . Pressure group action, logrolling in Congress, or partisan debate could not guarantee rational and scientific decisions. . . . Conservationists envisaged . . . a political system guided by the ideal of efficiency and dominated by the technicians who could best determine how to achieve it."
This belief in apolitical expertise provided the justification for independence and was embodied in the establishment of the Federal Trade Commission (FTC). Discussions concerning the need for an antitrust commission abounded. Prior to the creation of the FTC, the Senate Committee on Interstate Commerce clearly outlined the duties it believed an antitrust commission would need to perform. These duties were adopted and actually expanded by the Federal Trade Commission Act. Proponents believed that the commission should be quasi-judicial in character, and focused on this concept as the basis for creating the new independent agency. It was also believed that the FTC needed to be independent in order to correct "the partisan and pressure-controlled administration of the antitrust laws by the Department of Justice." Senator Newlands, a strong supporter of the independent agency concept, stated that "we want a body of administrative law built up. This can not [sic] be well done by the single occupant of an office .... Such work must be done by a board or commission of dignity, permanence, and ability, independent of executive authority ...."

Finally, the FTC was created in 1914. It was assigned the task of determining and preventing "unfair methods of competition," and had the authority to issue "cease and desist" orders against offenders—duties that afforded the new agency far more power than the 1887 ICC. The FTC was modeled after the ICC primarily for "its independent power and authority." Many believed that the only way to achieve effective business regulation was to establish a trade commission completely removed from

97. See CUSHMAN, supra note 10, at 183 ("The duties that such a commission would perform were outlined by the committee: first, extensive activities in the field of investigation; second, the administration of some system of licensing corporations engaged in interstate commerce; and third, the rendering of expert aid to the courts and to the Department of Justice in the dissolution of trusts and other unlawful combinations.").

98. See id. at 190-91 (discussing view of supporters that independence from the executive was necessary because of quasi-judicial nature of new Commission's work).

99. Id. at 189. Some senators and congressmen did stress independence from the executive branch. Senator Newlands expressed the importance of a committee "independent of executive authority except in its selection, and independent in character." Id. at 190 (citing 51 CONG. REC. 11,092 (1914) (statement of Sen. Newlands)).

100. 51 CONG. REC. 11,092 (1914) (statement of Sen. Newlands).


102. Id. § 5. The phrase "unfair methods of competition" proved to be very ambiguous and the Commission's authority to define it was challenged repeatedly in the courts. The enabling statute allowed the courts to fetter the Commission for several years. For a description of how the Commission was hobbled, see THOMAS C. BLAISDELL, JR., THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS 17-104 (1932).


104. CUSHMAN, supra note 10, at 189.
the political fray. 105 Another important consideration for the Commission’s independence was the need to “secure a body of experts” capable of resolving problems of a highly complicated and technical nature. 106 Congressional supporters of the act believed that the FTC, with its independent qualities of expertise and nonpartisanship, would instill confidence in the public. 107

As noted above, a cornerstone of Progressive ideology was scientific analysis, and during this era, a new type of administrative expert emerged—the scientific management expert. 108 One cognate corollary of this thrust was the increased focus on credentials. 109 Progressives heralded the skills of efficiency experts who could find ways to maximize utility and reduce the waste and inconsistency that plagued the government and administrative state through the application of scientific evaluation and analysis. 110 These new experts required independence from political and corporate pressure to efficiently regulate industry. 111 Influential scholars and
politicians such as Louis D. Brandeis' and Woodrow Wilson advanced the cause of scientific management.

With the creation of the FTC, it was clear that the ICC would serve as the template for a multitude of new independent regulatory commissions in the early twentieth century. As Professor Cushman has pointed out, "[a] controlling force moving legislative leaders to create the independent Federal Trade Commission was the model of the Interstate Commerce Commission." As the number of commissions grew, the indicia of independence were defined by replication.

Goodnow's formula did so with the intent of creating an honored and important profession of administrators having special skills and a special ethic." Id. at 103.

112. See McCraw, supra note 52, at 92 (noting Brandeis' support for "scientific management" techniques to improve efficiency). Brandeis used scientific management as a tool with which to club monopolies. In 1910, he represented shippers' interests before the ICC in the Advance Rate Case. The railroads sought an across-the-board rate increase for freight hauls which was vehemently opposed by the shipping industry. Brandeis successfully argued that the solution for the railroad companies was efficiency rather than a rate increase. The rate increase was denied. As one commentator concluded, "[t]he Brandeis view of scientific management allowed a politically insecure and institutionally limited ICC to take refuge in a strong disciplinary posture in administrative regulation." Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920 269-70 (1982).

113. See Woodrow Wilson, Democracy and Efficiency, 87 Atlantic Monthly 289, 299 (1901) (expressing support for "a trained and thoroughly organized administrative service instead of administration by men privately nominated and blindly elected"). As an academic, Wilson had written approvingly of the independent expert agency. See Woodrow Wilson, The Study of Administration, Pol. Sci. Q., Dec. 1941, at 481, 500-01 (explaining relationship between public opinion and administration, and expressing the ideal of "a civil service cultured and self-sufficient enough to act with sense and vigor," but one "intimately connected with the popular thought"); see also Marshall J. Breger, Thoughts on Accountability and the Administrative Process, 39 Admin. L. Rev. 399, 399-402 (1987) (discussing Wilson's views on separation of politics from administration).

114. Cushman, supra note 10, at 188.

II. THE MODERN INDEPENDENT AGENCY

A. Which Agencies are Independent

Section 11 of the Act to Regulate Commerce of 1887 set out the basic organizational model for the modern multi-member independent agency. It provided:

An uneven number of commissioners (5) appointed to staggered terms of a fixed period extending beyond the term of the President (6 years); Commissioners can only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office;" No more than a bare majority can come from the same political party; Individuals appointed to fill a vacancy can only fill the unexpired term, but there is no prohibition on reappointment; No professional qualifications for office set out in the statute; Federal service is full time and agency members cannot hold any financial interest in a member of the regulated sector; Combination of rule-making, enforcement and adjudication functions.

Section 17 provided that a majority of the Commission would constitute a quorum for the conduct of agency business and Section 11 provided that no vacancy in the commission would impair the right of the remaining members to conduct the agency's business.

There is no general, all-purpose statutory or judicial definition of "independent agency." Professor Bernard Schwartz notes that "[t]he key to independence is security of tenure." While this may be the baseline definition, notions of what constitutes independence expand easily. Thus, it is not surprising that Professors Kenneth Culp Davis and Richard Pierce define independent agencies as those that are "insulated from presidential control in one or more ways." And this notion of "tenure-plus" leads...
some to more extreme notions that independence means bi-partisanship,
non-partisanship, \textsuperscript{2} rule by experts, \textsuperscript{1} or freedom from executive influence. \textsuperscript{1}\textsuperscript{2} Most extreme is the notion that independent agencies should be completely free or independent of both the legislative and executive branches. \textsuperscript{1}\textsuperscript{2} William Gould, former chairman of the National Labor Relations Board (NLRB) under President Clinton, in a dispute with Congress over striker replacement legislation, wrote: \textquote{I am sure you agree that it is vital that independent administrative agencies remain free of interference from both the legislative and executive branches of government.} \textsuperscript{1}\textsuperscript{2} As can

\textsuperscript{122} See id. § 2.5, at 46 (noting that most independent agencies have \textquote{statutory limits on the number of members that can be of the same political party.}).

\textsuperscript{123} Thus, Senator Francis Newlands of Nevada, on early sponsor of the Federal Trade Commission, in congressional debate, stated \textquote{We have found in the Interstate Commerce Commission a non-partisan organization . . . .} ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 189 (1941).

\textsuperscript{124} See LANDIS, supra note 108, at 23-24 (arguing need for experts corresponds with the increase in regulation because \textquote{the art of regulating an industry requires knowledge of the details of its operation, [and the] ability to shift requirements as the condition of the industry may dictate}); Mark Seidenfeld, A Civil Republican Justification for the Administrative State, 105 HARV. L. REV. 1516, 1518 (1992) (\textquote{The New Deal contemplated that Congress should identify an area in need of regulatory control and turn the expert agency loose to regulate.}); see also id. at 519.

\textsuperscript{125} See SHARFMAN, supra note 13, at 454 and accompanying text. \textquote{We may ask what lawmakers meant concretely when they talked about an independent commission? In the first place, it seems clear that Congress intended the new commission to be free from the pressure and control of the president.” ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 193 (1941).

\textsuperscript{126} Strangely, notions of independence often go together with notions of congressional control. For example, Speaker of the House Sam Rayburn once said to President Kennedy’s FCC chairman Newton Minow: \textquote{Your agency is an arm of the Congress [and] you belong to us.” Neal Devins, Congress, the FCC, and the Search for the Public Trustee, 56 LAW & CONTEMP. PROBS. 145, 148-49 (1993) (quoting Speaker Rayburn) (citation omitted). And Senator Robert Packwood said to Reagan FCC chairman Mark Fowler that \textquote{you are a creature of Congress and you attempt to administer . . . [the] laws in accordance with what you think Congress has intended.” Id. (quoting Sen. Packwood) (citation omitted) (alternations in original).

\textsuperscript{127} Joan Flynn, \textquote{Expertness for What?}: The Gould Years at the NLRB and the Irrepressible Myth of the \textquote{Independent} Agency, 52 ADMIN. L. REV. 465, 512 n.193 (2000) (quoting Letter by NLRB Chairman Gould to Republican Members of House Economic and Educational Opportunities Committee April 19, 1995, 1995 Daily Lab. Rep. (BNA) No. 76, at E-1, E-2 (Apr. 20, 1995) (emphasis omitted)). But see JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947 261 (1981) (\textquote{The board is in many ways . . . a creature of Congress and the executive.”}. For an example of a Clinton independent agency chair who understood fully that the FCC was a \textquote{political entity, see REED E. HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS 19 (2000) (“Another revelation on day one was the
be readily seen, notions of independence have varied considerably and indeed have often transmigrated substantially from the core concept developed from the history of the ICC.

In 1980, Congress set out a statutory listing of "independent" agencies for the purposes of the Paperwork Reduction Act, but declined to provide a definition. Rather, the act listed sixteen agencies as "independent," all of them of the multi-member variety.


1. Organizational Structure

The organization of modern multi-member agencies follows the pattern established in the 1887 ICC statute, and the commission form has become synonymous with independence. Agencies usually have an odd number of members, with no more than a bare majority from the same political party. Members serve fixed, staggered terms (often, but not always, for an odd number of years) that typically extend beyond the four-year presidential term. This organizational structure is intended to dilute the effect of transitory political events on agency policy, which underscores the agencies' independent role.

omnipresence of congressional influence on the commission’s work.”). See also id. at 13 (“As a matter of law, the White House could not tell the FCC chairman or the commissioners how to vote. But naturally I, and any agency head, preferred the White House to approve of my agenda. Few are successful in any endeavor without learning the value of partnership. Moreover, the power of the White House to drive or block any agenda was, especially in the midst of the Gingrich Revolution, my primary source of support.”).

A requirement that members serve a fixed term of years is an essential element of independence, but alone is not sufficient. The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except "for cause." The protection against summary removal originally received constitutional approval in the leading case of *Humphrey's Executor v. United States* and, indeed, this protection continues to be the critical criterion by which scholars typically distinguish between "independent" and executive branch agencies.

Finally, independent, multi-member agencies, in common in this respect with agencies in the executive branch, typically possess a combination of rulemaking, enforcement and adjudication powers and functions.

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129. See, e.g., Parsons v. United States, 167 U.S. 324, 343 (1897) (concluding that U.S. Attorney is removable by President through appointment of new U.S. Attorney despite the existence of four-year term of office); Chabal v. Reagan, 841 F.2d 1216, 1219, 1222-23 (3d Cir. 1988) (concluding that U.S. Marshal is removable by President even though marshal is appointed to four-year term). The court in *Chabal* rested its decision in part on the marshal's status as a "purely executive" officer, *Chabal*, 841 F.2d at 1218-19, a ground undermined by the Supreme Court's 1988 decision in *Morrison v. Olson*, 487 U.S. 654, 689 (1988). However, it found, alternatively, that the statute does not manifest a congressional intent to confer "for cause" removal protection, a consideration that remains relevant. See *Chabal*, 841 F.2d at 1222-23 (contrasting statute with that at issue in *Humphrey's Executor*).


131. See, e.g., *DAVIS & PIERCE*, supra note 19, § 2.5, at 46 ("The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President's power to remove the head (or members) of an agency."); PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 15 (1989) ("Because [independent commission] members are appointed for fixed terms from which they cannot be dismissed without formal cause, they are more remote from presidential influence and control than the more usual 'executive' agency.").

132. See generally *STRAUSS*, supra note 131, at 14-18 (discussing rulemaking, enforcement, and adjudicatory authorities of independent agencies). From time to time when regulatory powers are conferred on cabinet departments, Congress decides to place the adjudication of cases in the hands of a separate, multi-member Board in what has come to be known as the split-enforcement model. For example, employers opposed the traditional arrangement when Congress created the Occupational Safety and Health Administration as part of the Department of Labor. So, Congress placed adjudication responsibilities in the hands of the Occupational Safety and Health Review Commission. See George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).
2. **Appointments**

Members of independent, multi-member agencies are generally appointed by the President with the advice and consent of the Senate, but not always. For example, the chairman of the National Indian Gaming Commission is appointed by the President with the advice and consent of the Senate, but the other two members are appointed by the Secretary of the Interior. All members serve three-year terms and can only be removed from office for good cause. At the Board of Veterans' Appeals, the chairman is appointed by the President with the advice and consent of the Senate to a six-year term, but other board members are appointed by the Secretary of Veterans' Affairs, with the approval of the President, based on a recommendation by the board chairman.

Appointments to regulatory boards and commissions reflect a variety of considerations. Typically, agency statutes require political balance, i.e., no more than a bare majority of members of multi-member agencies may come from the same political party, but there are exceptions. The statutes governing the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission, among others, contain no requirements pertaining to political balance. Geography can also play a role. For example, no more than one member of the Federal Reserve Board may be appointed from any one Federal Reserve District.

The original Act to Regulate Commerce did not require professional or other specific qualifications for agency membership. Most contemporary statutes follow that model. Some, however, do require certain qualifications. Apparent congressional inattention to detail creates some anom-
lies. The members of the Defense Nuclear Facilities Safety Board must be experts in nuclear safety but members of the Nuclear Regulatory Commission need not. Some statutes contain precatory language without genuinely circumscribing the President’s choices in any significant way. For example, members of the Postal Rate Commission “shall be chosen on the basis of their professional qualifications.” Members of the Federal Reserve Board must be selected with “due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.”

Some multi-member agencies have a tradition of members being selected from the ranks of the agency staff. According to a major study of regulatory agencies by the Senate Government Operations Committee in 1977, four of the nineteen appointments to the Securities and Exchange Commission (SEC) between 1961 and 1977 were career staff employees.

Not surprisingly, many regulatory commission appointments are made from among individuals closely associated with the regulated industry. Indeed, leading representatives of the regulated sector are often consulted on agency appointments. Moreover, many agency appointees have the support of a key member of Congress. The Senate Government Operations Committee found that no less than a third of the appointments to the FTC and the FCC during the period studied were almost entirely the result of congressional sponsorship, which is evidence that partisan considerations can override issues of expertise, experience, or even regulatory philosophy.

Moreover, at least one member must have professional or business experience in the private sector. See 49 U.S.C. § 701(b)(2) (Supp. IV 1998). At least two of the three members of the National Indian Gaming Commission must be enrolled in an Indian tribe. See 25 U.S.C. § 2704(b)(3).

145. See id. at 127.
146. See id. at 154. The committee also found that in a much larger number of cases, support from Congress was one of several major factors involved in the appointment decision. See id.
147. See, e.g., Senate Comm. on Commerce, 94th Cong., Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission (1949-1974) 391 (Comm. Print 1976) (stating the extent to which partisan political considerations dominated Commission appointment process was “alarming” given that “other factors—such as competence, experience, and even, on occasion, regulatory philosophy—are only secondary considerations”).
Article II, section 2, clause 3 of the Constitution authorizes the President to fill vacancies while the Senate is in recess regardless of whether a vacancy was unfilled when the recess began or arose during the recess. As a practical matter, Congress has confined the President’s recess appointment powers through the appropriations process. Section 5503 of Title 5 of the U.S. Code prohibits payment to recess appointees except in three circumstances: if (1) the vacancy occurred within thirty days of the end of a congressional session; (2) a nomination was pending when the Senate recessed; or (3) a nomination was rejected within thirty days before a recess and another individual receives the recess appointment. Therefore, there may be some situations where the President has the constitutional power to make a recess appointment but must find a recess appointee willing to work without receiving monetary compensation.

3. Removal from Office

The Constitution does not address, in express terms, the respective roles of the President and Congress with respect to the removal of federal officers. Whether Congress may, by legislative enactment, limit or restrict the President’s removal power grew to be the subject of great debate and the
source of the conflict that led to the impeachment trial of President Andrew
Johnson. 150

Several early cases upheld the authority of the President to remove sub-
ordinates. The Supreme Court in Parsons v. United States determined that
the President could remove a district attorney for the good of the country
although he was appointed to a four year term. 151 In Shurtleff v. United
States, the Supreme Court upheld the validity of the President’s removal of
a member of a board of appraisers that was established by Congress. 152
Congress had provided for removal only for inefficiency, neglect of duty,
or malfeasance in office but the court reasoned that the President’s general
power of appointment provided justification for removal of the officer. 153
These cases forecasted the court’s later decision in Myers v. United
States. 154

The issue of removal received judicial examination in a trilogy of well-
known 20th century Supreme Court decisions. In the first, Myers v. United
States, the Court concluded that the President’s power to appoint carries
with it the power to remove. 155 Chief Justice Taft’s opinion for the major-
ity, and the dissenting opinions, extensively reviewed the history of the is-

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150. Interestingly, congressional debates over the establishment of the ICC contain very
little discussion about removal power and the influence the executive branch would have
over the agency. Rather, the removal clause contained in the 1887 Act to Regulate Com-
merce was included as a safeguard against unwanted commissioners. See CUSHMAN, supra
note 10, at 61-62.

151. 167 U.S. 324, 343 (1897); see also Bruce Y. Curry, Note, President’s Power of
Removal—Consent of United States Senate: Myers v. United States, 6 OR. L. REV. 165, 166-
67 (1926-1927) (citing Parsons in a piece analyzing then recently decided case of Myers).

152. 189 U.S. 311, 318-19 (1903) (holding that President had power to remove official
on grounds other than those specifically mentioned in Customs Administrative Act).

153. See id.

154. 272 U.S. 52 (1926); see also Curry, supra note 151, at 166.

155. Myers, 272 U.S. at 176 (holding invalid a statute that prevented the President from
removing executive officers who had been appointed by him).

156. Id. at 119.
cause” limitation on the President’s removal power over a commissioner of 
the Federal Trade Commission.\textsuperscript{157} The Court distinguished between an 
“administrative body” that performed “quasi-legislative” and “quasi-
judicial” functions, where such limitation was found permissible, and agen-
cies that were “an arm or an eye of the executive,” where such limitation 
was not permissible.\textsuperscript{158} It concluded that an official who performed “purely 
executive” duties was subject to the President’s unqualified removal power, 
but an official whose duties were commingled between the branches en-
joyed a measure of independence which was provided by restricting the 
President’s removal power.\textsuperscript{159} The Court, however, did not explain 
whether a position was “purely executive” because of its placement within 
the executive branch or because of the nature of the position.

Finally, in \textit{Wiener v. United States}, the court invalidated President 
Eisenhower’s removal of a member of the War Claims Commission on the 
ground that there existed a “for cause” limitation on the President’s re-
moval power despite the lack of an explicit statutory condition.\textsuperscript{160} The 
court determined that Congress had intended the commission to perform 
adjudicative functions, not “purely executive” functions, and that therefore 
the President was precluded from exercising unfettered removal power.\textsuperscript{161}

The more recent decision in \textit{Morrison v. Olson},\textsuperscript{162} involving the in-
dependent counsel statute, has modified the analysis. The Court re-examined 
the underpinnings of \textit{Myers} and \textit{Humphrey’s Executor} and made it clear

\begin{itemize}
\item \textsuperscript{157} 295 U.S. 602, 629 (1935).
\item \textsuperscript{158} \textit{Id.} at 628-29.
\item \textsuperscript{159} \textit{Id.} at 627-29.
\item \textsuperscript{160} 357 U.S. 349, 356 (1958).
\item \textsuperscript{161} \textit{See id.} at 352, 354-55; \textit{see also} Swan v. Clinton, 100 F.3d 973, 983 (D.C. Cir. 
1996) (relying on \textit{Wiener}, 357 U.S. at 353, for proposition that court may be able to infer 
congressional intent regarding presidential removal power from nature of the function 
vested in agency by Congress); FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. 
Cir. 1993) (agreeing that good cause limitation may be implied by agency’s structure and 
mission and presence of statutory term of office); SEC v. Blinder, Robinson & Co., 855 
F.2d 677, 681-82 (10th Cir. 1988) (concluding that Congress can limit the grounds for 
presidential removal of a member of a multi-member regulatory agency to inefficiency, ne-
glect of duty, or malfeasance in office); SEC v. Bilzerian, 750 F. Supp. 14, 16 (D.D.C. 
1990) (“While the Act does not expressly give the President the power to remove a commis-
sioner, it is generally accepted that the President may remove a commissioner for ine-
efficiency, neglect of duty, or malfeasance in office.”) (citation omitted). A Congressional Re-
search Service official suggests that there are at least 13 “independent” agencies without a 
removal provision in their statutes. \textit{See Reviewing the Performance of the Social Security 
Administration as an Independent Agency: Hearing Before the Subcomm. on Social Security 
of the House Comm. on Ways and Means}, 104th Cong. 12 & n.19 (1996) (testimony of Ro-
gelio Garcia, Congressional Research Service) [hereinafter \textit{SSA Hearing}].
\item \textsuperscript{162} 487 U.S. 654 (1988).
\end{itemize}
that neither the organizational structure and placement of the agency nor the duties of an agency official per se affect Congress ability to confer some measure of independence by restricting removal power functions. Rather, the issue is whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to see that the laws are faithfully executed.

After Morrison, the fact that a presidential appointee performs any executive functions no longer automatically immunizes that official from congressional efforts to restrict the President's removal power. Nor is it critical that such appointee serves on a multi-member board "outside" the executive branch—which is logical since the first "independent" official of government, after all, was the Comptroller of the Treasury Department. Although Morrison dealt with an "inferior" officer, i.e., one not appointed by the President with the advice and consent of the Senate, both Humphrey's Executor and Wiener dealt with the President's removal power over officers appointed by the President and confirmed by the Senate. Thus, there are issues that will be argued in the future, but for now, the legitimacy of the independent agency has been validated.

There are other issues concerning removal power other than the scope of the President's authority. Agency statutes are typically silent as to (a) a definition of the statutory grounds for removal or (b) what procedures must be followed before a President may remove a member of an independent agency for cause.

a. Grounds for Removal

The Act to Regulate Commerce of 1887 contained the prototype removal provision that has been used in most agency enabling statutes. It provides that agency members can only be removed by the President for "ineffi-
ciency, neglect of duty, or malfeasance in office." There is no accepted definition of these statutory terms. Nonetheless, it now seems clear that the ICC Act, and those successor statutes that used it as a model, constrain to some degree the President's power to remove officials without either reason or explanation.

The precise contours of the President's power in this regard are less than clear. In its Wiener decision, the court suggested that removal for cause had to involve "the rectitude" of the government official. In Humphrey's Executor, the President had expressly requested Humphrey's resignation because the commissioner's views did not coincide with those of the President on "either the policies or the administering of the Federal Trade Commission." The court at least impliedly concluded that such ground was not embraced within a "for cause" standard. However, in Bowsher v. Synar, the Supreme Court noted that the terms are "very broad." Professors Lessig and Sunstein suggest that, contrary to conventional wisdom, the "for cause" provisions can be interpreted to allow a President to remove an independent agency member under a broad array of circumstances, including a commissioner's frequent or important failure to follow the President's wishes with respect to what is required by sound policy. Professor Peter Strauss argues that the President's request for Humphrey's resignation was "founded in failure of trust, not breach of discipline," so the case does not fully answer the question of what consequences might follow from a commissioner's failure to honor specific presidential policy directives. He

169. See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 110 (1994) (noting that the Supreme Court has failed to define "inefficiency, neglect of duty, or malfeasance in office").
170. See Humphrey's Ex'r v. United States, 295 U.S. 602, 619 (1935) (quoting President telling FTC commissioner whom he wanted to remove that "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and . . . I think it best for the people of this country that I should have a full confidence."). The President may plainly remove certain officials, such as Cabinet secretaries, for no reason and without explanation. Myers v. United States, 272 U.S. 52, 134 (1926). See generally SCHWARTZ, supra note 120, § 1.9, at 19 ("The President has absolute removal power over the executive departments . . .").
171. Wiener, 357 U.S. at 356.
172. Humphrey's Executor, 295 U.S. at 619 (internal quotations omitted).
174. See Lessig & Sunstein, supra note 169, at 110-11.
175. Strauss, supra note 5, at 615. Strauss appears prepared to concede that Congress may "forbid unilateral presidential removal for 'no reason at all'" if the official is "principally an adjudicator." Id. at 615-16. Plainly, the nature of an official's duties affect whether a President may remove him summarily. See Wiener, 357 U.S. at 354-56 (ruling that adju-
suggests that a court might sustain removal of an independent agency member for a refusal to follow certain presidential directives, such as a directive to perform a requested economic analysis of a proposed regulation.\textsuperscript{176} Professor Laurence Tribe observes that:

Statutes that permit removal of agency officers for such “causes” as “neglect of duty” might . . . be construed to “sustain removal . . . for any number of actual or perceived transgressions of the [removing authority’s] will.” . . . thereby avoiding the question whether Congress could constitutionally insulate such officers from all political accountability by making them removable only for such politically “neutral” causes as dishonesty.\textsuperscript{177}

Occasionally, Congress departs from using the archetypal removal clause and uses slightly different formulations without any apparent intent to alter the fundamental criteria for removal. For example, the statute governing the National Indian Gaming Commission employs the language “neglect of duty, or malfeasance in office, or for other good cause shown”—a hint, at least, that Congress sees neglect of duty and malfeasance in office as illustrations of a generic “good cause” ground for removal. Some agency statutes are silent with regard to the President’s power to remove agency members from office.\textsuperscript{179} But since the court in \textit{Wiener} read into a silent statute a limitation on the President’s removal power because of the agency’s intrinsic adjudicatory character,\textsuperscript{180} it can be fairly assumed that the absence of “for cause” removal language does not automatically preclude the imposition of such a limitation.

\textsuperscript{176} See Strauss, \textit{supra} note 5, at 667 n.402. Moreover, a President’s inability to remove a member of an independent agency need not imply, as Strauss points out, that “total removal of the FTC as a policymaking organ of government from presidential oversight or control would be within [Congress’s] power.” Strauss, \textit{supra} note 5, at 616. The Administrative Conference of the United States endorsed the notion of presidential review of rule-making initiatives of independent agencies. \textit{See} Recommendation 88-9, \textit{Presidential Review of Agency Rulemaking}, 54 Fed. Reg. 5207 (1989).

\textsuperscript{177} \textsc{Laurence H. Tribe, American Constitutional Law} \S 4-10, at 254 n.45 (2d ed. 1988) (quoting Bowsher, 478 U.S. at 728).


\textsuperscript{180} \textit{See Wiener}, 357 U.S. at 354-56.
b. Procedures for Removal

Most agency statutes are silent on what procedures (if any) the President must follow before removing an agency member from office for good cause.\textsuperscript{181} However, as early as the turn of the century, the Supreme Court indicated that "for cause" appointees were entitled to notice and hearing before they could be removed from office.\textsuperscript{182} The Supreme Court's due process jurisprudence of the 1970s does nothing to undermine this conclusion. An agency member's constitutional claim depends on having a property right in continuing employment.\textsuperscript{183} Job security created by statute has been held to be a property right.\textsuperscript{184} Thus, if the member has a statutory right to continued employment, he or she cannot be deprived of the job without due process.\textsuperscript{185} However, that jurisprudence also teaches that due process requires only "such procedural protections as the particular situation demands."\textsuperscript{186} Generally, something less than a full APA-style evidentiary hearing is sufficient to satisfy constitutional requirements.\textsuperscript{187}

\begin{itemize}
    \item \textsuperscript{181} See, e.g., 42 U.S.C. § 5841(e) (1994) (Nuclear Regulatory Commission).
    \item \textsuperscript{182} See Shurtleff v. United States, 189 U.S. 311, 313-14 (1903) (concluding that where removal is sought pursuant to statute for "inefficiency, neglect of duty, or malfeasance in office... the officer is entitled to notice and a hearing"); Reagan v. United States, 182 U.S. 419, 425 (1901) (stating that where causes of removal are specified by Constitution or statute, "notice and hearing are essential"). In Shurtleff, the court also determined that inclusion of explicit causes for removal did not, in the context of that statute, prevent the President from removing the individual for other reasons. However, the court hinged that aspect of its decision on the lack of any fixed term of office. A different construction of the statute, Justice Peckham observed, would "give an...[official] the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected..." Shurtleff, 189 U.S. at 316. That is no longer an issue under modern statutes. Members of independent agencies all serve for a fixed term.
    \item \textsuperscript{183} See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77 (1972).
    \item \textsuperscript{184} See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (ruling that persons classified as civil servants under state law who could only be terminated for cause possessed a property right in job security); cf. Shurtleff, 189 U.S. at 314 (stating that an individual appointed by the President with advice and consent of the Senate who may only be removed for "inefficiency, neglect of duty, or malfeasance in office" qualifies for due process protections).
    \item \textsuperscript{185} See Goss v. Lopez, 419 U.S. 565, 573 (1975) ("[A] state employee who under state law... has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process.") (citations omitted).
    \item \textsuperscript{186} Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Under the now-familiar test set out in Mathews v. Eldridge, 424 U.S. 319 (1976), the Court determined that the specific procedures due process requires is a balancing of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest
The National Labor Relations Act, and the Federal Labor Relations Act (FLRA) which was modeled after it, expressly provide that agency members of the NLRB and FLRA may be removed only "upon notice and hearing." 188 The statute governing the Board of Veterans' Appeals is also an anomaly. It creates different procedural requirements depending on which member is sought to be removed. The chairman may only be removed by the President for specified cause, while other members of the board may be removed by the Secretary of Veterans Affairs for poor performance or other causes. The chairman may be removed only "after notice and opportunity for hearing," 189 while other board members may be removed either following a specific set of statutorily-delineated procedures, if removal is based on performance, or after an Administrative Procedure Act (APA) hearing, if removal is based on other causes. 190

Neither the "notice and hearing" requirement contained in the NLRB, FLRA, and Board of Veterans' Appeals statutes, nor due process considerations require the President to follow the strictures contained within the APA. The APA is applicable only when an adjudication is "required by statute to be determined on the record after opportunity for an agency hearing." 191 None of the agency statutes that provide for "notice and hearing" uses the talismanic "on the record" formulation, and the Supreme Court attaches some significance to it. 192 Although the lack of the "on the record" language is not dispositive, 193 the omission of the phrase may be construed as evidence that Congress intended for something other than an APA hearing. 194 In fact, in the Board of Veterans' Appeals statute, Con-

through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the administrative and financial burdens to the government of additional or substitute procedures. See id. at 335.


190. See id. § 7101A(e).


192. See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972) (observing in a case involving a rulemaking proceeding that APA hearing requirements apply "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be on the record") (internal quotation marks and citations omitted).

193. See Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981) (requiring APA hearing despite lack of "on the record" language); United States v. Florida East Coast Ry. Co., 410 U.S. 224, 238 (1973) (stating that lack of magic words is not determinative if the statute contains "other . . . language having the same meaning").

194. See Railroad Comm'n of Tex. v. United States, 765 F.2d 221, 227 (D.C. Cir. 1985)
gress used the term “notice and opportunity for a hearing” with respect to the board’s chairman, but specifically provided for an “APA hearing” for other board members in certain circumstances—which is some evidence, at least, that the requirement of “notice and hearing” probably means something different than an APA hearing.195 Perhaps more important from a constitutional perspective, the Supreme Court has determined that, absent some express statement by Congress, the President is not to be considered an “agency” for purposes of the APA,196 so APA procedures are presumptively inapplicable.

Few examples of appropriate procedures are available, in large part because regulatory commissioners generally acquiesce to a President’s request that they resign, fail to challenge their removal, or negotiate some

195. See 38 U.S.C. §§ 7101(b)(2), 7101A(e)(2) (1994); see also Duquesne Light Co. v. EPA, 698 F.2d 456, 481-82 (D.C. Cir. 1983) (determining use of term “public hearing” in one place in statute and hearing “on the record” in another evinces a congressional intent that less formal procedures suffice under public hearing requirement). At least one court has interpreted “opportunity for” language to require an APA hearing. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978). But the more recent trend is to examine the type of hearing right Congress intended to create in each situation. See Friends of the Earth v. Reilly, 966 F.2d 690, 693 (D.C. Cir. 1992); see also Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 Tulsa L.J. 221, 232 n.70 (1996) (“T[he occasions where an evidentiary hearing is required seem to be steadily diminishing.”); William Funk, Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties, 24 Seton Hall L. Rev. 1, 20-21 (1993) (stating that statutory “notice and opportunity for hearing” language need not necessarily trigger a formal hearing before an administrative law judge). Given the circumstances, especially the distinction between the method of removal of the Chairman and other Board members, it seems almost certain that Congress intended to accord the Board Chairman hearing rights akin to those provided other independent agency officials across the government.

196. See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”). Cf. Public Citizen v. DOJ, 491 U.S. 440, 465-67 (1989) (applying Federal Advisory Committee Act to committee that advises President in connection with his constitutional appointment powers would raise serious separation of powers questions).
face-saving exit. Former Civil Aeronautics Board chairman Robert Timm was advised that the White House Counsel’s Office was planning to hold a “hearing” on his activities while in office for the purpose of determining whether he should be removed from office for cause. The hearing was characterized as an “evidence-gathering inquiry” to be presided over by the counsel to the President. Mr. Timm thereafter resigned.

The procedures proposed in the Timm case satisfy due process prerequisites. In Cleveland Board of Education v. Loudermill, due process was satisfied where a dismissed public employee received notice of the charges against him, an explanation of the supporting evidence, and a chance to present his side of the story. The fact that a senior subordinate official—here the Counsel to the President—actually hears the evidence, does not violate due process.

197. See, e.g., Paul R. Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 COLUM. L. REV. 943, 955 & n.74 (1980) (noting that threat of removal is effective method of obtaining resignations from commissioners, and speculating that Presidents have in past and might in future require commissioner to provide signed resignation in advance of appointment as means of circumventing for cause removal restrictions). President Nixon removed Raymond Lapin from his post on the Federal National Mortgage Association (Fannie Mae) at a time when Fannie Mae was part of the Treasury Department and directors could only be removed by the President for cause. Lapin briefly challenged his ouster in court but dropped the suit two months later. See Eric Pace, Raymond H. Lapin, 67, Dead: Fought Nixon at Fannie Mae, N.Y. TIMES, Apr. 6, 1986, at A38.

198. See In re Robert D. Timm, 223 Ct. Cl. 639, 639 (1980); see also Timm Resigns, Hits White House Staff, AVIATION WK. & SPACE TECH., Dec. 15, 1975, at 28. President Franklin Roosevelt actually met personally with the members of the Tennessee Valley Authority (TVA) before removing one of its members. TVA members were appointed by the President to a fixed term, with the advice and consent of the Senate, but did not have “for cause” protection and were removable by the President summarily. See Morgan v. TVA, 115 F.2d 990, 991, 992-94 (6th Cir. 1940).


200. See id. at 546; cf. Duke Power Co. v. Nuclear Regulatory Comm’n, 770 F.2d 386, 389 (4th Cir. 1985) (stating that for informal agency adjudication, Commission did not have to hold formal hearing with trial-type procedures but could rely on informal hearing in which written factual and legal materials were submitted); Independent U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 922-23 (D.C. Cir.1982) (requiring agencies in informal adjudications to provide “some opportunity for interested parties to be informed of and comment upon the relevant evidence before the agency”); Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding in case involving student’s ten-day suspension from school that student had to be “given an opportunity to explain his version of the facts” after being told “what he is accused of doing and what the basis of the accusation is”).

201. See Morgan v. United States, 298 U.S. 468, 481-82 (1936) (stating that evidence need not be taken by deciding official but may be received and analyzed by “competent subordinates,” provided that deciding official considers that evidence in making final decision); cf. Duke Power Co., 770 F.2d at 390 (approving informal presentation to staff which
A final and intriguing question is what remedy lies if an independent agency member is removed improperly. Can he or she sue the President for reinstatement? In *Franklin v. Massachusetts*, the Supreme Court held that the President is not ordinarily considered an “agency” for purposes of the APA so that statute does not serve to waive general principles of sovereign immunity. However, there may be other statutory avenues. The D.C. Circuit has concluded that, pursuant to 28 U.S.C. § 1361, it can exercise mandamus jurisdiction over the President “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

4. **Submissions to Congress**

Since the 1920s, the executive branch, through the Bureau of the Budget (which was succeeded by the Office of Management and Budget, or OMB) has asserted the authority to review legislation proposed by agencies, testimony and comments to be offered by agencies regarding pending legislation, and agencies’ budgetary proposals. The clearance process, although lacking a direct statutory basis, has evolved, in the words of Professor Richard Neustadt, as “a long series of ‘accidental,’ unforeseen accretions.” The Budget and Accounting Act of 1921 created the Bureau of the Budget and directed executive branch agencies to transmit their...
budget estimates to the President for inclusion in an overall federal budget request.\textsuperscript{206} Prior to passage of the Act, all agencies, including the ICC, submitted their budgets directly to Congress,\textsuperscript{207} and the independent agencies resisted the executive’s attempts to review their proposals.\textsuperscript{208} Even after its passage, independent agencies continued to submit their budget requests directly to Congress until statutory amendments enacted in 1939 made it clear that independent agencies were included within the purview of the Act.\textsuperscript{209}

By the 1970s, Congress, presumably desirous of giving independent agencies additional statutory bases for their resistance, changed its strategy. Thereafter, provisions were placed in specific acts that allowed selected agencies to submit their budget proposals, legislative proposals, or views on legislation directly to Congress without clearance.\textsuperscript{210} This authority prevents OMB from demanding changes in the agency’s proposals, but allows the administration to comment subsequently on the agency’s presentation. Other statutes require that an agency’s legislative proposals be transmitted simultaneously to Congress and the President.\textsuperscript{211} The concurrent submission provision does not, on its face, prohibit OMB from suggesting (or even requiring) changes, but ensures that Congress will be apprised of the agency’s original position. Some statutes have a mix of these procedures.\textsuperscript{212} Five agencies, although lacking express statutory authority, send communications to Congress without submitting them first to OMB. They appear to assert their historic status as independent regulatory agen-


\textsuperscript{207} See Neustadt, supra note 204, at 643.

\textsuperscript{208} Robert L. Calhoun, former legislative counsel to the ICC, notes that during the 1930s, President Roosevelt, following a meeting with ICC Chairman Eastman, simply requested the ICC’s cooperation in the clearance process. By the time Calhoun became legislative counsel, the practice was for the ICC simply to provide a copy of its legislative views immediately after it submitted them to Congress. See Robert L. Calhoun, The Interstate Commerce Commission, 1912-1937, 16 Transp. L.J. 59, 67 (1987-1988).


INDEPENDENT FEDERAL AGENCIES

5. Litigation Authority

Currently, except as otherwise authorized by statute, the conduct of the federal government’s litigation rests with the Attorney General. However, Professor Neal Devins has correctly observed that “[t]he reach of the Department of Justice control in general and Solicitor General control in particular is ill-suited to generalization.” Congress has authorized various independent agencies to represent themselves in court in certain situations. As Professor Moreno points out, control over litigation was a much debated issue when the ICC was created. The original Act to Regulate Commerce placed the enforcement of ICC orders in the hands of the federal district attorneys, under the direction of the Attorney General. The 1889 amendments left the ICC’s litigation relationship with the Justice Department unchanged. But statutory changes in 1906 divided litigation responsibility between the agency and the executive branch. The Justice Department retained responsibility for ICC orders involving the payment of money, while the commission obtained authority “in its own name” to seek enforcement of all other orders. Under the currently effective Adminis-


214. See id. at 14 & nn.33-34.


217. See Moreno, supra note 60, at 502-03.


220. See Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 584, 591 (amending section 16 of the 1887 act). Changes to the statute governing the courts in 1911 created some ambiguity over the ICC’s overall litigation authority. The changes enacted clearly gave the Attorney General litigation authority over cases in the Commerce Court (which then included enforcement of all ICC orders other than those for the payment of money), but it gave the ICC the right to appear as a party through its own lawyers in all cases involving the validity of ICC orders and to represent itself in the Supreme Court when the Solicitor General declined to do so. Act of Mar. 3, 1911, ch. 231, § 212, 36 Stat. 1087, 1150-51. The FTC has similar authority. See Devins, supra note 216, at 275 & n.103 (discussing the relationship between
tive Orders Review Act (commonly known as the Hobbs Act), the ICC's successor agency—the Surface Transportation Board (STB)—may intervene in any court proceeding in which one of its orders may be enjoined, set aside, or suspended, including cases in the Supreme Court, without regard to the action of the Attorney General.\textsuperscript{221}

In addition to the STB, the Hobbs Act also provides that as parties whose interests may be affected if one of their orders is or is not enjoined, set aside, or suspended, the FCC, NRC, and FMC may also intervene in any proceeding to review such an order, including cases in the Supreme Court, without regard to the action of the Attorney General.\textsuperscript{222} The SEC, Equal Employment Opportunity Commission (EEOC), and FERC have authority to litigate in the courts of appeals, and the CPSC has authority to litigate in the district court.\textsuperscript{223} As Professor Devins indicates, "there are several agencies whose arrangements are so complex that they defy description."\textsuperscript{224} [The] patchwork nature of independent agency litigating authority is rooted in historical and organizational bases.\textsuperscript{225}


223. See Devins, \textit{supra} note 216, at 278-79 & nn.122-29 (summarizing litigating authority of various independent agencies).

224. Devins, \textit{supra} note 216, at 279. For example, in \textit{FEC v. NRA Political Victory Fund}, 513 U.S. 88, 98-99 (1994), the court dismissed the FEC's petition for certiorari and denied the agency the right to represent itself before the Supreme Court. The court determined that the FEC's enabling statute did not provide the agency with independent litigation authority. As a result, the DOJ now wields complete power to prosecute campaign finance abuses and enforce federal election laws. Absent an express delegation of independent litigation authority contained within an agency's enabling statute, other independent agencies may find that the litigation authority they previously enjoyed has been eliminated. See \textit{generally} Alane Tempchin, Note, \textit{Fall From Grace: Federal Election Commission v. NRA Political Victory Fund and the Demise of the FEC's Independent Litigating Authority}, 10 ADMIN. L.J. AM. U. 385, 398-99 (1996).

225. Devins, \textit{supra} note 216, at 279. Even at those agencies that have some form of independent litigation authority, the Department of Justice frequently conducts litigation in those cases that involve issues unrelated to the agency's substantive mission but common to all departments and agencies, such as Freedom of Information Act cases, damage actions against agency officials, and suits involving personnel matters. See \textit{infra} Appendix (e.g.,
B. Theories

1. Theory of the Unitary Executive v. Functionalism

The constitutionality of the independent agency was not an issue of considerable debate until many decades after the establishment of the ICC. The Progressive and New Deal eras saw the proliferation of many new independent agencies that wielded considerable power. This induced many scholars to speculate on the constitutionality of agencies seemingly located outside the reach of the executive branch. Within the past few decades, there has been a resurgence of efforts to centralize the executive functions. As a result, debates concerning issues of separation of powers have proliferated once again.

Some commentators view the independent agency as analytically unconstitutional. The rejection of the notion of agency independence flows naturally from the "theory of the unitary executive," sketched out first in


227. Both the constitutional and policy aspects of the President’s role as head of the executive branch, and the resultant concept of a "unitary executive," are much discussed in the literature. There appear to be as many theories and answers as there are commentators. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REv. 1153, 1158 & n.10 (1992) (indicating that constitutional text supports theory of unitary executive, but acknowledging that there are several versions of theory); Colin S. Diver, Presidential Powers, 36 AM. U. L. REV. 519, 519 (1987) ("[T]he history of the administrative state is an unending contest between Congress and the President for control of the bureaucracy."); Frank H. Easterbrook, Unitary Executive Interpretation: A Comment, 15 CARDOZO L. REv. 313, 316, 321 (1993) (appearing to endorse unitary executive on policy grounds but accepting lack of constitutional precision about actual government operation); Lessig & Sunstein, supra note 169, at 2-4 (contending that although theory of unitary executive has no foundation in early constitutional practice, modern constitutional interpretation supports strong unitary executive); Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 CARDOZO L. REv. 201, 201-02 (1993) (arguing that presidential control of agencies goes from weak to strong along continuum that depends on functions and role of particular agencies); David B. Rivkin, Jr., The Unitary Executive and Presidential Control of Executive Branch Rulemaking, 7 ADMIN. L.J. AM. U. 309, 309-10 (1993) (arguing that
Hamilton's classic discussion of executive power, The Federalist No. 70.\textsuperscript{228} The unitary theory is derived from the "Vesting" and "Take Care" Clauses of Article II of the Constitution. Unitary theorists understand the Vesting Clause, which provides that "[t]he executive Power shall be vested in a President,"\textsuperscript{229} to mean that executive power is vested only in the President, so Congress is precluded from placing agencies outside the executive branch. Furthermore, these theorists believe that the President himself must undertake those enumerated powers explicitly granted by the Constitution, and in general "take Care that the Laws be faithfully executed."\textsuperscript{230} The argument suggests that this duty can be discharged only if those federal agencies that perform traditionally executive functions are understood to be agents of the President and responsible to him. Any other structure, the argument runs, would undermine accountability and thus collapse the notion that "the buck stops here."

Proponents of a unitary executive view the federal bureaucracy as a pyramid, with the President as the responsible official at the top. Although unitary theorists differ in varying degree over the extent of the President's executive power,\textsuperscript{231} there is consensus that the power to remove subordinates who do not follow the President's directives, or in whom he no longer has confidence, is vital to his supervisory ability and authorized by the Constitution.\textsuperscript{232} Under the rubric of the "unitary executive" theory, courts, both constitutional and policy considerations support unitary, elected, visible executive); Rosenberg, \textit{supra} note 117, at 634 (arguing that unitary executive lacks substantial constitutional basis and "subverts our delicately balanced scheme of separated but shared powers"); Strauss, \textit{supra} note 5, at 667 (rejecting notion of any "neat division" of government functions); Cass R. Sunstein, \textit{The Myth of the Unitary Executive}, 7 ADMIN. L.J. AM. U. 299, 300-01 (1993) (arguing that theory of unitary executive is not supported by early constitutional history). \textit{But see} Calabresi & Yoo, \textit{supra} note 17 (supporting unitary executive on historical grounds). This list does not pretend to exhaust the literature.

\textsuperscript{228} \textit{The Federalist} No. 70, at 199 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981) ("The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers. . . . This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him.").

\textsuperscript{229} U.S. CONST. art. II, § 1, cl. 1.

\textsuperscript{230} \textit{Id.} § 3.

\textsuperscript{231} \textit{See, e.g.}, Calabresi & Rhodes, \textit{supra} note 227, at 1165-68 (discussing varying unitary theory models).

\textsuperscript{232} \textit{See, e.g.}, Rosenberg, \textit{supra} note 117, at 634 (arguing that Congress has "virtually plenary power to create the administrative bureaucracy and to shape the powers, duties, and tenure of the offices and officers of that infrastructure in a manner best suited to accomplish legislative ends"); Peter L. Strauss, \textit{Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?}, 72 CORNELL L. REV. 488, 494-95 (1987) (de-
as in *Wiener,* have tended to exempt only those agencies possessed of some semblance of adjudicatory function from "at will" removal. Indeed, as one earlier commentator has suggested, "[w]here, in addition to their other functions, these commissions have been entrusted with judicial power, there has been a noticeable tendency to justify their independent position in terms of that power alone."233

Some scholars oppose the premise of the unitary executive and instead embrace a notion of broad congressional power that justifies divesting the President of unqualified executive power. They maintain that the Necessary and Proper Clause234 grants to Congress the power to structure the executive department and insulate subordinate officers from unfettered removal power of the President. "[T]he non-unitarians offer various functionalist theories of executive power that they believe better comport with the historical data, the Supreme Court’s caselaw, and the relevant structural concerns."235

For a period of time, it did appear that the constitutionality of the independent agency was under siege.236 In *Buckley v. Valeo,*237 the Court invalidated a portion of the Federal Election Campaign Act because it violated the doctrine of separation of powers.238 The legislation contained a provision that provided for congressional appointment of several members to the Federal Election Commission. The court deemed this bequest of authority unconstitutional for violating the powers assigned to the President in Article II of the Constitution.239 In September, 1985, then Attorney

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235. Calabresi & Rhodes, supra note 227, at 1170. See also Martin S. Flaherty, Re-learning Founding Lessons: The Removal Power and Joint Accountability, 47 CASE W. RES. L. REV. 1563, 1566 (1997) (arguing that historical record does not evince consensus at time of founding in support of presidential removal power, and that evidence tends more toward opposition to such power).

236. See, e.g., Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1392 (7th Cir. 1986) (noting that petitioner’s argument, if accepted, would result in every independent agency being declared unconstitutional); Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747, 751 (D.D.C. 1986) (stating that plaintiff’s challenge to constitutionality of the FTC as independent agency raised “a serious and substantial issue of considerable public importance” that “has never been fully adjudicated”). But see FTC v. American Nat’l Cellular, Inc., 810 F.2d 1511, 1517 (9th Cir. 1987) (Tang, J., concurring) (upholding the enforcement power of the independent agency).


238. See id. at 140-41.

239. See U.S. CONST. art. II, § 2, cl. 2. The President may, with the advice and consent of the Senate, appoint and commission “Officers of the United States.” See also *Buckley,*
General Meese suggested, in a speech to the Federal Bar Association, that "[t]he real lawmaking power in Washington is wielded . . . by relatively anonymous members of the federal agencies." These officials, he argued, are accountable to neither the President nor Congress. "It should be up to the President to enforce the law," the Attorney General declared. "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government." Mr. Meese urged that "[w]e should abandon the idea that there are such things as 'quasi-legislative' or 'quasi-judicial' functions that can be properly delegated to independent agencies."

During the following year, in Bowsher v. Synar, the court overturned a provision of the Gramm-Rudman-Hollings Act that gave the Comptroller General, who was removable only by Congress, the authority to review certain actions of the executive branch. The court categorized the Comptroller General as an agent of Congress and concluded that the delegation was an unconstitutional retention of executive power by Congress. During oral argument, the Solicitor General told the justices that the proponents of the constitutionality of the challenged Gramm-Rudman-Hollings Act were trying to "scare" them with the argument that upholding the lower court on the constitutional issue would endanger the independent agencies, such as the FTC and the Federal Reserve Board. At this, Justice O'Connor interposed: "They scared me with it."

In Morrison v. Olson, Mr. Meese won his linguistic battle over "quasi-legislative" and "quasi-judicial" functions. The Morrison court discarded the concept of "quasi-legislative" or "quasi-judicial" functions as a valid predicate for independence. It determined that such definitional distinctions, as earlier espoused in Humphrey's Executor, were no longer signifi-

424 U.S. at 140-41.
241. Id.
245. See id. at 731.
246. See id. at 726.
248. Id.
Rather, the court concluded that the issue was whether the "for cause" provision impermissibly interfered with the President's exercise of his executive power or his constitutional duty to "take care that the laws be faithfully executed."251

By sustaining the "for cause" removal provision with respect to the independent counsel, the court seems to have ended, at least for now, any serious challenge to the applicability of the "for cause" provision to members of multi-member agencies.252 It may even have created a predicate for application of such provisions to some executive branch agencies as well. The question, at least for now, seems to be whether there has been an aggrandizement or encroachment that interferes with the execution of the President's duties.

While there is no doubt that Morrison creates a clear flow against executive power, it remains to be seen whether its legacy is the demise of formalist thinking regarding the executive power and independent agencies.253 Certainly, later courts have sustained the Morrison principle of resistance to legislative encroachment on traditional legislative functions. But one must be careful not to overread Morrison's independence principle. Morrison concerns a highly unusual fact pattern—a case in which the executive is being asked to investigate itself. Notwithstanding the untrammeled freedom of the independent counsel to undertake the prosecution

250. See id. at 688-91 (stating that analysis in previous removal cases was not designed to "define rigid categories of those officials who may or may not be removed at will by the President").

251. Id. at 689-90 (determining that good cause removal provision in statute does not impermissibly burden the President's ability to perform his constitutional duty because the independent counsel is an inferior officer whose duties are not central to the functioning of the executive branch and because the President still retains some removal authority). But see id. at 723-27 (Scalia, J., dissenting) (arguing that the majority rule would permit restrictions on the President's power to remove virtually any executive officer).

252. Professors Davis and Pierce believe that the door may not be closed entirely. In Freytag v. Commissioner, 501 U.S. 868 (1991), four justices criticized the court's Humphrey's Executor decision. Davis and Pierce observe that "Freytag illustrates the surprising extent to which the entire modern structure of government rests on an uncertain and controversial constitutional foundation." See Davis & Pierce, supra note 19, § 2.5, at 64. For a view that the debate over the President's removal power is really a "symbol of the struggle between Congress and the President for control over policy-making" with only "limited real-world significance," see Jonathan L. Entin, Synecdoche and the Presidency: The Removal Power as Symbol, 47 CASE W. RES. L. REV. 1595, 1601 (1997).

function (one traditionally executive), the counsel’s decision whether or not to prosecute by its very nature encompasses an adjudicative function as well.\textsuperscript{254} It must decide that there is enough evidence to warrant going forward. Thus, \textit{Morrison} may be understood as a narrow holding with exceedingly broad language—language upon which those who seek to expand the penumbra of independence rely inordinately at times.

2. \textit{Political Will Theory}

Some commentators believe that in order to understand how independent agencies operate, variables that impact upon agencies, other than their structural organization and indicia of independence, must be analyzed. Professor Neal Devins believes that the “the focus of agency analysis should encompass interbranch power and expectations as well as agency structure.”\textsuperscript{255} In his article, \textit{Political Will and the Unitary Executive: What Makes an Independent Agency Independent?}, Professor Devins claims that political will exerted by the President, Congress, and independent agencies invariably affects the outcome of power struggles, notwithstanding the independent structure of the agency. Devins discusses executive litigation control and compares the effect of political will in several recent controversies concerning litigation authority. His study demonstrates that a President, who adheres to a strong paradigm of the unitary executive and strategically exerts political will in an altercation, can be victorious, notwithstanding a structurally independent agency.

There is a theoretical debate among commentators over whose interests the DOJ should represent when it controls litigation. There are several models that serve to justify the respective views. Under the bureaucratic theory of representation—the most common model—the agency is the policy-making client and the DOJ acts as the agency’s advocate.\textsuperscript{256} Opponents of this model promote the theory of the unitary executive and maintain that the DOJ represents the policies of the President to secure a unified executive branch through policy coordination and centralization.\textsuperscript{257} Devins argues that while structural factors such as litigation and removal authority

\textsuperscript{254} This adjudicative function is highlighted if one examines a comparative decision not to prosecute—the decision of Israeli Attorney General Elyakim Rubenstein not to indict former Prime Minister Benjamin Netanyahu because he lacked sufficient evidence. \textit{See} Deborah Sontag, \textit{No Prosecution for Netanyahu in Graft Inquiry}, \textit{N.Y. Times}, Sept. 28, 2000, at A1.


\textsuperscript{256} \textit{See id.} at 279.

\textsuperscript{257} \textit{See id.}
often influence the choice of models, political will is the principal factor that determines which of these models will prevail.\textsuperscript{258} When the DOJ wields litigation authority, for example, the President can successfully implement his policies and coordinate the executive branch if he strategically exerts his will. Devins illustrates this point by comparing the different approaches adopted by the Carter and Reagan administrations. During the Carter administration, Attorney General Griffin Bell believed that the DOJ should advocate the position of the agency and took pains to shield the Solicitor General's office from White House political will.\textsuperscript{259} In sharp contrast, both Presidents Reagan and Bush forcefully exerted their will to centralize the executive branch, and during their administrations, the DOJ proved to be an effective conduit through which policy was implemented and advanced.\textsuperscript{260}

During the Reagan administration, a power struggle reflecting these conflicting philosophies arose between the EEOC and the DOJ.\textsuperscript{261} In 1983, the DOJ discovered that the EEOC was preparing to file an amicus brief in \textit{Williams v. City of New Orleans}\textsuperscript{262} in support of affirmative action, which contradicted a brief previously filed by the DOJ.\textsuperscript{263} Although the multi-member commission has authority to litigate certain employment discrimination issues involving private parties before lower federal courts, the DOJ has exclusive authority to litigate matters concerning state and local governments.\textsuperscript{264} The DOJ viewed the EEOC's amicus brief as an attempt to thwart its exclusive litigating authority.\textsuperscript{265} The situation was further complicated by the fact that the EEOC had been instrumental in ensuring that federal agencies implemented affirmative action plans under the Carter administration and that during the Carter administration, the Solicitor General had allowed the EEOC to file briefs conflicting with the DOJ's briefs.\textsuperscript{266} In contrast, the Reagan administration wanted the executive

\textsuperscript{258} See id.
\textsuperscript{259} See id. at 281 (quoting Bell saying that DOJ lawyers "must take care not to interfere with the policy prerogatives of our agency clients") (internal quotation marks and citation omitted).
\textsuperscript{260} See id.
\textsuperscript{261} See Devins, \textit{supra} note 255, at 285-92 (describing conflict between EEOC and DOJ).
\textsuperscript{262} 729 F.2d 1554 (5th Cir. 1984).
\textsuperscript{263} See Devins, \textit{supra} note 255, at 286-87.
\textsuperscript{265} See Devins, \textit{supra} note 255, at 287 (noting DOJ's view that executive branch should speak with one voice in civil rights cases involving state and local governments, and that DOJ was appropriate entity for expressing government's uniform position).
\textsuperscript{266} See Devins, \textit{supra} note 255, at 290. By Executive Order 12,067, President Carter
branch to speak in a unitary voice in matters that it considered of major importance, such as affirmative action. Faced with a DOJ opinion asserting sole litigating authority, the EEOC surrendered.267

An independent agency’s efforts to exert political will are bolstered by several tools it has at its disposal. Its organizational structure and enabling statute provide the agency with a measure of independent authority. The greater the authority allocated to the agency by Congress, the greater its freedom from the executive branch. Often, though, the measure of an independent agency’s political will is dependent upon the actions of Congress or the President, or their failure to intercede.268 A vigilant President will make it more difficult for an agency to effectuate its own policies. Likewise, if Congress chooses to, it can closely regulate an agency through legislation and oversight. Although Congress defines the parameters of the agency’s powers through legislation, it would be inefficient and perhaps even contrary to congressional self-interest to regulate agencies’ daily activities in this manner. For example, public choice theorists claim that members of Congress often seek to pacify and appease powerful special interest groups to ensure future campaign contributions and support.269 Agency action that is sympathetic to a given member’s contributors will be welcomed by that member. Thus, congressional relationships with interest groups may give an agency more flexibility and another source of political power.

In 1992, the United States Postal Service (Postal Service) was successful in thwarting the will of President Bush by strategically exerting its own political will. A dispute arose between the Postal Service and the Postal

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268. Devins suggests that “agency independence is necessarily qualified. Independence from the executive may mean dependence upon the Congress. Furthermore, independence from the executive[ ] may be temporal—depending on shifting White House attitudes towards unitariness or competing policy demands that yield disunitariness in interpretation.” Id. at 312.

Rate Commission concerning rate-making authority. The DOJ challenged the independence of the service and tried to position itself as arbiter between the entities to centralize the dispute. President Bush attempted to directly compel the service’s Board of Governors to acquiesce, and when that tactic failed, he threatened to remove the board members who refused to comply with his directive. Those board members sought an injunction against the President to prevent their removal, which was granted.

In this matter, the President failed in his attempts to unify the executive branch and stymie viewpoints contradictory to those of the DOJ and himself. Not only did he ignore the independent structure of the Postal Service, but he tried to “strong-arm” the board members after he lost the 1992 election.

One ought not read this incident, however, as reflecting a secular diminution of presidential control of agency behavior generally. The President was in the waning days of his administration and his political power was largely emasculated, a point which the board members used to their advantage. The decision to exert his authority when his political power was at its weakest was a grave tactical error. As a result, the executive branch’s constitutional authority was unable to overcome the structural barriers of the Postal Service.

III. INTERNAL AGENCY PROCEDURES

Despite objections to their constitutionality and recent administrations’ attempts to centralize the administrative state, the independent agency form will, in all likelihood, persist into the next century. In order to understand the contextual nature of how agencies understand their “independence,” it

270. See Devins, supra note 255, at 308.
271. See id.
272. See id. at 308 & n.171 (citing Letter from President George Bush to Bert Mackie, Governor, U.S. Postal Service (Jan. 4, 1993)).
273. See id. at 310.
274. See id. at 310-11. The structural barriers included limits on presidential removal power, the absence of a presidential role in selecting two of the Board members, and a statutory grant of independent litigation authority. See id. In 1981, the DOJ’s Office of Legal Counsel declined to bring the Postal Service within the reach of an executive order that gave the Attorney General authority to coordinate the enforcement of various antidiscrimination laws. See Status of the United States Postal Service as an “Executive Agency” Under Executive Order No. 12,250, 5 Op. Off. Legal Counsel 239, 240-41 (1981) (concluding that Postal Service was not an “executive agency” under Executive Order in part because Congress intended to “grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments”).
is instructive to review their internal operations. These internal procedures must not be inconsistent with explicit statutory requirements. Nonetheless, most have been developed and shaped by case law and custom or adopted from other agencies.

A. Institutional Decisionmaking

1. Powers of the Chair

There is no doubt that the chair of a multi-member agency is ordinarily its most dominant figure. Most agency chairs are appointed to their positions by the President and are members of his political party. They often come to an agency to advance the President's agenda—or their own—but some come with no agenda. Former Tariff Commissioner Dan H. Fenn observed:

The Chairman, when I was appointed, believed that the Commission should be quiet and unobtrusive. He liked to refer to [the agency] as a fire department, with its staff wrapping hoses and keeping the equipment in good repair against the day when the alarm would ring, when someone would knock on the door with a case to be considered. He might, some of us thought, have added that the first effort in such an event would be to persuade the petitioner to try some other firehouse down the street. 275

The legal relationship between the agency chairman and his or her colleagues is statutorily established but nonetheless ambiguous. 276 It is a fre-

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275. 1 Senate Comm. on Gov't Operations, Study on Federal Regulation, S. Doc. No. 95-25, at 17 (1977) (citation omitted) (alternation in original). One agency—the FEC—still selects its own Chairman and Vice Chairman annually. That commission decides uniquely partisan issues as part of its supervisory role over the election process and its participants. To help ensure that neither major political party can wrest management control of the Commission for a sustained period, Congress has provided that the chairmanship rotates among the members, that a commissioner may serve as Chairman only once during his or her term, and that the Commission's Chairman and Vice Chairman may not come from the same political party. See 2 U.S.C. § 437c(a)(3) (1994).

276. There is some variation in the rate of pay of members of independent agencies that appears to reflect both a rough congressional hierarchy of importance and idiosyncratic considerations. Generally speaking, chairmen are paid more than their colleagues. Presidential appointees are paid at one of five levels, with Level I being the highest. The Commissioner of Social Security is paid at Executive Level I, the same rate as cabinet secretaries. The Chairmen of the Federal Reserve Board and the NRC, are the highest-paid heads of multi-member agencies at Executive Level II. 5 U.S.C. § 5313 (1994 & Supp. IV 1998). As of January, 1997, officials at Executive Level II were paid $133,600. See Exec. Order No. 13,033, 3 C.F.R. 245 (1996), reprinted in 5 U.S.C. § 5332, at 252. Executive Level II is also the rate of pay for deputy cabinet secretaries and the Administrator of the Environmental Protection Agency. Most regulatory Commission chairmen are paid at Executive
quent source of interest to members at virtually every multi-member agency, particularly those who are new to the job, and can be a cause for contention. Although the respective powers of a chairman and the agency as an institution differ from agency to agency, most chairmen are essentially the agencies' chief executive and administrative officers. They appoint and supervise the staff, distribute business among the agency's personnel and administrative units, and control the preparation of the agency's budget and the expenditure of funds. 277 But that does not mean that the other agency members play no role in the agency's management or administration. Professor David Welborn points out:

One of the major difficulties is finding that delicate balance point at which the members generally are engaged in the large questions in a positive way, but without constricting the chairman in caring for his essential functions. There are no magic formulas for locating the balance. The evidence suggests, however, that the [agencies] almost never give systematic and focused attention to questions of balance, roles, and the quality of the working relationship between members and chairmen. In most of the agencies, the formal delineations of authority are imprecise. Even when definition has been attempted, substantial gray areas have been left.278

When Congress removed the ICC from the Interior Department in 1889, it gave the Commission as an institution substantive and organizational


277. See infra Appendix. Former FCC Chairman Reed Hundt has noted that, by tradition, the FCC Chairman worked with the staff to make tentative decisions that were then presented to his colleagues for approval. The Chairman's success was measured by whether he could get a majority of the Commission to support his decision. See HUNDT, supra note 127, at 13, 146-47.

278. DAVID M. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES 150 (1977). The Welborn book is a revision of a study of seven multi-member agencies prepared under the auspices of the Administrative Conference of the United States. Although it examines only agencies with regulatory functions, it has relevance, in our view, to all multi-member agencies. It attempts to analyze the "inner life" of multi-member agencies and addresses the relationship between institutional characteristics and substantive results. Chapter three is a survey of the relationship between the Chairman and his or her colleagues in the management of the agency.
powers, including the power to appoint officers and employees,\textsuperscript{279} establish procedures "as will best conduce to the proper dispatch of business and to the ends of justice,"\textsuperscript{280} and lease offices and purchase supplies.\textsuperscript{281} There was no provision outlining any particular powers of the Chairman. Indeed, the chairman was referred to only once in the statute: expenses were to be paid upon the presentation of itemized vouchers approved by the chairman.\textsuperscript{282} Other multi-member agencies were modeled on the structure of the ICC.\textsuperscript{283}

Over time, both the President and Congress came to recognize that the day-to-day administration of an agency cannot be exercised collectively. Multi-member institutions need some centralized administration. In 1949, the Commission on Organization of the Executive Branch of the Government (Hoover Commission) recommended that all administrative responsibility at multi-member agencies be vested in the chairman of the agency.\textsuperscript{284} During the 1950s and 1960s, Presidents Truman and Kennedy, responding to that recommendation, presented several reorganization plans to Congress designed to transfer from the agency to its chairman the power of day-to-day agency administration.\textsuperscript{285} Since then, even non-chairmen members of multi-member agencies have come to accept the necessity of some centralized administration.\textsuperscript{286}

As our surveyed of some thirty federal multi-member agencies suggests,\textsuperscript{287} all of the reorganization statutes and their progeny fundamentally

\begin{itemize}
  \item \textsuperscript{279} See Act of Mar. 2, 1889, ch. 382, \textsection 7, 25 Stat. 855, 861-62.
  \item \textsuperscript{280} Id. \textsection 6, 25 Stat. 861.
  \item \textsuperscript{281} See id. \textsection 7, 25 Stat. 862.
  \item \textsuperscript{282} See id. For much of its history, the Commission itself selected its own Chairman from among the members. From 1910 until 1937, the chairmanship simply rotated among the members based on seniority. Reorg. Plan No. 1 of 1969, 3 C.F.R. \textsection 1066 (1966-1970), reprinted in 5 U.S.C. app. at 1547 (1994), authorized the President to select the ICC Chairman, and transferred administrative responsibility to the Chairman.
  \item \textsuperscript{283} As of 1941, agency chairmen were as often chosen by their colleagues as by the President. See Cushman, supra note 10, at 683, 747-48. Some chairmen still are. See infra Appendix (FEC, NMB).
  \item \textsuperscript{284} See Commission on Organization of the Executive Branch of the Government, The Independent Regulatory Commissions 5-6 (1949) [hereinafter Hoover Commission Report] (Recommendation 1) ("Administration by a plural executive is universally regarded as inefficient. . . . [T]hose cases where administration has been distinctly superior are cases where the administrative as distinguished from the regulatory duties have been vested in the chairman.").
  \item \textsuperscript{286} See Welborn, supra note 278, at 36-38.
  \item \textsuperscript{287} See Appendix, supra.
\end{itemize}
assign substantive authority to the agency as a whole and administrative authority to the chairman. But each statute uses its own form of words that can create slightly different demarcations of responsibility. Frequently, Congress simply copies from one statute to another, or amalgamates portions of more than one statute into the new statute. Statutory language is often ambiguous, and even relatively detailed statutes rarely fill in all of the fine points of the agency’s organization and operation.

The typical reorganization plan of the 1950s and 1960s contained the following language:

There are hereby transferred from the ... Commission ... to the Chairman of the Commission ... the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditures of funds.288

Use of the term “including” before the specific enumeration of the triology of conventional executive or administrative functions indicates that appointment and supervision of staff, the distribution of the agency’s work, and the use and expenditure of funds were generally regarded as executive or administrative functions belonging to the chairman. But the full range of executive or administrative powers, and the relationship between administration and substance, were undefined. The Hoover Commission could do no better than observe that “[p]urely executive duties [are] those that can be performed far better by a single administrative official.”289

Importantly, the chairman’s administrative and executive powers were rarely unfettered. The typical reorganization plan limited the chairman’s executive and administrative powers in four key respects:

(1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(3) Personnel employed regularly and full time in the immediate offices of members of the Commission other than the Chairman shall not be affected by the provisions of this reorganization plan.

289. HOOVER COMMISSION REPORT, supra note 284, at 3.
There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

In short, Congress sought to centralize day-to-day direction and internal administration of the agency in the chairman’s hands in order to prevent what one observer has described as “splintered management.” However, as noted, Congress did not accord agency chairmen absolute administrative and executive authority. It plainly left to each member selection and supervision of staff in his or her own office. Moreover, it required that, in exercising administrative powers, a chairman had to do so in accordance with the agency’s overall policy direction—whatever that meant. And it gave the agency as a whole a role to play with respect to certain core responsibilities—such as overall approval of key staff appointments, and the budget—that were likely to affect the agency’s substantive functions or mission. Professor Welborn observed in his study of multi-member agencies: “Although some differences are specified in the prerogatives of chairmen and the membership, ultimate formal responsibility for regulatory policy development and implementation is vested in . . . [the agency] to be exercised in a collegial, shared manner.”

The most significant publicly available examinations of the respective responsibilities of the chairman of a multi-member agency and the agency as a whole are (1) a 1974 opinion of the Comptroller General, and an amendment to it issued four months later, dealing with the EEOC; (2) a memorandum prepared by the Office of General Counsel of the Chemical Safety Board (CSB) outlining the respective roles of the chairman and the agency.


291. See Welborn, supra note 278, at 10 & n.18 (quoting MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 173 (1955)).

292. Welborn, supra note 278, at 5.

board as a whole under the agency’s rather typical statute;\textsuperscript{294} and (3) an opinion of the DOJ Office of Legal Counsel (OLC) broadly endorsing the CSB General Counsel’s analysis.\textsuperscript{295} The Comptroller General opinion supports the historical evidence that Congress ordinarily intends to leave day-to-day agency administration to the chairman while retaining for the agency as a whole a role to play in those administrative or management matters that may affect the agency’s substantive functions or mission.\textsuperscript{296}

In the Comptroller General case, the EEOC statute provided generally that “the Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission.”\textsuperscript{297} Although the words of individual statutes may have differed somewhat, the Comptroller General observed that the EEOC’s statute was analogous to provisions generally vesting administrative responsibilities in the heads of other independent regulatory agencies.\textsuperscript{298} The Comptroller General stated, however, that

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  \item\textsuperscript{294} Memorandum from Christopher Warner, General Counsel et al., U.S. Chemical Safety and Hazard Investigation Board, to The CSB Board (Aug. 30, 1999) <www.chemsafety.gov/board/1999/docs/boardgovmemo.pdf> [hereinafter CSB Board Governance Memo].
  \item\textsuperscript{295} Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, to Paul-Noel Chretien, General Counsel, Chemical Safety and Hazard Investigation Board (June 26, 2000) <www.chemsafety.gov/lib/DOJ_memo_06_26_2000.PDF> [hereinafter OLC 2000 Opinion].
  \item\textsuperscript{296} Under a relatively typical organizational statute, the EEOC Chairman was responsible for the agency’s administrative operations. In a dispute over contracting authority, three members of the Commission challenged the Chairman’s assertion that his administrative power included authority to execute contracts without submitting them first to the full Commission for approval. Interpreting the statutory provision, the EEOC general counsel drew a broad distinction between the establishment of agency policy, which rested with the Commission as a whole, and the implementation of agency policy, which was within the Chairman’s purview. He concluded that the execution of contracts designed to implement Commission policy decisions rested with the Chairman although “the award of certain contracts . . . may peculiarly fall within the realm of policy determinations and should therefore properly be approved by the Commission as a whole.” 1974 Decision of the Comptroller General, supra note 290, at *10 (quoting the general counsel). The three commissioners sought out the Comptroller General’s advice on the ground that the issue involved the expenditure of appropriated funds; the three commissioners also asked, more generally, that the Comptroller General address the respective roles and responsibilities of the Chairman vis-à-vis the Commission as a body. See id. at *1-*11.
  \item\textsuperscript{297} 1974 Decision of the Comptroller General, supra note 290, at *2 (quoting 42 U.S.C. § 2000A-4(a)).
  \item\textsuperscript{298} See 1974 Decision of the Comptroller General, supra note 290, at *13-15 (comparing EEOC statute with procedures governing FTC, Federal Power Commission, and SEC). As noted above, the statute deviated from the classic model by conferring on the EEOC Chairman express power to “appoint and fix the compensation of [officers and employees] as he deems necessary.” 1975 Decision of the Comptroller General, supra note
these provisions were "not intended to supersede or diminish in any way the substantive authorities and responsibilities of the Commission[s] as a whole." Based in part on this understanding, the Comptroller General approved the full commission's involvement in certain administrative activities:

[A] number of Commission activities, while in part administrative, also involve substantive determinations of legitimate concern to the full Commission [and] . . . the Commission as a body has authority to establish reasonable standards to delimit and govern the substantive aspects of such activities.

Drawing on the President's views, the Comptroller General attempted to construct the following general line between the functions of the chairman and those of the agency as a whole:

In regard to the regulatory agencies, the [reorganization] plans distinguish between two groups of functions necessary to the conduct of these agencies. One group includes the substantive aspect of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases. All these functions are left in the board or commission as a whole. The other group of functions comprises the day-to-day direction and internal administration of the complex staff organizations which the commissions require. These responsibilities are transferred to the chairman of the agencies, to be discharged in accordance with policies which the commissions may establish.

There are nonetheless some administrative functions with which the agency as a whole may not interfere. However, the Comptroller General indicated that "where disputes arise as to what matters are procedural or administrative and what are substantive, the full commission should have the final say." The Office of Legal Counsel endorses this principle as well.

Agency statutes are different and each is, to some extent, sui generis. Statutory deviation from the model of the reorganization plans ordinarily occurs when specific institutional issues are brought to Congress' attention, or are for some reason a matter of congressional (or, more likely, congressional staff) interest or concern. For example, the statute governing the

290, at *4 (emphasis added) (internal quotation marks omitted).
300. 1975 Decision of the Comptroller General, supra note 290, at *1; cf. OLC 2000 Opinion, supra note 295, at 3-4 (stating that while Chairman of the Chemical Safety and Hazard Investigation Board has authority to superintend and carry out daily activities necessary to implement Board's substantive decisions, he does not have authority to make those decisions alone).
302. Id. at *19-*20 (citing 96 CONG. REC. 7163-64 (1950)).
303. See OLC 2000 Opinion, supra note 295, at 2 (stating that Board's decision controls if it is not arbitrary or unreasonable).
FCC unambiguously assigns key administrative responsibilities to the agency as a whole. The statute provides that the commission:

may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere . . .), as may be necessary for the execution of the functions vested in the Commission . . . [304]

. . . may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions[305]

. . . may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice[306]

. . . shall have authority . . . to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions. 307

It further expressly provides:

From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission’s principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. 308

The statute also has an explicit statutory provision requiring meetings:

[To] be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases. 309

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305. Id. § 154(i).
306. Id. § 154(j).
307. Id. § 154(f)(1). At first blush, the appointment power in section 154(f)(1) would appear to include the power to appoint a managing director. Nevertheless, Congress goes on to provide expressly that the Commission “shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission.” Id. § 155(e). Presumably, this surplusage is intended to make clear both that the Commission must have a managing director and that the Commission as a whole must approve the Chairman’s selection.
309. Id. § 155(d).
The statute then sets out the chairman's powers with some specificity. He has the duty to:

[P]reside at all meetings . . . ;

[R]epresent the Commission in all matters relating to legislation . . . except that any [individual] commissioner may present his own or minority views or supplemental reports . . . ;

[Maintain contacts] with other governmental . . . agencies, and . . . coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.\(^{310}\)

Each of the chairman's explicit powers seems to come easily within the ordinary concept of administrative and executive authority. Taken together with those provisions that appear to accord the agency as a whole greater than usual administrative authority, the inclusion of these specific provisions leads to the presumption that Congress intended to leave no doubt as to the distinct responsibilities of the agency and the chairman.\(^{311}\)

Many statutes are far less detailed regarding the relationship between the chairman and the agency as a whole. They simply give the chairman undefined administrative and executive powers. For example, the statute governing the Federal Reserve Board provides that, "[t]he Chairman of the Board, subject to its supervision, shall be its active executive officer."\(^{312}\) The National Labor Relations Board's statute provides simply that the President shall designate one member to serve as chairman, but it otherwise has no provisions relating to the chairman's duties.\(^{313}\) As a practical matter, key decisions at both agencies are made collegially.\(^{314}\)

The chairman's clearest area of responsibility is the day-to-day administration of the agency. The prototype statute expressly gives the chairman the right to distribute business among agency personnel and administrative units within the agency.\(^{315}\) No other approach is genuinely workable. This power includes the direction of the work of the staff on behalf of the agency, and may also include the ability to initiate departures from routine

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310. Id. § 155(a).
311. Former FCC Chairman Reed Hundt was constantly concerned about the lack of a "reliable majority." See Hundt, supra note 127, at 157.
314. See infra Appendix.
or established approaches, either with or without notification of board members.\textsuperscript{316}

Most agency statutes give the chairman the right to appoint the staff, although such authority is frequently subject to some form of agency approval.\textsuperscript{317} By regulation, the NRC chairman can only appoint heads of major administrative units with the “approval of the Commission.”\textsuperscript{318} What constitutes a “major administrative unit” within an agency is left to the agency’s determination.\textsuperscript{319} However, even those statutes that merely require that the chairman’s executive or administrative actions be governed by the “general policies and decisions” of the agency\textsuperscript{320} would appear to give the agency as a whole some role, albeit undefined, in agency administration—if it elects to exercise it.

One administrative area in which agency members frequently have been involved is budgeting. Many statutes affirmatively accord the agency as a whole the right to approve the annual budget. Even where such authority is not explicitly conferred, the Comptroller General has recognized that

\textsuperscript{316} A reorganization plan that required a Chairman to act in accordance with agency directives would not give the agency the power to mandate that, in their day-to-day business, an agency’s bureaus or officers must report to someone other than the Chairman. Letter to George M. Stafford, Interstate Commerce Commission, No. B-181536, 1974 U.S. Comp. Gen. LEXIS 1817, at *3-*6 (July 25, 1974).

\textsuperscript{317} During his four years in office, FCC Chairman Reed Hundt hired 200 new people—about 10% of the total workforce and 50% of the policy ranks. See HUNDT, supra note 127, at 69. Both the Occupational Safety and Health Review Commission (OSHRC) and the Federal Mine Safety and Health Review Commission (FMSHRC) are adjudicatory tribunals that review matters brought by the Secretary of Labor pursuant to the “split-enforcement” model created by the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 29 U.S.C.), and the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended in scattered sections of 30 U.S.C.), respectively. They perform equivalent functions. Yet the OSHRC statute states that “[t]he Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission’s functions and to fix their compensation.” 29 U.S.C. § 661(e) (1994). The FMSHRC statute states that “[t]he Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission’s functions and to fix their compensation . . . .” 30 U.S.C. § 823(b)(2) (1994) (emphasis added). Are the Chairmen’s powers intended to be different? As a practical matter, the Chairmen appear to exercise the same powers at both agencies. See infra Appendix.

\textsuperscript{318} 10 C.F.R. § 1.111(a) (2000).

\textsuperscript{319} See WELBORN, supra note 278, at 51.

\textsuperscript{320} See, e.g., 49 U.S.C. § 1111(e) (1994) (National Transportation Safety Board).
“budget submissions involve policy determinations.” But the chairman also controls the agency’s workload and expenditure of funds and is the agency’s collegial spokesman with outside groups, including Congress. Although the location of these roles with the chairman does not prevent other agency members from offering their separate, independent views in an appropriate fashion, it accords the chairman the most powerful role in the agency for setting agendas, establishing budget priorities, developing consensus on substantive decisions, and handling external relationships.

It nonetheless seems clear, as the Comptroller General’s opinion at least implies, that the chairman’s unitary authority often does not extend beyond the preparation or drafting of budget documents, which is considered an administrative or executive responsibility. This is the system used at those agencies with which we are familiar.

According to the OLC, silence in a statute on issues such as an agency’s internal organization, practices, and procedures, clearly implies that these issues are to be decided by the members of the agency. As a practical matter, virtually every multi-member agency inevitably must fill in at least some statutory gaps and arrive at a modus vivendi for its operation. Fortunately, agencies have broad authority to fill in the gaps and resolve ambiguities. Most agency internal procedures and allocations of responsibil-

322. See WELBORN, supra note 278, at 20, 22-23 (noting centralized decisionmaking within agencies and discussing powers of Chairmen in different agencies).
323. See 1974 Decision of the Comptroller General, supra note 290, at *22-*23 (indicating that while the Chairman has significant responsibility for budget preparation, the full Commission has authority to approve budget submissions to OMB and Congress).
325. For example, some statutes make no explicit provision for a Vice Chairman or some other person or persons to temporarily run the agency in the event of the absence or disability of the Chairman. However, it would be irresponsible for an agency to allow itself simply to drift if critical administrative functions needed to be performed. The FCC has filled this statutory void by providing that it will temporarily designate one of its members to serve as Chairman in the absence of the appointed Chairman. See 47 C.F.R. § 0.3(b) (1999). The agency presumably relies on its statutory power to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i) (1994). However, even agencies with more limited statutory authority should have ample power to designate one of its members to perform functions that are essential to the continued operation of the agency. The Supreme Court has traditionally allowed agencies considerable procedural discretion, observing that agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978) (internal quotation marks omitted) (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)). Internal operations, in par-
Institutional determinations regarding these matters receive respect in the courts. In the absence of agency policy on a particular subject, the chairman necessarily possesses substantial discretion to act on his or her own. The OLC's general observations on the respective roles of the chairman and the agency as a whole are worth setting out in some detail:

Under the Act and general principles governing the operations of boards, the day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.

The Act provides that the chairperson "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board." The terms ["Chief Executive Officer" and "executive and administrative functions"] provide some general guidance on the proper division of authority between the chairperson and the Board as a whole. The chairperson, in other words, supervises and carries out the day-to-day activities necessary to effectuate the Board's sub-

Looking at multi-member agencies where the Chairman has general administrative responsibility, the Comptroller General has concluded that, in the absence of a Chairman, the remaining commissioners retain a "residual power" to perform administrative functions. Occupational Safety and Health Review Commission—Authority of Commissioners, 60 Comp. Gen. 627, 628 (1981). The OLC, more protective of the President's prerogatives, advised the Federal Reserve Board that its Vice Chairman could not simply assume the duties of the Chairman when a vacancy occurred because the Vice Chairman had express statutory power only to "preside" at Board meetings in the absence of the Chairman. The OLC acknowledged that a contrary argument could be made and noted that the Federal Reserve Board had, in the past, actually elected one of its members to serve as Chairman pro tempore. Nonetheless, the OLC asserted that, absent an express statutory mechanism for filling vacancies, the President may designate one of the Board members to serve as acting Chairman. Federal Reserve Board—Vacancy with the Office of the Chairman—Status of the Vice Chairman, 2 Op. Off. Legal Counsel 394 (1978). When the Chemical Safety and Hazard Investigation Board was without a Chairman, it delegated some administrative responsibilities to each of its four members but did not designate an "Acting Chairman." See infra Appendix.

326. See Idaho v. ICC, 939 F.2d 784, 788 (9th Cir. 1991) (explaining and upholding traditional use of ICC's notation voting procedures), aff'd per curiam sub nom., Herrin Transp. Co. v. United States, 366 U.S. 419 (1961). The Act provides that the chairperson “shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.”

327. See Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. 1996) (upholding SEC's creation of innovative quorum requirements).
stantive decisions. He does not, absent some form of Board approval . . . make those
decisions by himself.

The Act also empowers the Board to “establish such procedural and administrative
rules as are necessary to the exercise of its functions and duties.” . . . These could in-
clude rules bearing on matters of internal Board governance . . . as well as rules gov-
erning the conduct of Board business with the public . . . . To the extent the Board
establishes such rules, the chairperson, as the Board’s administrative and executive
officer, must put them into practice. . . .

[T]his does not mean that the Board, exercising its oversight authority and its powers
to make substantive decisions . . . may or should attempt to address itself to the pleth-
ora of minute administrative problems bound up with the operation of a complex or-
ganization. Some degree of managerial discretion is inherent in the concept of an ex-
cecutive or administrative office, and the statutory assignment of the Board’s
executive and administrative functions to the chairperson necessarily vests the chair-
person with a degree of managerial autonomy on which the Board, in the proper ex-
ercise of its powers, cannot trench . . . . At the same time . . . any number of Board ac-
tivities or day-to-day aspects of Board business, while at least in part administrative
and even seemingly mundane, may involve or affect the board’s duties and functions
in ways that are of legitimate concern to the board as a whole. Where that is the case,
it is the prerogative of the Board to pass upon such issues in ways appropriate to its
function as a policymaking and rule-setting body.328

It must be noted that an agency’s statute alone rarely tells the complete
story of agency operation. Because most statutes are incomplete or am-
biguous and there is no official forum (such as a court) for regular resolu-
tion of intra-agency management questions, agency chairmen may, and at
certain times do, assert administrative prerogatives. Former FTC Chairman
Miles Kirkpatrick observed:

I should make it clear that in the management of the Commission’s day-to-day af-
fairs, there are no collegial decisions. Management of the Commission, save for the
appointment of the top policy making positions and policy decisions having to do
with the allocation of major resources, is placed squarely in the Chairman. In my ex-
perience, matters having to do with the management of the Commission’s staff are
not the subject of debate among the Commissioners.329

328. OLC 2000 Opinion, supra note 295, at 2-4 (internal citations omitted).
329. Miles W. Kirkpatrick, Nineteenth Annual Antitrust Spring Dinner Address, in 40
ANTITRUST L.J. 328, 332 (1971). Even at the FCC, where the Chairman’s powers are
somewhat circumscribed by statute, former FCC member Glen Robinson has noted: “From
personal experience I can report that the FCC’s Chairman and a handful of staff—usually
selected by the chair—can and usually do exercise nearly total control over that agency’s
basic policy agenda.” Glen O. Robinson, Independent Agencies: Form and Substance in
Professor Welborn also suggests that chairmen have a relatively greater influence than their colleagues do on substantive matters. He found that agency chairmen dissent with far less frequency than their colleagues in substantive, collegial decisions. As a result, decisionmaking even at multi-member agencies is "relatively centralized" and "independent action at lower levels on critical matters is limited." A more recent study by Professors Derthick and Quirk of three multi-member agencies (Civil Aeronautics Board, ICC, FCC) during the deregulatory period from 1975-1980 reached the same conclusions. They observed:

Commission members tended in general to defer to the chairman. The formal executive powers that all of the chairmen possessed gave them a great advantage over commission members. In truth, commission members had very little to do and few resources with which to do it.

Being the president's choice also helped the chairman. This created some presumption that the chairman was pursuing policies that were also the president's policies and that he was therefore entitled to support from those commission members who were of the same political party as the president and the chairman.

As a practical matter, the combination of political prestige and managerial authority accord some agency chairmen the power to dominate and

Executive Prerogative, 1988 Duke L.J. 238, 245 n.24. Professor Welborn indicates that "[o]perating arrangements in which the role of Chairman is primary and that of the Commission as a whole is secondary are considered to be entirely appropriate, or legitimate." Welborn, supra note 278, at 36. Indeed, this is also the practice at the NTSB. However, the OLC makes clear that the retention of significant authority in a Chairman "is a matter of the development, through collegial practice and over time, of the [agency's] own internal policies concerning delegation of authority to the . . . chairperson, the [agency's] acquiescence in the chairperson's assertion of authority over certain substantive areas, and the general evolution of the [agency's] current allocation of responsibilities." OLC 2000 Opinion, supra note 295, at 7. Absent an express statutory provision, the accretion of power by a Chairman over an agency's affairs is a "matter of the [agency's] grace and does not deprive the [agency] . . . of its stated authorities and responsibilities." Id. at 6.

330. See Welborn, supra note 278, at 109 (stating that based on a survey of reported decisions since 1961, "[w]ith only a few exceptions, the number of times chairmen dissent during their tenure can be counted on the fingers of one hand.").

331. Id. at 20. This is not to minimize the volume or importance of action taken by the staff. However, such action is typically based on reasonably well-accepted agency precedent or the staff's view of current agency policy. The Welborn study offers a comprehensive examination of the powers of seven independent agency chairmen and the relationship of agency chairmen to other agency members. See id. at 20-27.


333. Id. at 86-87.
control their agencies' agendas. Such control is obtained more easily at agencies that have a tradition of chairman leadership. Alfred Kahn was heir to such tradition when he became chairman at the Civil Aeronautics Board (CAB) in the mid-1970s. More importantly, his personal association with President Carter and the White House staff allowed him an effective veto over the nomination or reappointment of other board members. 

This ensured that he worked with a sympathetic set of colleagues. Kahn’s political influence at the White House—and, to some degree at least, his overall reputation—also ensured his colleagues’ acquiescence on staff appointments and the board’s agenda.

334. See id. at 77-78 (noting tradition of Chairman leadership at CAB and FCC and lack of it at ICC). It wasn’t until 1969 that administrative authority was transferred from the ICC collegially to the Chairman. See Reorg. Plan No. 1 of 1969, 3 C.F.R. 1066-67 (1966-1970), reprinted in 5 U.S.C. app. at 1547 (1994). The Commission’s first permanent Chairman, George Stafford, rarely used it. DERTHICK & QUIRK, supra note 332, at 78.

335. See McCRAW, supra note 52, at 288-89 (stating that Kahn proposed names for President Carter’s consideration and that all appointments to the Board itself met with Kahn’s approval). Former FCC Chairman Reed Hundt has noted that during his tenure in the Clinton administration, the Senate Republicans exercised a veto power over Republican seats on the Commission. See HUNDT, supra note 127, at 159.

336. Cf. Robinson, supra note 329, at 245 (noting that “[r]espectful regard for signs of presidential preferences on policy issues is ensured not so much out of gratitude for the favor of the appointment (though this may be a factor) as by the possibility of future rewards for faithful service (including other high appointments in the government.”)).

337. Although the Board had to approve the appointment of heads of major administrative units, see Reorg. Plan No. 3 of 1961, 3 C.F.R. 873 (1959-1963), reprinted in 5 U.S.C. app. at 1508 (1994), a Board majority gave Kahn carte blanche. Kahn reorganized the Board, created a new Office of Economic Analysis, and appointed a number of committed deregulators to critical positions. See McCRAW, supra note 52, at 274-75; DERTHICK & QUIRK, supra note 332, at 78-79. After key staff members were appointed, the Washington Post quoted Kahn as saying “[a]ll the bomb throwers are here and in place. You have to judge this agency starting from this point forward; now there are no excuses.” McCRAW, supra note 52, at 275 (quoting Carole Shifrin, CAB Geared Up to Cut Regulation, WASH. POST, Jan. 12, 1978, at D9). Kahn also used the Chairman’s control of the Board’s calendar to advance his substantive agenda. He moved two applications from new entrants to the head of the queue for evaluation. See Id. at 280-82. Professor Edles served as CAB Deputy General Counsel during the Kahn administration. He participated in a meeting at which Kahn’s executive director indicated that the Chairman wanted the application of Midway Airlines, a new entrant, to be considered by the Board within a year. The only way to meet Kahn’s deadline was to eliminate the preparation of an initial decision by the presiding ALJ and have the Board decide the case itself, as an agency is authorized to do in initial licensing cases under 5 U.S.C. § 557(b)(1) of the APA. So the staff developed a schedule that had the ALJ preside at the hearing but simply certify the record to the Board for decision. The general counsel’s office worked closely with Kahn and his colleagues in reviewing the evidence and drafting an opinion, and the Board issued its decision (technically a “tentative decision”) within a year as Kahn had directed. Chicago-Midway Low-Fare Route Proceeding,
A chairman's assertion of power can be thwarted by colleagues. A 1999 turf battle between the Chairman of the Chemical Safety and Hazard Investigation Board (CSB) and his fellow members demonstrates the inadequacy of law and the ascendancy of political will in the resolution of internal agency conflicts. The CSB's statute and legislative history, not uncharacteristically, fail to delineate precisely the respective roles of the chairman, as the agency's chief administrative officer, and his colleagues, in directing the agency's overall operation. At long-established agencies, this relationship has been worked out over time. But the CSB was brand new, with four newly appointed members.

None of the four board members were lawyers. Three of them were distressed that the chairman and a newly appointed chief operating officer simply ran the agency without consultation. The three asked the agency general counsel to provide guidance as to the respective responsibilities of the chairman and the board as a whole. He opined that the chairman was in day-to-day administrative control of the agency, with authority, for example, to assign work to and supervise the staff; but he also said that the board had statutory power to play some admittedly undefined role in the overall administration of the agency, such as approval of senior staff appointments and the agency's annual budget. With no express statutory guidance on any particular division of responsibility, the general counsel proposed that the board members jointly agree on a modus vivendi. The chairman de-

78 C.A.B. 454 (1978). See also Mark E. Budnitz, The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation, 46 CATH. U. L. REV. 371, 413-14 (1997). Budnitz observes that the approval process for many FTC rules in the pipeline but not promulgated became "stalled" when James Miller became the FTC Chairman. Nonetheless, some rules went forward. The FTC unanimously enacted a credit practices rule and promulgated a funeral industry practices regulation over Miller's opposition. See id. at 421-24. Budnitz notes that Chairman Miller did not terminate any rulemaking proceedings, thus leaving open the possibility that a new Chairman might have resumed them. As of the 1997 date of the article, that had not happened. See id. at 436-37. The FTC's adjudicatory caseload also decreased during the Miller administration. See id. at 391.

338. Among other things, the Chairman unilaterally decided that the Board would not undertake any new investigations. See Guy Gugliotta, Chemical Hazards Board and Chief a Volatile Mix, WASH. POST, Nov. 24, 1999, at A21.

339. Id. The general counsel's thirty-one page memorandum was released to the public and is available at the Board's web site at <www.chemsafety.gov/board/1999/docs/boardgovmemo.pdf>. See CSB Board Governance Memo, supra note 294. Professor Edles served as a consultant to the Office of General Counsel during this period.

340. See CSB Board Governance Memo, supra note 294, at 2 ("The Chairperson and the Board Members should work cooperatively to design a set of rules that do not compromise the statutory functions of either the Chairperson or the Board Members and that permit the
clined and, instead, asserted total authority to run the agency. The other members demurred. Matters came to a head when the chairman submitted his own budget request to Congress without consulting his colleagues.

There is no official forum for the resolution of such intramural disagreements. An administration can play a role by informal intervention, however, and so too can key members of Congress. In the instant case, Senator Lautenberg—described as “the board’s biggest congressional booster”—endorsed the board majority’s power-sharing approach. Given the CSB’s tenuous position with Congress, his views were significant. The chairman backed down, tendered his resignation as chairman (he elected to remain on the board as a member), and all members signed a “concordat” that went forward with a request for a DOJ opinion regarding the general counsel’s views. While awaiting the opinion, all board members reviewed and commented on communications submitted to Congress,

Board to fulfill its fundamental substantive responsibilities . . . .”); Gugliotta, supra note 338.

341. See Gugliotta, supra note 338 (quoting the Board Chairman as indicating that “[h]iring personnel and budget development, in my view, are administrative”).

342. See Gugliotta, supra note 338; see also Dean Scott, Board Acts Without Chairman, Calls for Justice Department to Settle Rift, 23 Chem. Reg. Rep. (BNA) 1358, 1358 (Nov. 26, 1999) (reporting that three Board members voted to direct the Chairman to rescind his request for a doubling of the Board’s budget). The agency’s chief operating officer described the dissension as “an ideological disagreement.” Id. at 1359.

343. The OLC is permitted to offer “informal opinions” or “legal advice” on issues affecting independent agencies pursuant to 28 C.F.R. § 0.25(a) (1999), and independent agencies solicit such opinions or advice from time to time, although not very often in our experience. Agencies will seek advice when to do otherwise might expose them to subsequent legal risk or embarrassment. See, e.g., Federal Reserve Board Policy on Bank Examiner Borrowing, 6 Op. Off. Legal Counsel 509 (1982), clarified in 17 Op. Off. Legal Counsel 168 (1993) (determining whether Board bank examiners may borrow from or hold credit cards from banks they are authorized to examine); Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies, 15 Op. Off. Legal Counsel 74 (1991) (determining whether NRC has statutory authority to collect annual charges from federal agencies that hold licenses issued by NRC). But seeking advice—particularly on internal agency operations—may mean that the agency will get an answer it does not like and will then be constrained, even if only politically, to follow the advice received.

344. Guy Gugliotta, Hill Quits as CEO of Chemical Investigations Board, WASH. POST, Dec. 18, 1999, at A15. A chemical workers’ union official who had supported the Board blamed the Chairman for the impasse. See id.

345. See Dean Scott, Hazard Investigation Board Members Seek Meeting to Discuss Role in Budget, Policy, 23 Chem. Reg. Rep. (BNA) 1323 (indicating that some members of Congress questioned the need for the agency, the House Appropriations Subcommittee Chairman was “skeptical” of the agency’s annual request for budget increases, and the Senate Appropriations Subcommittee Chairman had requested a GAO investigation of the agency’s operations).
including the agency's appropriation request and on contracts involving more than $25,000. In addition, the board members concurred in the hiring of heads of offices within the agency. The members also agreed to schedule monthly public meetings.\footnote{\textit{\textsuperscript{346}}} The OLC's June 26, 2000, opinion forcefully backing the CSB general counsel and the board majority largely ended the turf battle.\footnote{\textit{\textsuperscript{347}}}

2. Collegial Decisionmaking

When the chairman of the NLRB was about to leave his post in the summer of 1998, he complained about the inability of the board to issue key decisions, noting that even a single member could hold them up.\footnote{\textit{\textsuperscript{348}}} The problem was one of collegiality and custom (or inability to muster a majority) rather than legality.\footnote{\textit{\textsuperscript{349}}}

Where circumstances require, a majority of a multi-member agency generally can issue a decision without awaiting preparation of any dissenting or other separate statements. The courts use this technique, usually with the consent of the dissenting members,\footnote{\textit{\textsuperscript{350}}} but it can also be done over the objection of a dissenting colleague.\footnote{\textit{\textsuperscript{351}}} Although the technique can com-


\textsuperscript{347} See OLC 2000 Opinion, \textit{supra} note 295; cf. Budnitz, \textit{supra} note 337, at 385-91 (discussing FTC Chairman James Miller's efforts to reorganize FTC, including resistance of two of Miller's colleagues to his effort to close most of Commission's regional offices, and resultant congressional intervention). At the SEC, Chairman William Casey in 1972 separated the Enforcement Division from the Division of Market Regulation. In the opinion of one former commissioner, this reorganization, coupled with key appointments to the Commission and its senior staff, made the Division of Enforcement staff the dominant player in setting the Commission's agenda. The dynamic changed to some extent when Chairman Harold Williams gave the Office of General Counsel a role to play in analyzing Enforcement Division recommendations. See Robert S. Karmel, \textit{Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor}, 61 \textit{Law \& Contemp. Probs.}, 33, 40-41 (1998).


\textsuperscript{349} See generally Flynn, \textit{supra} note 127, at 517-28 (detailing breakdown of collegiality within NLRB).

\textsuperscript{350} See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 209 (1947) (Frankfurter, J. \& Jackson, J., dissenting) (stating that while they dissented, "there is not now opportunity for a response adequate to the issues raised," and that "detailed grounds for dissent will be filed in due course"); Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 857 (5th Cir. 1977) (Roney, J., dissenting) (regretting that press of court business prevented preparation of dissent in time for distribution with majority opinion).

\textsuperscript{351} See \textit{In re} Kirk, 376 F.2d 936, 946 (C.C.P.A. 1967) (Smith, J., dissenting) (protesting publication of majority opinion before dissenting opinions had been completed).
promise collegial decisionmaking, materials submitted to us and contained in the Appendix indicate that those agencies that have specifically addressed the matter allow a majority to issue an opinion without awaiting the preparation of dissenting or other separate statements. Indeed, even the NLRB has such a procedure.\textsuperscript{352} It just does not seem to use it.\textsuperscript{353}

\section*{B. Quorum and Voting Requirements}

Agency quorum and voting requirements are established by statute or, in the absence of a statutory provision, by agency regulation or tradition. The National Labor Relations Act contains an example of the traditional statutory provision. It provides simply that three of the NLRB's five statutory members constitute a quorum.\textsuperscript{354}

Obviously, agencies must follow explicit statutory quorum or voting requirements.\textsuperscript{355} Absent a statutory provision, however, most multi-member federal agencies follow the common law "majority of the quorum" rule, which means that a quorum is needed before the agency may act, but only a majority of the quorum is needed for action once a quorum is constituted. Thus, if an agency's enabling legislation provides that it has five members

\begin{itemize}
\item \textsuperscript{352} See infra Appendix (NLRB).
\item \textsuperscript{353} In a highly unusual case, certain private parties sued the three-member Occupational Safety and Health Review Commission (OSHRC) to compel its secretary to release a decision that had been signed by two members, one of whom had left the agency before the third member (the Chairman) had completed his dissenting statement. The remaining member of the majority joined in the lawsuit. In due course, following completion of the Chairman's dissenting statement, the agency released the "2-1" decision and the court dismissed the case as moot. See Arcadian Corp., 17 O.Sh. Cas. (BNA) 1345 (Apr. 27, 1995) (Weisberg, Chairman, dissenting), dismissed as moot, In re Arcadian Corp., 17 O.S.H. (BNA) 1406 (D.C. Cir. Oct. 4, 1995).
\item \textsuperscript{354} See 29 U.S.C. § 153(b) (1994).
\item \textsuperscript{355} For example, the FEC statute requires four affirmative votes out of six commissioners before the agency may act; a vote of 3-2, with one abstention, is insufficient. See 2 U.S.C. § 437c(c) (1994). In one case, the FEC was unable to muster the necessary four votes, and thus dismissed a complaint without opinion notwithstanding a recommendation by its general counsel, based on FEC precedent, that the complaint be pursued. The D.C. Circuit held that the FEC was required to explain its reasons for dismissal so that the court could evaluate them. Democratic Congressional Campaign Comm. v. FEC, 831 F.2d 1131, 1132 (D.C. Cir. 1987). An agency member who concurs separately but articulates what a court decides is an impermissible basis for his or her decision can doom an agency's decision. Where four of five members of the NLRB participated in a case—two joined in a plurality opinion, one concurred separately, and one dissented—the court reversed the decision because it found that the concurring opinion had relied on an impermissible construction of the statute. The court found it unnecessary to examine the plurality opinion because the Board, as a whole, had failed to articulate a proper basis for resolving the case. Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB, 46 F.3d 82, 88 (D.C. Cir. 1995).
\end{itemize}
and that three members shall constitute a quorum, the agency may take action by a 2-1 vote. It is immaterial that only a minority of the agency’s total membership participates or that any statutorily intended balance is disrupted. To be counted as part of a quorum, agency members need not offer their views on the merits of a proceeding. As the New Jersey Supreme Court observed in connection with a multi-member state agency:

Insofar as the presence of a legal quorum is in issue, all that matters is whether the physically present commissioners participated in agency deliberations and took purposeful action by joining, concurring in, dissenting from, or even abstaining from the final decision.

Absent statutory requirements, a multi-member agency may, within reason, use its other statutory powers to determine how its quorum requirements will be satisfied. For example, the enabling statutes for the Securities and Exchange Commission (SEC) do not have explicit quorum requirements. Those statutes nonetheless authorize the agency to “make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter . . . .”

In 1995, the SEC adopted a regulation that provides that three members constitute a quorum unless the number of members in office is fewer than three, in which case the quorum consists of the number of members actually in office. The regulation further provides that if on any matter of business, the number of members in office minus the number of members who are disqualified to consider the matter is two, then those two members constitute a quorum for purposes of that specific matter. The D.C. Circuit

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357. See Braniff Airways, Inc. v. CAB, 379 F.2d 453, 460 (D.C. Cir. 1967).
358. Morris v. Commodity Futures Trading Comm’n, 980 F.2d 1289, 1293-94 (9th Cir. 1992) (stating that agency member who merely concurred in the result held to have participated in the decision for quorum purposes).
359. King v. New Jersey Racing Comm’n, 511 A.2d 615, 618-19 (N.J. 1986); see also American Commercial Lines, Inc., 291 N.L.R.B. 1066, 1066 (1988) (reporting a decision issued by two members of three-member Board where third member did not participate in merits of decision). Decisions by numerous courts and agencies establish that an agency member who did not participate at the agency’s oral argument may nonetheless familiarize himself or herself with the record and participate in the decision. See, e.g., Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 298-99 (7th Cir. 1979) (citing Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 802 (D.C. Cir. 1965)).
upheld the validity of the SEC’s quorum provision.\textsuperscript{362} The Ninth Circuit upheld a decision by the ICC to allow five members to participate through a written notation vote on a circulating draft decision, although one member had resigned before the last member had voted on the same decision. Although the ICC’s regulations did not explicitly cover this eventuality, the court was influenced by the fact that the procedure had been used by the Commission for many years and was not invented for the purposes of the instant case.\textsuperscript{363}

The original Act to Regulate Commerce provided that vacancies on the ICC did not impair the right of the remaining members to act. A similar provision has been incorporated into many subsequent statutes. Even where it has not, the courts have generally reached the same result as a matter of sensible administration.\textsuperscript{364}

Less than a quorum of the agency may ordinarily grant discretionary review of an administrative law judge’s decision. A typical provision is that of the five-member Federal Mine Safety and Health Review Commission, which requires only two votes to take review.\textsuperscript{365} Likewise, the five-member Securities and Exchange Commission grants review on request of only one of its members.\textsuperscript{366}

Depending on the language of an agency’s enabling statute, there may be limited circumstances where it can even operate without a statutory quorum. In Railroad Yardmasters of America v. Harris, the court decided whether the National Mediation Board violated its quorum requirement.\textsuperscript{367} According to statutory provisions, the National Mediation Board has authority to delegate functions to individual members.\textsuperscript{368} In Harris, one seat on the Board was vacant and another seat was soon to be vacated.\textsuperscript{369} On the eve of the resignation of the second Board member, the two mem-

\textsuperscript{362} See Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. 1996) (holding that SEC was within its authority to promulgate the rule).

\textsuperscript{363} See Idaho v. ICC, 939 F.2d 784, 788 (9th Cir. 1991), affg Union Pacific R.R. Co.—Abandonment In Fremont and Tentom Counties, 6 I.C.C.2d 641, 644 (1990) (explaining the ICC’s notation voting procedures).

\textsuperscript{364} See Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 472-74 (7th Cir. 1980).

\textsuperscript{365} See 29 C.F.R. § 2704.308(b) (1999) (explaining that novel questions of law or policy only require two votes).


\textsuperscript{367} See Railroad Yardmasters of Am. v. Harris, 721 F.2d 1332, 1333 (D.C. Cir. 1983).


\textsuperscript{369} See Harris, 721 F.2d at 1333-35 (explaining one member had retired and a second was about to resign).
bers delegated decisional authority to the soon to be remaining member who, thereafter, acted for the agency pursuant to the delegation. The D.C. Circuit held the arrangement was valid because it prevented the three-member Board from complete disability due to the two vacancies.\footnote{See id. at 1334-35. Other agencies have comparable statutory authority. See Notice of Delegation of Authority to the Chairman of the Nuclear Regulatory Commission, 60 Fed. Reg. 34,561 (1995); Order Delegating Authority to Secretary and Certain Office Directors, 63 F.E.R.C. ¶ 61,073 (Apr. 16, 1993).}

Similar to the National Mediation Board’s provision, the statute that controls the operations of the Occupational Safety and Health Review Commission provides that an administrative law judge’s decision goes into effect “unless any Commission member has directed that such [decision] shall be reviewed by the Commission.”\footnote{McLaughlin v. Union Oil Co. of Cal., 869 F.2d 1039, 1041 (7th Cir. 1989).} Thus, an ALJ’s decisions go into effect if no member directs review, even if the Commission has no members!

Whether a tie vote constitutes agency action depends on the agency’s statutes and regulations, which vary among agencies. Agency and court interpretations reflect an experiential linkage between procedure and substance. Generally speaking, where affirmative agency action is required, a tie vote does not represent agency action because a majority of the agency has failed to agree on a decision.\footnote{See Ed Taylor Constr. Co. v. OSHRC, 938 F.2d 1265, 1269 (11th Cir. 1991) (holding that there may be circumstances in which absence of Commissioners available to review ALJ’s decision can constitute denial of individual’s procedural rights, in which case decision may be returned for review by Commission).} Following this approach, the rules of the SEC expressly provide that an initial decision of one of the agency’s ALJs has no effect if a majority of the Commission cannot agree to a disposition on the merits of a decision that is under its review.\footnote{See Farmers Export Co. v. United States, 758 F.2d 733, 736-37 (D.C. Cir. 1985) (explaining that “there can be no final decision when there is no majority agreement on the merits of a position”).} In contrast, when the Federal Mine Safety and Health Review Commission divides equally, two for affirmation and two for reversal, the ALJ’s decision is affirmed.\footnote{See 17 C.F.R. § 201.411(f) (1999) (stating that when there is failure to obtain a majority, an order shall be accordingly issued).} The difference in approach may be explained by the fact that the FMSHRC’s major responsibility is dispute-resolution while the SEC perceives its adjudicatory role to be part of its broader policy-making responsibilities.

Courts are divided on what the effect of decisions made by divided agencies should be. With respect to the three-member Occupational Safety and Health Review Commission that has frequently operated with only two members (and occasionally with only one), some courts have concluded that at least those decisions by an equally-divided agency (1-1) purportedly "affirming" an ALJ's decision constitute final, judicially reviewable agency action, while other courts have reached the opposite result. Some statutes provide that a divided vote on reconsideration brings an agency action to an end by leaving the original decision in place. In common sense fashion, numerous agencies have adopted the same approach in practice, which has been approved by the courts.

A practical question that arises from time to time, but which has received little attention, is whether members who are disqualified or have recused themselves voluntarily from participation in a matter may, nonetheless, constitute part of a quorum. Members who are disqualified from participation because of some genuine conflict of interest probably cannot be included in the quorum. The participation rights of a member who voluntarily recuses himself or herself likely depends on the circumstances and terms of the recusal.

As best we can tell, there is no direct precedent involving the federal multi-member agencies. However, the Third Circuit confronted the issue in a case involving a local draft board. The court determined that participation by a disqualified member, even to constitute a quorum, would conflict with the duty to act impartially. Acknowledging that there is a split of opinion on the issue, the court relied on cases involving corporate boards of directors, and suggested that a strict rule was required when governmental agencies acted in order to protect the due process rights of indi-

375. See Curry v. Beatrice Pocahontas Coal Co., 67 F.3d 517, 522 n.8 (4th Cir. 1995) (stating that decision by equally divided agency, like similar court decision, is "affirmance-by-necessity").
376. See Cox Bros., Inc. v. Secretary of Labor, 574 F.2d 465, 467 (9th Cir. 1978) (stating that "affirmance" by equally divided court was not official because it was supported by one member instead of statutorily required vote of two members); Shaw Constr., Inc. v. OSHRC, 534 F.2d 1183, 1186 (5th Cir. 1976) (deciding that no reviewable order exists in a tie vote of Commission).
378. See Ford Motor Co. v. ICC, 714 F.2d 1157, 1163 (D.C. Cir. 1983) (explaining that 3-3 tie vote leaves prior decision final); Delta Air Lines, Inc. v. CAB, 497 F.2d 608, 615 (D.C. Cir. 1973) (holding that unless split-Board decision contained fundamental defect, Board's original order shall stand).
379. See In re Shapiro, 392 F.2d 397, 399-400 (3d Cir. 1968).
380. See id. at 399-400.
INDEPENDENT FEDERAL AGENCIES

The New Jersey Supreme Court reached the same result in a case involving a state administrative agency. The court observed:

We are thus entirely satisfied that for purposes of determining whether a legal quorum is present, it is not relevant whether a member is physically absent, is disqualified because of interest, bias, or prejudice, or other good cause, or voluntarily recuses himself or herself. A member who is disqualified from participating in a particular matter may not be counted in determining the presence of a legal quorum.

Nevertheless, agencies have been advised by courts to attempt to reach a final decision whenever possible. Where the recusal or disqualification of individuals would prevent the body from acting, and there is no legally available substitute decisionmaker, courts have approved the participation of individuals who may be "biased" as a matter of law under a "rule of necessity." Such cases include United States v. Will, where the Supreme Court decided an issue involving pay raises for all federal judges even though the case affected their salaries, and FTC v. Cement Institute, where disqualification of the entire administrative agency would have left no forum available for decision.

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381. See id.
383. Id. at 618.
384. See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 861 (D.C. Cir. 1970) (stating agency member's vote, cast simply to avoid an impasse, is "a perfectly sound reason for his vote"); United Air Lines, Inc. v. CAB, 281 F.2d 53, 56 (D.C. Cir. 1960) (finding no abuse of discretion when agency member read briefs and participated in case despite not hearing oral argument).
385. 449 U.S. 200, 216-17 (1980) (holding that public interest in attaining competent and independent judiciary was more important than the disqualification of judges).
387. See id. at 700-01 (holding that Commission's expression of views in other official contexts cannot serve to disqualify all Commissioners because Congress has not provided for any alternative tribunal). Two Nuclear Regulatory Commission decisions reflect that agency's effort to avoid incapacity as a result of recusals. During the course of their Senate confirmation hearings, two prospective NRC commissioners agreed to limit their participation in a particular license proceeding then pending before the agency, but had differing understandings with the Senate committee regarding the extent of possible participation. In Public Service Co. of New Hampshire, 32 N.R.C. 218, 223 (1990), with one vacancy on its five-member Commission, the NRC denied a motion to reopen the case. This denial indicated that two commissioners voted in favor of the result, one commissioner did not participate, and the fourth abstained. See id. at 223. Under established NRC procedure, the quorum count included the abstaining commissioner but not the non-participant. Therefore, the agency was able to act with only a 2-0 vote. In Consolidated Edison Co. of New York, 5 N.R.C. 1330 (1977), the NRC had two vacancies on its 5-member Commission. The Chairman who had voluntarily recused himself from consideration of the merits of a particular licensing proceeding, participated to form a quorum for the sole purpose of preserv-
C. Disqualification and Recusal

The APA provides that a presiding or participating employee may at any time disqualify himself. But the APA does not apply to the agency members themselves (except in those rare instances where an agency member serves as presiding officer) or contain a substantive definition of bias. The law on the subject, which applies to all agencies, whether multi-member or not, has been developed in court decisions that rely on basic principles of due process.

1. Bias

The definitions of bias are now reasonably well established and attempt to take into account two critical distinctions between agencies and courts. First, agencies undertake legislative, executive and quasi-judicial functions simultaneously. If an administrative system is to function without a duplication of personnel or a cloning of politically accountable officials, the mere performance of all three functions by agency members should not, and does not, standing alone, violate due process. Second, agencies are
program-oriented institutions that possess substantial discretion in the administration of their duties. They have a responsibility for deciding individual cases within a broad statutory and policy context. Agency members frequently seek agency positions (or are selected for them) because they are experts in the field or hold views on how the agency’s statutory responsibilities should be administered. The public benefits when those views are known rather than concealed. So an underlying philosophy of regulation, even publicly articulated, does not ordinarily rise to a level of bias that would violate due process principles. Indeed, in an oft-quoted phrase, the Seventh Circuit has observed that a total absence of preconceptions “would be evidence of a lack of qualification[s] not lack of bias.”

Professors Gellhorn and Levin have pithily stated, “[T]he law has generally demonstrated a keen awareness that an agency decisionmaker should be open minded, but not empty headed.”

The courts have adapted concepts of bias to the administrative arena. When an agency is engaged in formal adjudication, most closely resembling dispute resolution as practiced by judges, the courts have created a definition of bias closely resembling that applicable to judges. As a general matter, a federal judge must disqualify himself: “in any proceeding in which his impartiality might reasonably be questioned;” where he has a “personal prejudice concerning a party, or [has] personal knowledge of disputed facts;” or has an interest “that could be substantially affected by the outcome of the proceeding.” The classic disqualification standard applicable in formal administrative adjudications was set forth in Cinderella Career and Finishing Schools, Inc. v. FTC: “[t]he test for disqualification [is] whether ‘a disinterested observer may concluded that [a decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’”

393. See FTC v. Cement Inst., 333 U.S. 683, 701 (1948) (arguing views expressed by agency members on general illegality of pricing system do not disqualify them from sitting in judgment on the use of that system in specific industry); Skelly Oil Co. v. Federal Power Comm’n, 375 F.2d 6, 18 (10th Cir. 1967) (deciding agency member having “advance views on important economic matters in issue” not disqualified), modified sub nom. Permian Basin Area Rate Cases, 390 U.S. 747 (1968).


397. 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting Gilligan, Will & Co. v. SEC, 267 F.2d
Allegations of bias in adjudicatory proceedings principally arise in two ways. First, an agency member may have pre-existing views on issues he or she is supposed to determine from the facts presented in the proceeding. Typically, such views are revealed when the agency member speaks out forcefully on issues or matters pending before the agency. In Cinderella, FTC Chairman Dixon’s speech to the National Congress of Petroleum Retailers used one of Cinderella’s advertising claims to illustrate a case of possible fraud. The court ruled that Chairman Dixon was disqualified because he had prejudged, or at least appeared to have prejudged, specific facts at issue in an adjudication still pending before him. However, the mere exposure to facts as part of an agency member’s official duties, apart from adjudication, will not require disqualification. Similarly, having a preconceived position concerning legal or policy issues, which an agency member has acquired while carrying out other duties, will not ordinarily result in disqualification.

Second, an agency member may have had some association with a case he or she is later called upon to decide. For example, in Trans World Airlines, Inc. v. CAB, a member of the agency was prohibited from participating in a decision involving the determination of an airline’s mail pay where he had earlier signed a brief in the case as solicitor for the Post Office Department. It is important to note that the prior contact need not have been as a representative of a party. In American Cyanamid Co. v. FTC, the agency chairman was barred from participating in a case because he had previously been counsel to a congressional committee, and because he had played an active role in investigating some of the same issues while a congressional staff member.

Similarly, an agency member may be seen as having some personal, ordinarily pecuniary, stake in the outcome of the proceeding. In such circumstances, disqualification is not merely required in the interest of fairness, but participation in the case may constitute a criminal offense or

461, 469 (2d Cir. 1959)).
398. See id. at 591.
399. See id.
400. See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n, 426 U.S. 482, 497 (1976) (holding that Board’s familiarity with case was not sufficient to “overcome the [Board’s] presumption of honesty and integrity”).
401. See Cement Inst., 333 U.S. at 701 (stating that information acquired through an ex parte investigation did not automatically result in bias).
403. See id. at 91 (stating that participation was prohibited to preserve fairness).
404. 363 F.2d 757 (6th Cir. 1966).
405. See id. at 763.
406. See, e.g., Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (involving state licensing
otherwise violate federal law. However, cases in which an agency official actually participates in a proceeding in which he or she has a financial interest or had a prior involvement are now infrequent. The rigorous screening process conducted by the White House Counsel’s office, the agency’s ethics officer, and the Office of Government Ethics ensures that any agency official who is nominated by the President will not derive personal gain from the position.

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The courts have been unwilling to impose the strict Cinderella standard when agencies are engaged in informal rule-making proceedings of a policy nature. In such cases, the court will disqualify an agency decision-
maker only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.  

Judge MacKinnon has argued that the unalterably closed mind assumption would be "practically impossible to prove," and he appears to have been correct.

2. Theory of Political Contacts and Independence

Agency members can especially be influenced by members of Congress or Administration officials, including the President, who may attempt to sway the agency's decision, either through the public submission of views or via some type of off-the-record contact. Up to a point, efforts to influence or superintend agency activity is a recognized part of the oversight process by elected officials. Public pronouncements, including speeches in Congress or the public filing of documents with the agency, have not posed legal problems. Communications implicate considerations of fairness in two circumstances. First, if political involvement is off-the-record, i.e., it involves communications with the agency not known to the participants in the proceeding or subject to effective rebuttal, it plainly endangers

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410. See Association of Nat'l Advertisers, 627 F.2d at 1154 (holding Cinderella standard inapplicable).
411. Id. at 1181 (MacKinnon, J., concurring and dissenting).
412. See 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 374-75 (2d ed. 1980) (agreeing that closed mind standard is impossible to prove). But see Northwestern Bell Tel. Co. v. Stofferhahn, 461 N.W.2d 129, 134-35 (S.D. 1990) (applying "unalterably closed mind test" to disqualify a state regulatory commissioner who opposed deregulation from participating in any proceeding involving issues of "deregulation, classification, or competitive status determination of telecommunication services" where U.S. West Communications was a party). Professor Davis also suggests that the proper distinction lies in the nature of the fact alleged to have been prejudged, not in the nature of the proceeding. He calls the Cinderella case "[a]n outstanding example of disqualification for prejudgment of adjudicative facts." DAVIS, supra, at 382. He notes that the leading case of FTC v. Cement Institute, 333 U.S. 683 (1948), where the FTC issued cease and desist orders against 74 companies, involved so-called "legislative facts," not adjudicative facts, such that "the question whether the Commission's proceeding was adjudication or rulemaking was of no consequence." DAVIS, supra, at 414.
413. See DCP Farms v. Yeutter, 957 F.2d 1183, 1187-88 (5th Cir. 1992) (holding communications between Congress and agencies over policy issues or administration of a congressionally created program are legitimate part of Congress' oversight role and should not be restricted).
the transparency of the agency’s proceeding. Second, political involvement can encourage the agency to decide a matter based on factors not included in a statute as relevant to the agency’s consideration. A reliance on impermissible factors renders an agency decision arbitrary. Here too, the courts have taken into account the practical factors affecting the relationship between agencies and their political overseers.

Political contacts by the executive branch can be viewed as violations of agency independence. The notion is that the executive chooses the commission member, particularly the chairman, because of a consonance between his or her political views and the President’s views. The President may further give him a general route to follow. But when the new member “sails off” in the general direction urged upon him, he has to maintain radio silence. This consequence of this silence is that he will lack the kind of reinforcement or mid-course correction provided to an executive branch employee.

The APA has explicit prohibitions against ex parte contacts that affect all agencies and complement the law of bias. Such provisions prohibit “[an] interested person outside the agency” from communicating off-the-record with any agency official, whether a member of the staff or a political appointee, “who is or may reasonably be expected to be involved in the decisional process of the proceeding.” They also prohibit any decisional official within the agency from making an ex parte communication to “any interested person outside the agency.” Because they are included in section 557, they are applicable only to formal proceedings and the courts have recognized the distinction between the agency’s activity as adjudicator and rule-maker. The Fifth Circuit’s decision in the leading case of Pillsbury Company v. FTC established the proposition that the courts can set aside an agency’s decision in a formal adjudication where it appears that agency members were unduly influenced by a congressional investigation of a case pending before the agency. Since the high water mark of

416. Id. §§ 5(c) & 557(d)(1)(B); see also Professional Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 562 (D.C. Cir. 1982) (defining “interested person” broadly to include “any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have”). It would seem that anyone with sufficient concern to contact the agency on the merits of a case would qualify as an “interested person.”
417. 354 F.2d 952 (5th Cir. 1966).
418. See id. at 964 (stating that Congress is intervening in agency’s judicial function when investigation focuses on mental processes of Commission).
the *Pillsbury* case, however, courts have been exceedingly reluctant to condemn members of Congress when they openly express their views to agencies. They recognize that members of Congress and the Administration cannot be prevented from attempting to influence agency decisions.419

The prohibitions on congressional (and Executive) intervention in formal adjudicatory proceedings, as outlined in *Pillsbury*, do not extend to less formal agency adjudicatory activity. Examining an agency’s pre-hearing informal activities, the Fifth Circuit observed that the test (at least in such circumstances) should be whether the congressional contacts urged the agency to rely on factors that are not relevant under the statute420—a standard with which an agency’s skilled professional writing staff should be able to comply.421

Ex parte contacts in a rule-making proceeding of a policy nature are not prohibited. In *Home Box Office, Inc. v. FCC*,422 the D.C. Circuit Court appeared to change the law by concluding that ex parte contacts impermissibly compromised the court’s obligation to review an agency’s decision based on the body of material contained in the paper record.423 Nonetheless, shortly thereafter, in *Action for Children’s Television v. FCC*,424 the D.C. Circuit made it clear that ex parte prohibitions in rule-making proceedings were only applicable when the proceedings involved competing private claims to a valuable privilege, i.e., when they resembled adjudicatory proceedings.425 That limitation is now clearly established.426

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419. See Gulf Oil Corp. v. Federal Power Comm’n, 563 F.2d 588, 611 (3d Cir. 1977). The court characterized the congressional interest as directed more toward the agency’s processes (the case had taken too long to decide) than its substantive outcome, and that any “incidental intrusions” did not actually affect the agency’s decision. See id. Similarly, in *California v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992), the court declined to upset an agency decision where the congressional correspondence, although from a powerful committee chairman, did not introduce new evidence or inquire into the agency’s decisional processes. But see *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1550 (9th Cir. 1993) (remanding adjudicatory proceeding to agency to determine whether decision was tainted by ex parte contacts from White House staff).

420. See *DCP Farms*, 957 F.2d at 1187-88 (stating aim of congressional communication was not to influence decisionmaking body).

421. See *Louisiana Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1112-13 (D.C. Cir. 1992) (stating pre-hearing and non-substantive communications are appropriate and do not compromise judicial integrity).

422. 567 F.2d 9 (D.C. Cir. 1977).

423. See id. at 58 (stating that Commission should hold all evidentiary material so that a hearing examiner can determine the nature and source of the ex parte pleas).

424. 564 F.2d 458 (D.C. Cir.1977).

425. See id. at 477 (holding that communications were not of kind susceptible to ex parte influence).

426. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400, 401 (D.C. Cir. 1981); United
As a practical matter, most agencies maintain some form of public "ex parte file" for the receipt of "off-the-record" comments, including those from the legislative and executive branches. Such file is not part of the record for decisional purposes. However, the availability of such a file gives members of Congress a useful vehicle for transmitting constituent views or even their own opinions. The file also accords agencies a respectful way to acknowledge off-the-record submissions by noting that they have been placed in a public file, without compromising the integrity of the agency's proceedings.

Even in formal adjudications, courts demand that agencies simply follow their own rules on ex parte contacts and attempt (as best they can) to resist off-the-record pressure. ATX, Inc. v. Department of Transportation is a good illustration of an agency's response to congressional pressure that received strong judicial endorsement. It represents a utilitarian accommodation between agency and Congress.

Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1215 (D.C. Cir. 1980) (stating that proceedings in this case are distinguished from those that resolve "conflicting private claims to a valuable privilege" or are "quasi-adjudicatory" proceedings) (internal citations omitted).

See generally JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 231-33 (3d ed. 1998) (explaining that independent regulatory agencies appear to have the most restrictive rules regarding ex parte contacts in rulemaking proceedings).


41 F.3d 1522 (D.C. Cir. 1994).

420. See id. at 1520. In ATX, Frank Lorenzo, who had previously been chief executive of Eastern Air Lines during a period of tumultuous labor-management relations, filed an application with the Department of Transportation to establish a new airline. See id. at 1524. At the urging of labor unions, over 60 members of Congress, including key committee chairmen, wrote strong letters to the Secretary requesting that he deny Lorenzo's application. See id. at 1527. Two members of Congress introduced legislation to prevent Lorenzo from reentering the business. See id. at 1525. The Secretary ordered that the application be set for public hearing before an agency administrative law judge and that the final decision be made by the Department's senior career official. See ATX, 41 F.3d at 1525. The Secretary also responded to the Congressional communications with a form letter indicating that "it would be inappropriate for me to discuss the merits of the case with you," that the congressional correspondence would be placed in the "ex parte file," and noting that the application would be thoroughly reviewed. Id. at 1525. Following the hearing at which one congressman actually testified, the decisional official, Deputy Assistant Secretary Murphy, a career civil servant serving temporarily as Acting Assistant Secretary, rendered a 75-page opinion based entirely on the public record. See id. at 1526. That was about all the agency could do considering the circumstances, and the court upheld its decision even though the agency denied Lorenzo's application, which was what the members of Congress had initially requested. See id. at 1532. It was probably helpful to the agency's position in court that it had affirmed its administrative law judge's decision. However, as long as the agency
3. Agency Supervision of Its Members

It is not entirely clear if multi-member agencies have a collegial obligation to evaluate one of their members to determine if he or she should be disqualified from a proceeding. The legislative history of the APA suggests that the agency's power to disqualify is limited to its presiding officers. But permitting a "biased" agency member to participate in a case can clearly call the agency's substantive decision into question. For example, in Berkshire Employees Ass'n v. NLRB, the court determined that the litigants were entitled to an unbiased tribunal, but recognized that it was impossible to determine if one member influenced his or her colleagues. Under these circumstances, the agency was required to "determine for itself" whether one of its members should be disqualified from participation.

Only a handful of agencies have regulations that explicitly address whether the agency may independently determine whether one of its members should be disqualified from participation in a particular case. Agencies that have considered the matter have taken different positions. Most agencies, including the Securities and Exchange Commission, provide that the decision to disqualify a member from a proceeding "rests with that individual member." Nevertheless, in at least one case, the SEC collectively investigated allegations of bias after the two commissioners against whom the allegations were brought voluntarily agreed to have their colleagues assess their culpability. The Federal Trade Commission's regulations, however, allow the Commission to disqualify a commissioner in the event that the commissioner in question declines to recuse himself or

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432. 121 F.2d 235 (3d Cir. 1941).
433. See id. at 239; see also Berkshire Knitting Mills v. NLRB, 139 F.2d 134, 136-37 (3d Cir. 1943). Where the term of the allegedly biased member expired, and the remaining agency members (including two who were not agency members at the time of the earlier decision) reconsidered the case, the court subsequently declined to examine the allegations of bias against the former member. See id.
435. See United Corp., 32 S.E.C. 633, 634 n.3 (1951) (demonstrating agency's collective involvement in disqualifying one of its members).
herself from the proceeding.436 Accordingly, the FTC has exercised this provision.437

4. Recusal

Neither the APA nor case law indicates whether, and in what circumstances, an agency official who has not yet been legally disqualified from a matter, should exercise his or her discretion not to participate in the interest of avoiding an appearance of conflict of interest. The principal court decision that evaluates an agency member’s discretionary decision not to recuse is Center for Auto Safety v. FTC.438 Judge Harold Greene reviewed the recusal policies of several high level government officials and determined that the then-chairman of the FTC did not abuse his discretion in declining to recuse himself from a proceeding involving a former client.439

Judge Greene indicated that “[a]bsent an abuse of discretion, the decision with regard to recusal is that of the official who is directly involved.”440 Agency members appear to have different philosophies in this regard. Former FTC Commissioner MacIntyre’s decision in the National Biscuit Co.441 case reflected his determination not to let his participation delay the resolution of a case. In contrast, former NRC Chairman Palladino’s refused to step down in Long Island Lighting Co.442 because he feared that if he did so, he would “[appear] to give credence to an accusation that aims baseless charges of impropriety not just at me,” but at other NRC officials as well.443

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437. See, e.g., Kellogg Co., 97 F.T.C. at 159; see also Lone Star Airways, 97 C.A.B. 642, 642 (1982) (considering—and rejecting—an allegation of bias lodged against member of former Civil Aeronautics Board).
439. See id. at 1251 (holding that FTC Chairman’s favorable references and relationship with automobile manufacturer and related testimony given before Congress was not improper participation).
440. Id. at 1250; see also Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1164 (D.C. Cir. 1995) (applying “deferential, abuse of discretion” standard) (citing Air Line Pilots Ass’n Int’l v. DOT, 899 F.2d 1230, 1231-32 (D.C. Cir. 1990)) (finding cabinet secretary’s participation in decision declining to investigate client of prospective employer not an abuse of discretion).
443. Id. at 1062-63.
IV. THE TENSION BETWEEN AUTONOMY AND ACCOUNTABILITY

A. The Need for Accountability and the Independent Administrator Concept

A central question addressed by the form, structure and operations of administrative agencies is whether accountability should be focused in one place, or if it should be diffused. The debate has been ongoing since creation of the Interstate Commerce Commission in 1887. Placing decisional responsibility with a group ensures that the group takes into account diverse policy perspectives and that it adopts moderate policies. Consensus-building through compromise can also produce a broader range of public acceptance for those decisions ultimately reached. This approach has especially drawn favor where agencies serve as adjudicators, deciding licensing, rate-making, antitrust and similar cases that typically involve the resolution of issues affecting individual rights.

It is important to assign accountability in one place for two interrelated reasons. First, accountability is vital to a proper implementation of democratic principles in the administrative state. The American public and elected representatives can examine the activities of unelected officials, determine the identity of the person who completed each act, and evaluate the success or failure of a particular initiative. Officials who are appointed by the President and who serve at the President’s pleasure are, to some degree at least, the President’s responsibility. Eventually, the President’s appointments and policies will be tested at the polls during the presidential elections.

Second, accountability can translate into better decisionmaking. For example, Professor William Kovacic examined appointments to the Federal Trade Commission and concluded that, as a threshold matter, “[r]eplacing a multi-member structure with a smaller number of commissioners or a single administrator probably increases the likelihood that more nominees will be highly qualified.” Kovacic also believes that this approach narrows the ability of the President to appoint, or the Congress to endorse, candidates with weak qualifications. We would argue that a strong administrator can establish policy, create clear lines of responsibility for implementation of that policy, and eliminate delay in at least certain aspects of an organization’s operation by shifting resources. But we doubt that the

445. See id. at 948-49.
reduction in the size of multi-member agencies alone is likely to improve the quality of appointees.

The perceived ineffectiveness of collegial decisionmaking at the Nuclear Regulatory Commission at the time of the Three Mile Island accident, and the benefits of centralized control, were arguments advanced in 1988 and 1989 for replacing that multi-member commission with a single administrator. Senator John Breaux of Louisiana observed:

I sincerely believe that the benefits of a Commission process are largely illusory.

....

I think it is fair to say that we have learned that we primarily have both people and organizational problems with nuclear energy, not technological problems.

....

[ Less than 10 percent of the decisions that have come from the agency (over a 3-year period) can be attributed to collegial discussions occurring in an open meeting when a majority of the Commissioners are present. A more cursory examination of the record since 1975 indicates that this pattern is not far from the norm of every Commission during that time-frame.]

In contrast, a perceived lack of independence led Congress in 1994 to remove the SSA from the Department of Health and Human Services (HHS) and establish it as an independent agency.

The structure that Congress adopts for a particular agency depends both on what it expects from the agency and what it can achieve politically. Should an agency be personally answerable to the President or, should it, like the independent agencies, have a measure of autonomy? The structural and organizational options theoretically available to Congress are quite varied. At one time or another, Congress has created departments, offices, boards, commissions, government corporations, quasi-public government-sponsored enterprises, and foundations—almost as many types of governmental units as there are problems to solve and programs to administer.

446. 135 Cong. Rec. 8530 (1989).

447. The Administrator of SSA is appointed by the President with the advice and consent of the Senate to a six-year term and may be removed only for “neglect of duty or malfeasance in office.” 42 U.S.C. § 902(a)(1)-(3) (1994). Her budget is submitted to Congress by the President without revision. See 42 U.S.C. § 904(b) (1994).

In our experience, the benefits of one type of structure can also be found to some degree in the other. On the one hand, there are few agencies that are both headed by a single person and deemed to be genuinely monolithic. They often have staff components that reflect different viewpoints. They are subjected to a multiplicity of outside pressures. Compromises are made internally as recommendations move up the chain to the ultimate decision-maker. On the other hand, statutes establishing multi-member organizations tend to minimize confusion by resting day-to-day administrative responsibility in the hands of one of the members. Moreover, as a practical matter, not every member of a multi-member agency is interested in every issue. Thus, a single member may well take a keen interest only with respect to a specific project or matter. Indeed, as noted above, the chairman at many federal multi-member agencies is likely to exercise both management and policy leadership.

Congress' decision not to place an agency explicitly within the executive branch can bear on the ability of the Administration or Congress to superintend its activities. Agencies that are perceived to be "independent" usually were intended to have this characteristic. They are also generally believed to be less responsive to the policy direction of an incumbent President than appointees who serve expressly at his pleasure. In our experience, this outcome did not result because independent agency officials were unwilling or unable to follow policy direction. Rather, it is because, right or wrong, both sides believe that there must be less interactive communications between the President and his staff and his "independent" appointees, and more freedom by such appointees to reach their own decisions without direct consultation with Administration policymakers. The appointees of independent agencies, in other words, are often left largely to their own devices. Frequently, they align themselves with congressional committees. It is difficult to rearrange established relationships whether increased accountability or increased independence is the objective.

As we discuss later, Senate efforts to transform the multi-member Nuclear Regulatory Commission into a single administrator structure were unavailing despite the public concern over government responsibility in the wake of the Three Mile Island accident. Other recent initiatives, such as the initiative to make the Federal Aviation Administration (FAA) independent of the Department of Transportation, and the initiative to bring the

449. See HUNDT, supra note 127, at 12 (noting that Congress viewed the FCC as its creature because the agency's authority came from congressional statute).

450. But see STRAUSS, supra note 5, at 92 (suggesting that differences in political leadership should not overwhelm a larger sense of similarity between multi-member agencies and those situated more directly in executive branch).
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multi-member Federal Energy Regulatory Commission more squarely under presidential control by replacing it with a single commissioner, were both equally unsuccessful (at least so far).

For its part, the Executive Branch, no matter how demanding its rhetoric, has been relatively loath to require independent agencies to follow traditional executive oversight procedures. When President Reagan issued Executive Order 12,291 in 1981 requiring agencies to submit proposed and final rules to OMB for clearance, and Executive Order 12,498 in 1985 requiring agencies to submit their anticipated regulatory initiatives to OMB annually, both executive orders exempted the multi-member independent agencies. President Bush took an initial step by distributing in January 28, 1992 to both department heads and independent agencies a memorandum entitled “Reducing the Burden of Government Regulation.” The memo placed a ninety-day freeze on new regulations so that a review of all current regulations could be performed to identify regulations that unnecessarily inhibited U.S. economic growth. On September 30, 1993, President Clinton issued his own Executive Order 12,866. Although the Clinton executive order retained the provision excluding independent agencies from the requirement of submitting proposed and final rules to OMB, it did extend the regulatory planning process to these agencies.

B. Divided Accountability and Super Separation of Functions

The draftsmen of the APA rejected the principle that there must be a total separation of enforcement and adjudicatory functions through the establishment of separate agencies. The concentration of functions within the same agency, and even in the same person, does not automatically violate recognized principles of due process. Nonetheless, the APA requires that, within an agency, employees who are involved in adversarial pro-


452. See Memorandum on Reducing the Burden of Governmental Regulation, 28 WEEKLY COMP. PRES. DOC. 232 (Jan. 28, 1992). This regulating moratorium was extended for another 120 days on April 29, 1992. See Memorandum on Implementing Regulatory Reforms, 28 WEEKLY COMP. PRES. DOC. 728 (Apr. 29, 1992).


454. See Exec. Order No. 12,866, 3 C.F.R. at 639.

455. See Withrow v. Larkin, 421 U.S. 35, 58 (1975) (recognizing combination of investigatory and adjudicative functions does not constitute due process violation).
ceedings (other than the agency heads) be insulated from those with decisional responsibilities.\footnote{456}

Congressional attempts to change this arrangement at multi-member agencies have been sporadic and driven by pragmatic or political, and not institutional, considerations. Only a year after enactment of the APA, Congress rejected the general APA-model in the labor-management context. In the Taft-Hartley Act,\footnote{457} Congress modified the structure of the National Labor Relations Board (NLRB) to allow the Board’s General Counsel to be appointed by the President with the advice and consent of the Senate and to have independent authority to prosecute unfair labor practice charges.\footnote{458} The General Counsel’s discretion whether or not to prosecute is not reviewable by the Board itself. Further, the NLRB members have personal assistants who review the record in particular cases but, unlike most agencies, the NLRB may not establish a review staff to advise the members.\footnote{459} It was fear of pro-labor commissioners that led Congress to amend the Taft-Hartley Act to insulate the “charging” function from the Board.\footnote{460} In 1952, the members of the FCC, and the agency’s administrative law judges (then called examiners) were statutorily prohibited from having a review staff.\footnote{461} The prohibition was dropped in 1961.\footnote{462} The Senate Committee explained that such a strict prohibition against access to the agency’s expert staff was “wasteful and inefficient.”\footnote{463}

In 1998, congressional dislike of the Federal Election Commission led to an effort to split off that agency’s General Counsel, making him an advice and consent appointee of the President rather than a civil servant directly

\footnote{456}{See 5 U.S.C. § 554(d)(2) (1994).}
\footnote{458}{See 29 U.S.C. § 153(d).}
\footnote{459}{See id. § 154(a). See generally Benjamin W. Mintz, Administrative Separation of Functions: OSHA and the NLRB, 47 Cath. U. L. Rev. 877, 881-82 (1998). At most agencies, personal assistants or the member themselves work on separate statements. See infra Appendix. At other agencies, such as the FMSHRC, staff assistance is provided, if needed. See infra Appendix. At the EEOC, by tradition, no dissenting statement is issued even if a Commission member disagrees with the majority’s determination. See infra Appendix.}
\footnote{460}{See Christy Concannon, Comment, The EAJA and the NLRB: Chilling the General Counsel’s Prerogative to Issue Unfair Labor Complaints?, 36 Cath. U. L. Rev. 175, 177 (1986).}
\footnote{461}{See Daniel J. Gifford, Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions, 49 Admin. L. Rev. 1, 11-12 (1997) (discussing Communications Act of 1952’s prohibition against consultation).}
\footnote{462}{See id.}
accountable to the Commission. The effort was not undertaken to protect the independence of the General Counsel, who was a career civil servant, but instead reflected congressional displeasure at the incumbent. Congress wanted a chance to vote on his tenure. The effort ultimately failed, but it demonstrated how accountability can undermine technical expertise.

On a handful of occasions involving regulation by executive agencies, Congress created independent, multi-member boards to adjudicate enforcement proceedings instituted by the executive agency. This so-called "split enforcement" model gives the cabinet agency the responsibility for promulgating and enforcing regulations and the independent, multi-member agency the responsibility for adjudication. The Occupational Safety and Health Act reflects a congressional fear that the political agendas of executive appointees will inappropriately infiltrate their adjudicatory activities. Specifically, it was the private business' fear of Department of Labor pressure that lead to the creation of the Occupational Safety and Health Review Commission (OSHRC) in the final days of congressional debate.

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465. See Bruce T. Rubenstein, FEC General Counsel's Job is Threatened by Congress, CORP. LEGAL TIMES, Nov. 1998, at 4; see also Amy Keller, FEC Counsel Tries to Prevent His Ouster, ROLL CALL, Oct. 1, 1998, available in LEXIS, Allnewsplus Library.

466. See, e.g., 29 U.S.C. §§ 661-668 (1994) (establishing Occupational Safety and Health Review Commission to adjudicate cases prosecuted by Occupational Safety and Health Administration of the Department of Labor); 30 U.S.C. §§ 823-825 (1994) (establishing Federal Mine Safety and Health Review Commission to adjudicate cases prosecuted by Mine Safety and Health Administration of the Department of Labor). Certain cases involving the revocation or suspension of licenses issued by the Federal Aviation Administration (FAA) and some civil penalty cases are prosecuted by the Federal Aviation Administration but adjudicated by the National Transportation Safety Board. Other cases are adjudicated by the FAA itself, although administrative law judges of the Department of Transportation serve as the presiding officer rendering the initial decision in each case. See generally Richard H. Fallon, Jr., Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication, 4 ADMIN. L.J. AM. U. 389 (1991).


468. Labor groups wanted all authority consolidated in the Department of Labor. Business groups were prepared to allow the Department to investigate and prosecute cases but wanted separate entities to promulgate health and safety standards and to decide enforcement cases. Under a compromise amendment proposed by New York Senator Jacob Javits, the Occupational Safety and Health Administration within the Department of Labor promulgates standards and prosecutes violations but the separate Occupational Safety and Health
The abolition of the multi-member Civil Aeronautics Board in 1985, and the transfer of its remaining functions to the Department of Transportation (DOT), presented Congress with a classic choice between independence and political accountability. Among the functions transferred to DOT was the Board's responsibility for adjudicating competing international route licensing applications. Historically, such licensing cases were heard initially by one of the Board's administrative law judges but the decisions of ALJs were always reviewed by the Board itself and then transmitted to the President, who made the final decision. To allay concerns that international licensing cases would henceforth be decided on political grounds, the DOT informed Congress that it would create procedures that "insulated" certain decisions from political pressure. Congress acquiesced in those assurances.

Review Commission decides cases. See Mintz, supra note 459, at 885.

469. See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948) (noting that Board orders are "not mature" and ready for judicial review until they are "finalized for Presidential approval").

470. See Delta Air Lines, Inc. v. DOT, 51 F.3d 1065, 1070-72 (D.C. Cir. 1995) (holding that Department of Transportation correctly applied insulating procedures when awarding airline carrier routes). Congress authorized the DOT to process applications either through the traditional hearing method or through simplified non-hearing procedures. See 49 U.S.C. § 41111 (1994). Implementing the legislation, the DOT issued regulations that provided, among other things, that "[c]arrier selection proceedings for international route authority and such other hearing cases as the Secretary deems appropriate" would be adjudicated through a hearing process, and the final decision would be made by the Department's "senior career official." 14 C.F.R. § 302.22a(b)(4) (2000). Final decisions by the senior career official are subject to a "petition for reconsideration" filed with the Assistant Secretary. But the regulations limit the Assistant Secretary's options to affirming the decision or remanding it for further action pursuant to instructions—options more limited than the normal decisional options available when an agency reviews a presiding officer's decision. The APA provides that an agency has all the powers when reviewing an initial or recommended decision that it would have in making the decision in the first instance. See § 7(a), 5 U.S.C. § 556(b) (1994). An agency may, with some limitations, review the evidence de novo and substitute its judgment on issues of law, policy, discretion and even facts, for that of its presiding officer. See Valkering, U.S.A., Inc. v. Department of Agric., 48 F.3d 305, 308 (8th Cir. 1995) (holding that agency determination, if reasonable, must be upheld by Court even if different from that of subordinate hearing officer); NLRB v. Brooks Cameras, Inc., 691 F.2d 912, 915 (9th Cir. 1982) (finding court must uphold factual determinations of Board). Other hearing cases and non-hearing cases are decided directly by the Assistant Secretary. See 14 C.F.R. § 302.22a(c)-(d) (2000). Significantly, the Department construes its regulations to give the Assistant Secretary discretion to determine what procedures will be used. The D.C. Circuit upheld the regulations. Judge Rogers observed the fact that "this scheme does not minimize the participation of political appointees to the extent desired by [the petitioning airline] does not make it plainly erroneous." Delta Air Lines, 51 F.3d at 1071; see also USAir, Inc. v. DOT, 969 F.2d 1256, 1262 (D.C. Cir. 1992) (discussing how procedure limiting Assistant Secretary's review to remand has "an artificial quality" but is not illegal).
C. Oversight Agencies

On occasion, Congress uses the multi-member agency as a check on the work of the executive branch departments. Although the work of these agencies is entirely or primarily advisory, their multi-member structure "diffuses" power and inhibits executive control of a process designed to review the executive.

Examples of this type of agencies are the Defense Nuclear Facilities Safety Board (DNFSB), the National Transportation Safety Board (NTSB), the Chemical Safety and Hazard Investigation Board (CSB) and the Postal Rate Commission (PRC). The DNFSB reviews the design of defense nuclear facilities run by the Department of Energy (DOE), makes recommendations to DOE regarding the safety of these facilities, and investigates events or practices at these facilities that may affect public health or safety. The NTSB investigates civil aviation accidents and significant accidents in other modes of transportation and makes recommendations to the FAA and other bodies. The CSB investigates the probable cause of accidental chemical releases in much the same way as the NTSB investigates transportation accidents. The CSB also conducts research and issues reports concerning the safety of chemical production. The PRC is an adjudicatory agency that issues formal recommendations regarding changes the Postal Service proposes regarding postal rates, fees and mail classification. Although Congress requires that executive departments respond to recommendations in some fashion, none of the multi-member agencies has the power to enforce its recommendations.

A skepticism about the executive branch agencies' ability to police themselves undergirds the creation of these advisory boards. They are designed as an independent check on the regulatory or operational activities of the executive branch. As the Senate Report observed when setting up the Chemical Safety Board:

471. See 49 U.S.C. § 1131 (1994). The NTSB also has regulatory responsibility for the administrative trial and appellate review of FAA and Coast Guard decisions assessing civil penalties or affecting the certificates of pilots, mariners, or mechanics. See id. § 1133.

472. See id. § 7412(r)(6)(C).

473. For example, the Secretary of Labor must respond within 180 days to recommendations of the Chemical Safety Board. See 42 U.S.C. § 7412(r)(6)(J). The Labor Department must indicate whether the Secretary will initiate a rule-making or issue orders to implement the CSB's recommendations. "Any determination by the Secretary not to implement a recommendation or to implement a recommendation only in part . . . shall be accompanied by a statement from the Secretary setting forth the reasons for such determination." Id.
It is unlikely that an agency charged both with rule-making and investigating functions would be quick to acknowledge that existing requirements were insufficient to prevent an accident. In fact, the investigations conducted by agencies with dual responsibilities tend to focus on violations of existing rules as the cause of the accident almost to the exclusion of other contributing factors for which no enforcement or compliance actions can be taken. The purpose of an accident investigation (as authorized here) is to determine the cause or causes of an accident whether or not those causes were in violation of any current and enforceable requirement.

... [T]he [multi-member advisory agency] is created as an independent source of expertise which may make recommendations for rules and orders. ... 474

D. Independent Agencies in the Executive Branch

In *Morrison v. Olson*, 475 the Chief Justice decided whether a statutory provision had impermissibly restrained the President’s power to control executive branch officials. In the opinion, he indicated that the focus is on whether any removal restriction “impermissibly burdens the President’s power to control or supervise the [appointee], as an executive official, in the execution of his or her duties under the Act.” 476 Phrased differently, does the limitation “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.” 477 In the dissenting opinion, Justice Scalia characterized the Court’s approach as “an open invitation for Congress to experiment.” 478 What about “a special Assistant Secretary of Defense for Procurement?” he asked. 479 Frankly, no one knows. If the Court’s approach was indeed an invitation, Congress has rarely accepted it.

Multi-member agencies emerged in the 1880s as the regulatory vehicle of choice, and flowered during the New Deal. 480 In recent years, that regulatory model has been largely replaced by congressional and Presidential interest in agencies with a single head. Twice since *Morrison v. Olson*, Congress passed legislation that attempted to combine the advantages of unified administration and centralized control with the benefits of inde-

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476. Id. at 692.
477. Id. at 693.
478. Id. at 726 (Scalia, J., dissenting).
479. Id.
pendence. In both cases—the Special Counsel and the Social Security Administration—Congress removed the entities from their parent organizations, gave the new head of the agency a statutory term, and provided that he or she may be removed by the President only for cause.

When Congress in 1979 created the Office of Special Counsel, the office was an independent investigative and prosecutorial component of the multi-member Merit Systems Protection Board. However, the Whistleblower Protection Act of 1989 recreated the office as a free-standing, independent agency. The Special Counsel, who heads the agency, is responsible for enforcing the ban on so-called prohibited personnel practices by federal agencies, especially those involving whistleblowers, ensuring compliance with provisions of the Hatch Act that deals with political activity, and prosecuting cases involving denial of federal benefits to veterans and reservists. The agency itself is small and employs about ninety employees. To ensure the agency’s independence, Congress provided that the Special Counsel be appointed by the President, with the advice and consent of the Senate. The Special Counsel serves a five-year term and may be removed from office only for the classical reasons—"inefficiency, neglect of duty, or malfeasance in office." The Special Counsel is given explicit statutory power to submit reports and testimony simultaneously to Congress and the President. However, Congress has not given the Special Counsel the authority to represent himself or herself in court.

The SSA, in contrast, is a large agency that administers what has been described as "the Western world’s largest income support program for people unable to engage in substantial gainful activity." Its massive adjudication apparatus handles nearly three million disability claims annually and

486. See id. § 1212 (delineating powers and functions of Office of Special Counsel).
holds nearly 600,000 hearings each year using over 1,000 ALJs.\textsuperscript{488} To accord the Administrator a measure of independence, Congress removed the Administration from the HHS in 1994 and provided that the Administrator be appointed by the President, with the advice and consent of the Senate, to a 6-year term and may be removed only for "neglect of duty or malfeasance in office."\textsuperscript{489} The Administrator’s budget must be submitted to Congress by the President without revision.\textsuperscript{490} Like the Special Counsel, the Administrator may not represent himself or herself in court.\textsuperscript{491}

The emergence of these two agencies reflects a congressional effort to shift the traditional balance in some, but not all, respects. When Congress enacted the Special Counsel legislation, President Clinton, based on advice from the DOJ, opined that the removal provision raised a significant constitutional question.\textsuperscript{492} Although not all innovative approaches offend separation of powers principles, each must be analyzed from both policy and constitutional perspectives. However, Congress’ determination is entitled to some weight. Whether Congress’ judgment in these two cases is sufficient to override the President’s ordinary authority over executive branch officials has yet to be seen.

The Office of Legal Counsel (OLC) recently evaluated the President’s removal power as part of a wide-ranging reappraisal of separation of powers issues.\textsuperscript{493} OLC observed:

The Supreme Court’s removal cases establish a spectrum of potential conclusions about specific removal limitations. At one end of the spectrum, restrictions on the President’s power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional. We think, for example, that a statute that attempts to limit the President’s authority to discharge the Secretary of Defense would be plainly un-

\begin{footnotesize}
\begin{enumerate}
\item See id. § 904(b).
\item See id. § 902 (delineating powers and functions of Commissioner of Social Security).
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constitutional and that the courts would so hold. . . . At the other end of the spectrum, we believe that for cause and fixed term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.

Between these two extremes, the arguments are less clear . . . . In situations in which Congress does not enact express removal limitations, we believe that the executive branch should resist any further application of the Wiener rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory.494

Given the nature of the Social Security Administration’s primary function, the “for cause” removal provision seems quite likely to withstand constitutional attack. The Special Counsel statute is more problematic, but would probably meet the Morrison v. Olson test. However, neither statute may actually be challenged on constitutional grounds. There appears to be little incentive for an aggrieved party to claim that the agency head should not be independent. Therefore, it appears likely that this new form of agency will join the others among the accepted structures of government institutions.495

494. Id. at *147-*49.

495. The recent restructuring of the Federal Aviation Administration reflects a useful illustration of an agency head who, despite some statutory changes, remains under the President’s plenary control. In the agency’s 1996 Reauthorization Act, Congress provided that the Administrator shall continue to be appointed by the President with the advice and consent of the Senate, as before, but shall now serve a five-year term. See 49 U.S.C. § 106(b) (1994 & Supp. IV 1998). There is no “for cause” removal provision. Moreover, the Administrator continues to report to the Secretary of Transportation. See id. These statutory provisions create a strong presumption that Congress did not intend to alter the President’s historic removal power over the Administrator. The five-year term appears simply to be a political compromise designed to encourage continuity of office by according the Administrator some added decisional and management freedom. The legislative history supports this reading of the statute. H.R. 2276, an early version of the reauthorization legislation, would have removed the FAA from the Department of Transportation and replaced the current Administrator position with a three-member Presidentially-appointed Board whose members could only be removed for cause. See H.R. Rep. No. 104-475, pt. 1, at 25 (1996). The Senate approach, which was enacted, simply added a five-year term for the Administrator. See 49 U.S.C. § 106(b); see also S. Rep. No. 104-333 (1996). In contrast, the single, ten-year term for the Director of the FBI indicates a congressional intent to limit a director’s tenure. See Kenneth Williams, Gays in the Military: The Legal Issues, 28 U.S.F. L. Rev. 919, 954 n.286 (1994). As with the FAA administrator, the FBI director’s tenure provision does not prevent summary removal by the President before the term expires.
V. THE FUTURE OF THE INDEPENDENT AGENCY

The independent agency has developed deep roots in the American administrative state. However, as this article suggests, the independent agency reflects a political calculation of a specific time and place drawn first from the 19th century British and state experience in railroad regulation, followed by the Progressive movement's elevation of experts and "the science of administration" into a governing cultural myth. The number of independent agencies has not grown significantly since the Great Society. Newer multi-member agencies often play more a supervisory than a regulatory role—different from their earlier counterparts. Some newer agencies were previously components of larger units. At times, multi-member agencies have disappeared because they were transmogrified into different forms, reorganized into more fashionable structural modes, or terminated because they completed their work. At the same time, few multi-member agencies have been abolished. The Civil

496. See supra text at notes 15-90.
497. See supra text at notes 91-113.
498. See infra Part. V-B.
502. Occasionally, a temporary agency will be abolished. The National Bituminous Coal Commission was established in 1935 as a temporary multi-member agency within the Department of the Interior. Cushman observes that there was no discussion in Congress of
Aeronautics Board appears to be the only permanent multi-member agency actually abolished since the New Deal.\textsuperscript{503}

What then is the future of the independent regulatory mode? The following points should be kept in mind.

\textbf{A. Restructuring Multi-Member Agencies: The Single Member Option}

Most congressional efforts to restructure agencies have generally resulted in legislative paralysis. This is due principally to division among relevant interest groups and executive branch opposition to any desiderata of agency independence. The SSA is an interesting exception.

\textbf{1. Social Security Administration}

The depression-era SSA has had an interesting institutional history.\textsuperscript{504} In 1935, President Roosevelt sent Congress legislation to establish a Social Insurance Board as part of the Department of Labor. After receiving the legislation, the House and Senate divided on the institutional placement of the new entity. The Senate backed the Roosevelt approach and the House favored the creation of an independent agency.\textsuperscript{505} In the end, the House

the Commission's status within the Interior Department, although the Interior Secretary later testified that he in fact exercised no control over the Commission's activities. \textit{See Cushman, supra} note 10, at 379-80, 387-88. Key features of the Commission's enabling statute were declared unconstitutional in \textit{Carter v. Carter Coal Co.}, 298 U.S. 238 (1936). Although the agency was later resuscitated by the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72, it was eliminated as part of a presidential reorganization plan in 1939, and its functions were transferred directly to the Interior Department. \textit{See Cushman, supra} note 10, at 388-89. Cushman observes that the Commission "passed out of the picture, apparently un lamented." \textit{Id.} at 389.

\textsuperscript{503} \textit{See} Theodore J. Lowi, \textit{President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers}, 47 CASE W. RES. L. REV. 1219, 1227 (1997) (observing that two New Deal agencies—the CAB and the ICC—have been abolished). However, as we discuss, the ICC was actually transformed into a new multi-member agency.

\textsuperscript{504} Except as noted, the material in this section is adapted from the SSA Organizational History contained on the Social Security Administration's web page. \textit{See} Social Security Administration History Page: SSA History (last visited Oct. 5, 2000) <http://www.ssa.gov/history/orghist.html>.

view prevailed. The Social Security Act of 1935 established a three-
member agency known as the Social Security Board to administer the old
age and survivors insurance, unemployment compensation, and public as-
sistance programs. The Board had many of the characteristics of an inde-
dependent multi-member agency except it did not have an explicit statutory
provision governing removal of members.

A mere four years after its creation, the Board lost its independent status.
In the Reorganization Plan I of 1939, President Roosevelt created the Fed-
eral Security Agency (FSA), a sub-cabinet level entity, to administer a
range of programs, including the U.S. Public Health Service, the Civilian
Conservation Corps, and the Office of Education. The reorganization plan
retained the Social Security Board but it was placed under the jurisdiction
of the FSA.

Then, in 1946, the Board lost its multi-member status. Reorganization
Plan 2 of 1946 abolished the Social Security Board and transferred its
functions directly to the FSA. Then President Truman praised the
Board’s work but characterized its status as an “anomaly.” In the Presi-
dent’s view, the “existence of a department within a department [was] a se-
vere barrier to effective integration.” The FSA Administrator created the
position of SSA Commissioner and named the Board’s Chairman as the
first Commissioner of Social Security.

In 1953, the FSA was abolished and its functions, including those of the
SSA, were transferred to the newly established Department of Health, Edu-
cation and Welfare. Later, the SSA became a central part of HHS when

507. The Board had three members, appointed by the President with the advice and con-
sent of the Senate, serving six-year terms, no more than two of whom could be from the
same political party. See id.
508. The Board’s functions were thereafter to be administered “as a part of the Federal
Security Agency under the direction and supervision of the Federal Security Administrator.”
(1994). The Board’s Office of General Counsel was consolidated with the Office of Gen-
eral counsel of the Federal Security Agency. The statute was also amended in 1939. See
Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. The old age insurance
program was so drastically amended in 1939 that the amendments were called “the new
1448 (1994). The FSA delegated most of its powers to the Commissioner of Social Secu-
ritv, although the FSA Administrator retained authority over the Appeals Council. See
Koch & Koplow, supra note 487, at 235.
510. Reorg. Plan No. 2 of 1946, Message of the President, 3 C.F.R. § 10 (1943-48), re-
that department was established in 1980. However, this reorganization did not quiet the conflict. In the 1990s, the classic institutional battle arose yet again. An agency backlog of disability cases, coupled with a re-examination of disability claims that resulted in the numerous termination of benefits, led to a perception that the agency lacked independence from political control. Eventually, legislation was proposed to remove the Social Security Administration from HHS and establish it as an independent agency. The House favored the independent multi-member board format akin to the one that it had favored in 1935, but the Senate’s preference prevailed. This time, the new agency would be headed by a single individual whose independence would be protected by a statutory provision that allows the President to remove the individual only for good cause.

2. **Nuclear Regulatory Commission**

The effort to replace the Nuclear Regulatory Commission (NRC) with a single administrator produced a more typical result. In the wake of the Three Mile Island nuclear accident, a “maze of reform proposals” for the NRC were introduced in Congress. Six separate bills were introduced in the House of Representatives, covering the waterfront of administrative reorganization and inter-branch issues. In particular, two bills, H.R. 3285 and H.R. 4134, would have replaced the Commission with a single administrator. Several bills reflected efforts to resolve the internal squabble

app. at 1488 (1994).


516. See NRC Hearings, supra note 516, at 237, 239 (statement of Lando W. Zech, Jr., Chairman, NRC) (testifying that majority of the NRC supported the single administrator concept). H.R. 3285 would also have established a statutorily independent Inspector General and a brand new multi-member independent Nuclear Safety Board responsible for investigating events at both NRC-regulated and Department of Energy-owned facilities. See id. at 237. H.R. 4134 would have replaced the NRC with a single head administrator. See id. at 239.
between the NRC’s Executive Director for Operations and its Director of the Office of Investigations, or to address other perceived NRC failings.517

A bare majority of the Commission supported the single administrator concept,518 but only if the new Administrator were to be entirely free of the usual forms of OMB regulatory oversight.519 A fourth Commissioner thought that things were fine as they were and that the Sunshine Act was at the heart of the Commission’s institutional problems because it impeded collegiality.520 The fifth Commissioner, who would later become Chairman, supported retention of the multi-member NRC, but wanted enhanced administrative powers for the Chairman.521

Congressional efforts to ensure independence from presidential oversight for the new agency was virtually a kiss of death for any legislation. The Department of Justice strongly opposed the creation of any independent board as part of the new agency regime on constitutional grounds.522

517. See id. at 118 (statement of Rep. Gejdenson) (referring to undermining by NRC staff of Office of Investigations examinations of licensee wrongdoing and noting House Subcommittee Chairman Udall’s letter to NRC urging it not to place Office of Investigations under Executive Director for Operations); Matthew L. Wald, Report Contradicts Reason Given By Nuclear Officials for an Inquiry, N.Y. TIMES, Dec. 9, 1989, at A12 (noting conflicts between NRC’s Chief of Staff and senior staff of Office of Investigations). These bills, however, adopted conflicting approaches. H.R. 3285 and H.R. 4134 would have eliminated the position of Executive Director for Operations, while H.R. 3124 would have elevated the position to a presidential appointee, confirmed by the Senate. See NRC Hearings, supra note 516, at 239 (statement of Lando W. Zech, Jr., Chairman, NRC). H.R. 4140 would have established the Office of Investigations as a statutory office, and it would have required the office to report to the Commission. See id. at 242. H.R. 2126 addressed the issue of the Inspector General and the Office of Investigations, but injected a separate issue by proposing new protections for whistleblowers. See id. at 240. Finally, H.R. 3049 addressed conflicts-of-interest by precluding the appointment to the Commission of any individual who had a significant financial relationship with a regulated entity in the two years prior to the appointment. See id. at 243; see also Ben A. Franklin, Nuclear Officials Assailed as Biased, N.Y. TIMES, Apr. 22, 1987, at A1 (concerning allegations that top management at NRC improperly assisted regulated companies and noting congressional claims that a “distinctly cozy relationship” existed between Commission’s top manager and a regulated company).

518. See NRC Hearings, supra note 516, at 147 (statement of Lando W. Zech, Jr., Chairman, NRC) (stating that “the Commission majority on this issue is very marginal”).

519. See id. at 232 (statement of Lando W. Zech, Jr., Chairman, NRC) (explaining that majority of NRC believed it should not be subject to OMB regulatory oversight).

520. See id. at 213 (statement of Frederick M. Bernthal, Commissioner, NRC) (arguing that Sunshine Act undermined concept of collegial decisionmaking).

521. See id. at 223 (statement of Kenneth C. Rogers, Commissioner, NRC) (urging that Chairman be made responsible for management of all operational matters).

522. The Department said that it would recommend a presidential veto of any bill that contained a new, independent-style Board. See Letter of Thomas M. Boyd, Acting Assistant
The OMB opposed giving the new agency authority to bypass OMB on legislative, budgetary and regulatory matters. In due course, the reform effort collapsed and the Senate indefinitely postponed a bill to reorganize the functions of the NRC.

3. Federal Energy Regulatory Commission

The short-lived effort to replace the FERC with a single administrator came as a surprise element of the Bush Administration’s 1991 National Energy Strategy. Introduction of the National Energy Strategy itself “followed 10 years of work by lobbyists, academics, true-believer congressional staff members, think-tank scholars, policy specialists and a handful of aggressive industry leaders.” However, the Bush Administration’s effort to abolish FERC was “an eleventh hour recommendation” by Vice President Quayle’s Competitiveness Council.

The proposed abolition of FERC appears to have been a rather sweeping response to the chronic delays that were seemingly endemic in the agency’s proceedings. But such significant structural change not only threatened prevailing arrangements but lacked both the sense of urgency and the consensus of “elite opinion” that Professors Martha Derthick and Paul Quirk believe is essential to reform. There had also been little, if any, political preparation. As a result, Congressman John Dingell, the Chairman of the House Energy and Commerce Committee, urged the Administration to separate it from the overall energy initiative, while Senator Bennett

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523. OMB too was prepared to recommend that the President veto the bill. See Letter of James C. Miller, Director, OMB, to John Glenn, Chairman, Senate Comm. on Gov’t Affairs (July 26, 1988), reprinted in 134 CONG. REC. 20,794 (1988).


525. See Letter of Secretary James D. Watkins, Dep’t of Energy, to Dan Quayle, President of the Senate (Mar. 4, 1991), reprinted in 137 CONG. REC. S2795 (daily ed. Mar. 6, 1991) (“This proposal was developed independently of the National Energy Strategy by the Vice President’s Council on Competitiveness. It is included here because it complements the reform and streamlining of the regulatory infrastructure for the natural gas and hydroelectric power industries contained in the National Energy Strategy.”).


528. See James H. McGrew, Let’s Streamline, Not Abolish FERC, PUB. UTIL. FORT., June 15, 1992, at 12 (rejecting abolition of FERC as a way to streamline it).

529. See DERTHICK & QUIRK, supra note 332, at 238-39.

530. See Lori M. Rodgers, NES: A Mixed Bag Receives Mixed Reactions, PUB. UTIL.
Johnston, the Senate Energy Committee Chairman, opposed the initiative from the outset.\textsuperscript{531} Elements of the regulated sector opposed the measure as well.\textsuperscript{532}

FERC itself seems to have been taken a bit by surprise. Its chairman, Martin Allday,\textsuperscript{533} was a Texas lawyer and personal friend of President Bush who had been involved in Republican activities but had served on the Commission for only about a year.\textsuperscript{534} Vice President Quayle was careful not to link the FERC abolition proposal to any Administration dissatisfaction with Allday’s chairmanship.\textsuperscript{535} At the same time, Chairman Allday was publicly noncommittal about the proposal. In March 1991, he defended his agency’s performance but offered no specific comment on the reorganization.\textsuperscript{536} Three months later, when pressed by a House committee for FERC’s views on the pending legislation, Chairman Allday chose to submit only a staff analysis of the legislation that included the following, somewhat Delphic, observation:

To the best of our knowledge, neither the Chairman nor the Commission recommended a legislative proposal regarding the transfer of its functions. It is our understanding that Chairman Allday was consulted prior to the proposal being submitted to the Congress.\textsuperscript{537}

On the merits, the staff noted, in a surprisingly noncommittal fashion for an agency under attack, that “there are both advantages and disadvantages in the independent commission and single administrator structures, which have been the focus of much debate throughout the years.”\textsuperscript{538} FERC may

\textsuperscript{531} FORT, Apr. 1, 1991, at 36 (stating that proposal faced uncertain future in Congress because of Rep. Dingell’s opposition).
\textsuperscript{532} See NES Package Sees Replacing FERC with Gas, Electricity Commission, 
\textsuperscript{533} See 1989 PUB. PAPERS 1345, 1345 (Oct. 16, 1989) (announcing President Bush’s intent to nominate Allday as Chairman of FERC).
\textsuperscript{534} See Allday Tells President April 12 is His Last Day at FERC, ENERGY DAILY, Mar. 2, 1993, at 4.
\textsuperscript{536} See id.
\textsuperscript{537} Staff Report and Analysis in Response to Chairman Dingell’s May 11, 1991 Letter of Chairman Martin Allday, Chairman, FERC 3 (June 14, 1991) (on file with author).
\textsuperscript{538} Id. at 4. The staff paper nonetheless defended FERC’s operations. See id. at 5-7 (“The independence of the Commission does not stand in the way of a coordinated national energy policy. . . . [W]e do not understand the basis of the Council’s claim that the Commission’s current structure hampers Congress in the performance of its oversight and legislative
well have recognized that by the time of its June 1991 response that the reorganization proposal was a dead letter. The overall energy legislation passed with virtually no opposition. But the attempt to abolish FERC failed, and FERC remains resilient.

4. Others

More recent efforts to reorganize agency structures have focused less on independence and more on accountability. For example, Congress attempted to create a Nuclear Defense Security Agency within the Department of Energy in order to provide that agency with greater access to the Secretary. As noted earlier, Congress also attempted to make the general counsel of the Federal Election Commission a Senate-confirmed position that could have allowed the Senate greater leverage regarding the FEC’s docket. Finally, efforts were made in 1999 to create a separate agency within the DOT to reduce truck accidents. As seen, the emphasis is no longer on independence per se, but on clearer lines of authority and accountability.
B. Successful Closures

1. Civil Aeronautics Board

The Civil Aeronautics Board (CAB) was in the business of regulating airlines from 1938 to 1985. Among the key factors that influenced Congress was an impressive empirical data-base (including clearly identifiable anecdotal evidence) that conveyed the benefits of unregulated competition, the strong divisions within the regulated sector over the continuing benefits of government intervention, the lack of a well-organized opposition to deregulation, and the commitment of two presidential administrations and the agency (and its staff) itself.

Timing was critical. First, airline deregulation was on the agenda during relatively prosperous and improving economic times for the airline industry. Second, the CAB, which had historically been able to retain the loyalty of all segments of the airline industry to some extent, established policies during the Nixon Administration that divided the industry's loyalty.

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545. The Board had an ambiguous institutional beginning. It started life in 1938 as the Civil Aeronautics Authority, with responsibility for economic and safety matters. See Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. The 1938 statute also established an Administrator for the Authority, who was the forerunner of the Federal Aviation Administrator, and a separate Air Safety Board to investigate accidents, which was an institutional precursor to the National Transportation Safety Board. See CUSHMAN, supra note 10, at 401-02. A Presidential Reorganization Plan in 1940 consolidated the functions of the Authority and the Air Safety Board into a new Civil Aeronautics Board and placed the Board within the Commerce Department. See Reorg. Plan No. 4 of 1940, 3 C.F.R. 1302 (1938-1943), reprinted in 5 U.S.C. app. at 1444 (1994). The Administrator was placed under the direction of the Secretary of Commerce. See id.; see also CUSHMAN, supra note 10, at 415-16. The Board's safety functions were shifted to the newly created Department of Transportation by the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.


547. Id.

548. See id. at 626-31; see generally DERTHICK & QUIRK, supra note 332 (discussing deregulation of CAB, ICC, and FCC).

549. See Edles, supra note 546, at 626.

550. See also George W. Hilton, The Basic Behavior of Regulatory Commissions, 62 AMER. ECON. REV. 47, 48 (1972) (explaining how agencies receive support from all key sectors of regulated sector by engaging in "minimal squawk" industry pacification behavior in which no constituent group is disaffected in the longer term). There may also have been, however, a generation component at work. Roy Pulsifer, a career government lawyer actively involved in promoting airline deregulation during his tenure at the Civil Aeronautics
By 1985, however, Congress abolished the CAB and transferred its surviving functions to the Department of Transportation.551

2. Trucking Deregulation

Timing was also critical to trucking deregulation. Congress acted in 1995 as part of the anti-regulation agenda that accompanied the Republican take-over of Congress that year.552 But the ICC’s abolition had been in the works for a while, and was ultimately only partial and somewhat symbolic. Although the government regulation of trucking ended, Congress retained railroad regulation and replaced the ICC with the smaller Surface Transportation Board (STB). This action gave the STB, a new multi-member agency, the responsibility of overseeing the gradual decrease of government intervention in surface transportation.553 The railroad industry’s support for “an industry-friendly forum for their mergers”—rather than review by the Department of Justice—and the support from congressional committees “whose clout stood to be greatly diminished by elimination of the

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Board, asked the essential question: “Why . . . should the criticisms that academic economists have been making for more than twenty years and government economists since the early 1960s suddenly become popular issues, and why should the Administration be proposing drastic changes in the law?” Roy Pulsifer, Introduction, 41 J. AIR L. & COM. 573, 575 (1975). His answer was provocative.

The basic reason appears to be that the end of the great post-World War II boom, and the recent recession, compounded by the negative impact on income resulting from petroleum price increases, have made the public sensitive to claims of the adverse impact of economic regulation on consumer prices. Put another way, the impact of governmental regulation on the allocation of resources, on how the pie is sliced, becomes a matter of intensified public concern when the overall economy, the pie, is not expanding. A second factor, although far from understood, is the maturation of the generation born during and in the decade after World War II. This group, by education and upbringing in a time of prosperity, is skeptical of government protectionism, and is likely to call for changes in any government policy which does not maximize opportunity, including regulatory regimes that seem to favor the status quo in industrial organization.

Id. at 575-77.


553. The new Board is now administratively part of the Department of Transportation. See Mary Jacoby, Foes of Bureaucracy Learn A Tough Lesson, CHI. TRIB., June 16, 1996, at C1 (reporting that although ICC’s name on the building was removed and its $15 million budget cut in half, three former ICC commissioners and a staff of 200 were still “at their same desks and mediating the same railroad rate-charge disputes and mergers, just as before”).
ICC,” helped ensure that the ICC was “reinvented,” and not simply abolished.554

C. Comparative Examples

Administrative law scholarship in the United States understandably focuses on domestic rather than comparative elements,555 and most American work in the field at least, proceeds from the view that our constitutional framework is set in time, if not in stone. Still, it is worth considering the extent to which centralization and its attendant mode-bureaucratization may or may not be the future of regulation in governments globally. In the post-World War II era many thought bureaucracy was associated with concepts such as tyranny and centralized authority.556 Indeed, in his exhaustive study, Oriental Despotism, Karl Wittfogel concluded that the need for “large-scale and government-managed works of irrigation and flood control” influenced the totalitarian structure of many ancient and medieval eastern societies.557 Put otherwise, the marginal bureaucracy needed in order to run and protect large-scale government public works projects can lead all to easily to centralized state control.558

Modern (meaning before the fall of the Berlin wall) Marxist scholars recognized the dangers inherent in what some termed the bureaucratisation du mond.559 Liberals prophesized that a knowledge-based elite, be they scientists or engineers, were taking over.560 Conservatives bewailed the

554. Id. at C12.
556. The classic text is Franz Neuman, Behemoth (1942) (discussing history and philosophy of National Socialism). See also Hannah Arendt, The Origins of Totalitarianism (2d prtg. 1959) for additional material on totalitarianism.
558. Under this notion of “Asiatic despotism” (viewed by Marx as an exception to his laws of economic development). It is the technological imperative, rather than the economic “mode of production,” that determines the structure of society and need for a strong overbearing state. Karl Marx, The British Rule in India, N.Y. Daily Trib., June 25, 1853, in 12 Karl Marx & Frederick Engels: Collected Works 125 (Moscow 1979).
560. Several scholars have written material that supports this prophecy. See, e.g., John K. Galbraith, The New Industrial State 282-95 (1967) (discussing the educational and
advent of “the Technological Society”\textsuperscript{561} with its contaminant loss of faith. Many accepted the inevitability of continued bureaucratic centralization, as evidenced by the title of a recent law review article: \textit{The Rise and Rise of the Administrative State}.\textsuperscript{562}

But there may be limits to this centrifugal pull in both this country and abroad. True, in the United States, the constitutional norm of the “unitary” executive creates normative pressure toward centralization in the federal administrative state. Nonetheless empirical sociology suggests a structural, dare we say, extraconstitutional tension, between bureaucracy and centralization and subsidiarity and local flexibility which affects regulatory efforts in and out of the United States. Rather than centralization, it is possible that the principles of subsidiarity, accountability and lines of authority in other countries who, like us, have drank deeply from the administrative state. There can be little doubt that centrifugal pressures toward diffused bureaucratic accountability, or what some have called “diffused sovereignty,”\textsuperscript{563} have dramatically affected the bureaucratic structure of the administrative state outside of the United States.

The rich variety of pragmatic and eclectic organizational structures and differing elements of political control that characterize American administrative management appear in European public administration as well. As in the United States, Departments or Ministries are under the control of a minister (who is himself a member of the legislative branch), which are the most prominent organizational units in European governments.\textsuperscript{564} Nonetheless, European governments also deploy a diverse range of ad hoc gov-

\textsuperscript{561} See \textsc{Jacques Ellul}, \textsc{The Technological Society} x (John Wilkinson trans., 1964) (1954) (stating that phrase technological society describes the way as “the way in which an autonomous technology is in process of taking over the traditional values of every society without exception, subverting and suppressing these values to produce at last a monolithic world culture in which all nontechnological difference and variety is mere appearance.”).\textsuperscript{562} See \textsc{Gary Lawson}, \textsc{The Rise and Rise of the Administrative State}, 107 \textsc{Harv. L. Rev.} 1231, 1231 (1994) (asserting that the post-New Deal administrative state contravenes the Constitution’s design).\textsuperscript{563} \textsc{Daniel Gutman}, \textsc{Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty}, 52 \textsc{Admin. L. Rev.} 859, 881-82 (2000).\textsuperscript{564} \textsc{Yves Meny}, \textsc{Government and Politics in Western Europe: Britain, France, Italy, Germany} 283 (Janet Lloyd trans., Oxford University Press 2d, ed. 1993) (comparing structure of European ministries); see also \textsc{Renate Mayntz} & \textsc{Fritz W. Scharpf}, \textsc{Policy-Making in the German Federal Bureaucracy} 63-64 (1975) (discussing structure of German bureaucracy); \textsc{L. Neville Brown} & \textsc{John S. Bell}, \textsc{French Administrative Law} 2-3 (1998).
ernment institutions that undertake specialized functions. Many of these are not accountable to parliamentary authority. Indeed, the term "public agencies" in France is defined as those that engage in any activity that the government believes should be performed by a public authority in the public interest. So there is a full range of "[p]ublic administrative or industrial and commercial establishments, . . . mixed-economy companies, . . . agencies, commissions, and offices, not to mention the thousands of organizations funded with public money and camouflaged by their anodyne appearance as associations set up under the law of 1901." Indeed, the creation of such administrative entities can serve as a political compromise or "way station" as countries move to deregulate or privatize industry or services.

The "cooperative federalism" of Germany represents a special form of governmental arrangement, where power is shared between the national government, and regional "Laender" governments. Indeed, two academic observers have noted that in Germany, "most federal ministries should be regarded primarily as fairly large policy-making staffs rather

565. See John Bell, The Concept of Public Service under Threat from Europe? An Illustration from Energy Law, 5 EUR. PUB. L. 189, 191-92 (1999). "Public bodies" may be organs of the government or public enterprises of an administrative or commercial kind. Id. at 192. For example, the French railroad is a publicly-owned commercial enterprise while the French airline, Air France, was created under private law, with the government holding a majority interest.

566. Mény, supra note 565, at 300. The Law of 1 July 1901 deals with the right of association. See Brown & Bell, supra note 565, at 17.

567. For example, in French administrative law there are:

[I]ndependent and autonomous agencies to regulate or supervise particular policies or policy areas: the Commission Nationale de l'Informatique et des Libertés, which regulates the use of computers and databases; the Conseil de la Concurrence, which monitors monopolies, take-overs and restrictive practices; the Commission des Sondages, which investigates complaints about opinion polls; the Commission de la Consommation, which advises on consumer affairs; the Commission des Opérations de Bourse, which regulates the financial markets; and the Commission Nationale de contrôle des campagnes électorales, which makes recommendations and monitors the conduct of national electoral campaigns. In the areas of deregulated markets and privatized industries, such agencies have a major role in supervising the operation of the market. Thus the Conseil Supérieur de l'Audiovisuel supervises broadcasting, and the Autorité de régulation des télécommunications deals with the telecommunications sector. Control by officials is seen in many cases as a way of resolving problems which divide politicians.

Brown & Bell, supra note 565, at 26-27.

than as administrative line organizations.\textsuperscript{569} Committees of national and Laender officials often negotiate agreements on issues of common concern, which are often entitled to judicial enforcement.\textsuperscript{570} The national and regional governmental entities create further interdependence by negotiating fiscal and financial arrangements.\textsuperscript{571}

The emergence of the European Union (EU) has created new tensions between centralization and independence for the administrative process. Two elements of "independence" are particularly important in the European Union context. On the one hand, the European Commission is designed to be free of domination by individual member states. Article 10 of the Merger Treaty of 1965, which combined earlier European institutions, expressly provides that commissioners must "neither seek nor take instructions from any government or from any other body."\textsuperscript{572} On the other hand, numerous EU agencies are designed to be only partially independent of the Commission or the member states.\textsuperscript{573} So agencies are created with managerial, technical, or information gathering and analysis responsibilities, but not ordinarily with independent regulatory power.\textsuperscript{574} To that extent, they have some of the flavor of "Sunshine Commissions" of 19th century America. Those agencies that make decisions ordinarily do so by consensus that does not compromise the prerogatives of the individual national administration.\textsuperscript{575}

\textsuperscript{569} MAYNTZ \& SCHARPF, supra note 564, at 46. Thus a pivotal and continuing issue of German governmental administration is the practical degree of cooperation between the central government and the Laender.

\textsuperscript{570} See MENVY, supra note 564, at 295.

\textsuperscript{571} See id. at 297.


\textsuperscript{573} See SHAPIRO, supra note 555.

\textsuperscript{574} See id. For example, the European Agency for the Evaluation of Medicinal Products and the European Environment Agency are not regulatory bodies and only have the power to make recommendations to the Commission. See GIANDOMENICO MAJONE, THE NEW EUROPEAN AGENCIES: REGULATION BY INFORMATION, 2 (Robert Schuman Centre, European Univ., Inst., 1997); KARL-HEINZ LADEUR, THE NEW EUROPEAN AGENCIES: THE EUROPEAN ENVIRONMENT AGENCY AND PROSPECTS FOR A EUROPEAN NETWORK OF ENVIRONMENTAL ADMINISTRATION 1-3 (European Union Institute Working Paper No. 96/50, 1996) (on file with Robert Schuman Centre, European Univ. Inst., Florence).

It is unclear whether European treaties permit the creation of multinational European administrative entities.\textsuperscript{576} The precise place of European Community institutions remains, therefore, ambiguous. Professor Renaud Dehousse suggests that their institutional position is something of a compromise. "Agencies owe their existence to a kind of paradox. On the one hand, increased uniformity is certainly needed; on the other hand, greater centralization is politically inconceivable, and probably not desirable."\textsuperscript{577} Professor Martin Shapiro agrees that they are not genuinely free of "intergovernmental politics."\textsuperscript{578} These traits seem to be endemic in any democratic administration.

What is true for the U.S. and continental Europe is true for Britain as well. A review of the British system demonstrates the apparent need for independence in other large administrative states. In Britain, the departments of the national or central government, known as Departments of State, are the most political entities, and resemble United States cabinet departments in many respects.\textsuperscript{579} Each department is headed by a politically accountable member of the government, usually a Secretary of State, but relies on a large staff of civil servants. British secretaries of state are also members of the legislative branch.

In 1968, the Fulton Committee on the Civil Service recommended the "hiving off" of certain responsibilities from government departments to autonomous or semi-autonomous institutions.\textsuperscript{580} These "children of departments"\textsuperscript{581} are not subject to direct political control. They are, however, subject to certain financial, policy and performance arrangements that are formulated by the Minister, the Permanent Secretary, and the agency head, and embodied in a framework document.\textsuperscript{582} The performance of these agencies is reviewed every three years.\textsuperscript{583} The bodies are unofficially re-

\textsuperscript{576} See LADEUR, supra note 574, at 3.
\textsuperscript{577} DEHOUSSE, supra note 575, at 20.
\textsuperscript{578} SHAPIRO, supra note 555, at 20.
\textsuperscript{579} See PATRICK BIRKINSHAW, GRIEVANCES, REMEDIES AND THE STATE 29-34 (2d ed. 1994).
\textsuperscript{580} A.W. BRADLEY \& K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 303 (12th ed. 1997).
\textsuperscript{581} BIRKINSHAW, supra note 579, at 26.
\textsuperscript{582} See BIRKINSHAW, supra note 579, at 26. For example, the Civil Aviation Authority (CAA) was created from the Department of Trade and Industry. See P.P. CRAIG, ADMINISTRATIVE LAW 81-82 (3d ed. 1994). Originally, the CAA operated under the general guidance of the minister but that authority was abolished in 1980. See BIRKINSHAW, supra note 579, at 165. Nonetheless, there remains a right of appeal to the minister from CAA decisions, although not every participant in proceedings before the CAA may appeal. Id.
\textsuperscript{583} See BIRKINSHAW, supra note 578, at 27 (stating that they are reviewed for completion of objectives, quality of service, financial performance, and levels of efficiency).
ferred to as NDPBs (non-departmental public bodies) or “quangos” (quasi non-governmental organizations), and include various regulatory boards and commissions and grant-giving agencies such as the Commission for Racial Equality and the Arts Council. Numerous public corporations, such as the BBC, the Post Office, and the British Airports Authority, were also created in an effort to remove ministers from day-to-day control of certain administrative or oversight functions.

The broadest initiative to transfer power away from British government departments to independent agencies was the creation of the so-called “Next Step” agencies. An outgrowth of the government’s “Next Steps” Report in 1988, these agencies reflected devolution of power to non-departmental agencies, largely in the areas of service delivery. As of 1992, there were ninety-two Next Step agencies, including the Social Security Benefits Agency, the Employment Service, the Passport Office, and the Driver and Vehicle Licensing Agency.

British Statutory Tribunals (at times called authorities, commissions, committees, or tribunals) are primarily adjudicatory bodies, designed to apply an established body of rules to particular facts. With antecedents in the 1600s, tribunals decide disputes involving specialty subject areas such as employer-employee relations, social security, taxes, or immigration. These, independent tribunals are justified on much the same basis as independent U.S. federal agencies. Their processes are cheaper, faster, and less formal than the generalist courts. They also possess greater subject matter expertise and may be more sympathetic to the protection of substantive interests. Tribunals are typically headed by a President, who is

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584. See Bradley & Ewing, supra note 58, at 327. The term “quango” is a word of American origin that never caught on in the United States, “perhaps because it sounds too much like a marsupial.” Seitz, supra note 50, at 273 n.2.
585. See Bradley & Ewing, supra note 580, at 302-03.
586. See Bradley & Ewing, supra note 580, at 328-29.
588. See Craig, supra note 582, at 83 (noting reasons for creating departmental agencies).
589. See id. at 84.
590. See Sir William Wade & Christopher Forsyth, Administrative Law 909 (7th ed. 1994) (stating that tribunals function similarly to courts; tribunals consider facts and application of statutes to those set of facts). There are about 2000 tribunals deciding 250,000 cases a year. See Birkinshaw, supra note 580, at 47.
591. The Commissioners of Customs and Excise were given statutory judicial power in 1660. See Wade & Forsyth, supra note 590, at 905.
592. See id. at 904, 908.
593. See Wade & Forsyth, supra note 590, at 906-07; see also Birkinshaw, supra.
The President decides, among other things, how many local tribunals should be established throughout the country. Each local tribunal is ordinarily headed by a lawyer, with laymen as panelists. The courts retain a statutory right of review on "questions of law" from adverse tribunal decisions.

note 579, at 46-50.
594. See CRAIG, supra note 582, at 147.
595. See id.
596. See id. Membership depends on the nature of the tribunal's business. See WADE & FORSYTH, supra note 590, at 913. The so-called "balanced" tribunal includes a legally trained Chairman, appointed by the Lord Chancellor, and two members representing opposing interests or perspectives, such as management and labor. See id. On such tribunals the Chairman is ordinarily paid while the others serve without compensation. See id. Where greater expertise is required, full-time paid members may be asked to serve on the tribunal. See id. at 913-14.
597. See CRAIG, supra note 582, at 157. An issue in many cases is what constitutes an "issue of law." Some scholars and court decisions divide matters into legal issues and factual issues. The latter includes inferences from so-called "primary facts." See id. An important supervisory body—the Council on Tribunals—oversees the work of tribunals. It is a purely advisory body but can make recommendations on tribunal membership and operations and must be consulted before any tribunal enacts new procedural regulations. See id. at 146. The Council of 10-15 members includes both lawyers and non-lawyers but a majority are laymen. See id. We should note that the British also have a highly developed system of Ombudsmen. The principal Ombudsman, known as the Parliamentary Commissioner for Administration, is responsible for investigating complaints concerning administrative functions of the departments and agencies of the central government. See id. at 127. There are two principal restrictions on the Ombudsman’s authority. He may only entertain a complaint referred to him by a member of Parliament and may not examine the merits of an agency’s discretionary decisions. See id. He is charged, in other words, with investigating "maladministration." CRAIG, supra note 582, at 129. The Parliamentary Commissioner for Administration also serves as the Ombudsman for the Health Services. However, in exercising these powers, he may entertain complaints directly from the public. See id. at 134-35. Finally, there are Commissions that serve as Ombudsmen over local government authorities and a separate Ombudsman for Northern Ireland. See id. at 138. Another "independent" structure for review of government action is the statutory inquiry. See id. at 160. The British employ the statutory inquiry as a governmental instrument that melds impartiality with political accountability. The statutory inquiry process emerged in Britain in the latter part of the 19th century as a means of resolving primarily local disputes between individuals and public authorities, or between authorities and the national government. Inquiries are most common in the areas of planning and development and serve as either an appeal mechanism or a vehicle for the public presentation of views before government action is taken. See id. For example, a local authority may refuse planning permission for a requested project and the losing applicant can appeal. See id. Alternatively, the public may be asked to offer its views before some form of application or request is granted. See CRAIG, supra note 582, at 160. Generally, an independent person (or persons) is appointed to gather the facts and report to the relevant minister. However, the minister, or one of his or her immediate associates, makes the final decision. See id. at 160-61.
Several broad theories have been offered to justify creation of the myriad of institutional arrangements outside the scope of the traditional British government departments.

First, there is the 'buffer' theory which sees them as a way of protecting certain activities from political interference. Second, there is the 'escape' theory which sees them as escaping known weaknesses of traditional government departments. Third, the 'Corson' theory, following Mr. John Corson sees them as used to 'put the activity where the talent was', which might be outside government departments. Fourth, there is the participation or 'pluralistic' theory which thinks it desirable to spread power. Fifth, there is the 'back double' theory. This is based on the analogy with a taxi-driver who finds the main streets too busy and therefore uses back streets—what is known to taxi drivers as 'back doubles.' The back double theory is that if governments, local authorities or other bodies find that they cannot do the things they want within the existing structure, they set up new organisations which make it possible to do them. Sixth, the 'too many bureaucrats' view, mainly an American one, suggests that if the public thinks a country has too many civil servants it can set up quasi-non-governmental organisations whose employees are not classified as civil servants.598

Whatever the rationale, it is clear that the rest of the industrialized world has seen fit, on occasion, to create administrative structures with diffused lines of authority and accountability similar to the independent regulatory agencies. Whether this is a reflection of a drive toward subsidiarity or a reflection of the limits of centralized authority in technologically-driven society remains to be seen.

D. American Perspectives

Notwithstanding the increased focus on issues of agency accountability since the Great Society, recent years have seen a seeming efflorescence of creative quasi-governmental administrative structures with varying levels of government control. Private parties have taken over a variety of public functions through "contracting out" and privatization.600 Public-private

598. Id. at 82 (quoting PUBLIC POLICY AND PRIVATE INTERESTS: THE INSTITUTIONS OF COMPROMISE 362 (Douglas C. Hague et al. eds., 1975)). Professors Wade and Forsyth view the system in more pragmatic terms. As they see it, "[t]ribunals are subject to a law of evolution." WADE & FORSYTH, supra note 590, at 908. Each is devised for the purposes of some particular statute and is, therefore, so to speak, tailor-made. See id.

Professor Birkinshaw would concur, but would seemingly go further. In his view, "[t]he method of regulation adopted by government over particular bodies or activities will often reflect the degree of trust with which a body or institution is held by government." BIRKINSHAW, supra note 579, at 163. Both observations are also true of their American counterparts.

partnerships can also substitute for government regulation through use of industry self-audits and industry standard setting. Jody Freeman has incisively referred to regimes of “mixed administration” “in which private actions and government share regulatory roles.” Two such government-sponsored enterprise (GSE) regimes are public corporations and government-sponsored enterprises. Public corporations are largely controlled by the federal government while GSEs are further removed from government control.

1. Public Corporations

Like independent agencies, public corporations are viewed as important vehicles through which the business of government can be effectuated. They include entities such as the Legal Services Corporation, the Corporation for Public Broadcasting, the United States Postal Service and the Pension Benefit Guaranty Corporation. The cornerstone of these entities has been their independence, which they obtained because of their location outside the political realm. While they share similar characteristics with the independent agencies—expertise, independence, and reduced accountability—their corporate structure is the feature that sets them apart from the independent agency. The public corporation was designed as a profit-making entity that was self-sustaining and removed from the political fray. Wholly-owned Federal Government Corporations (FGCs) are
treated like agencies located within the executive branch and are subject to executive control. For example, the United States Postal Service, a government corporation, is treated as a government department for purposes of the Appointments Clause of the Constitution. Mixed-ownership FGCs, however, are considered more akin to private entities, and presidential control over them is tenuous.

FGCs are subject to varying degrees of government control. Those that are wholly owned or controlled by the government are subject to portions of the APA and treated more like agencies, while those that have a more tenuous connection to the government greater autonomy. GSEs, on the other hand, are private federal corporations that are subject neither to government ownership nor to significant government control. As the nature of the corporation moves closer to the private ownership end of the spectrum, the amount of control that the government wields over the corporations' activities wanes.

While most FGCs are subject to the Freedom of Information Act (FOIA), a few are exempt. This is also the case with the APA, with various civil service rules and the Government Corporation Control Act.

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611. See U.S. CONST. art. II, § 2, cl. 2; Silver v. United States Postal Serv., 951 F.2d 1033, 1040 (9th Cir. 1991) (finding Postal Service is part of Executive Branch because the President has power to appoint Postmaster General).


614. For example, Attorney General Robert F. Kennedy stated that the directors of COMSAT, a privately owned FGC, were not considered officers of the United States, and therefore not subject to the President’s removal power. See MOE REPORT, supra note 608 (citing 42 Op. Att’y Gen. 165 (1962)).

615. They include: Communications Satellite Corporation (COMSAT); Conrail; NCCB; Corporation for Public Broadcasting (CPB); and National Park Foundation (NPF). See Craig D. Feiser, Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law, 52 FED. COMM. L.J. 21 (1999).

616. The vast majority of the FGCs are subject to the APA. Those that are not include: Comsat; Conrail; NCCB; NCHC; CPB; Legal Services Corporation (LSC) and National Park Foundation (NPF). A detailed examination of the APA and government corporations can be found in Jack M. Beermann, The Roads of Administrative Law in the United States, in The Province of Administrative Law 171, 173-75 (Michael Taggart ed., 1997).

617. The Federal Financing Bank (FFB), Neighborhood Reinvestment Corporation (NRC), Comsat, CPB, Legal Service Corporation (LSC) and the National Park Foundation
Those FGCs that enjoy exemption from these government controls are located close to the private-ownership side of the spectrum. The ease by which public functions can be assigned to non-governmental structures create a structural problem for proponents of the unitary executive. Public functions undertaken by public structures outside the executive branch have limited executive oversight; privatized functions are under even less control. The sharp break between those structures subject to the “unitariness” and those that are not, reflect a theoretical break not evident in real life.

The public corporation became integrated into our government system during the Progressive and New Deal eras. The structure of the public corporation was appreciated by Progressives who espoused theories of scientific management and valued its potential for efficiency and its freedom from partisan politics. President Wilson stressed the need to bring business principles to government and successfully compelled Congress to establish several public corporations during his years in office. During his presidency, President Franklin D. Roosevelt increased the number of public corporations, a trend which was continued throughout the New Deal. President Roosevelt valued the public corporation because its structure lent itself to experimentation. He also valued it “because he wanted government to become more creatively active in the application of its administrative expertise." The public corporation form was even applauded by the

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618. Interestingly, while privatized functions may lack Article III control, corporations that take on public functions may face judicial review with attendant liability. **See** Samuel D. Walker & N. Christopher Hardee, *Perils of Privatization*, NAT'L L.J., Oct. 2, 2000, at C1 (discussing §. 1983 liability).

619. **See** MOE REPORT, supra note 608, at 2.

620. **See** JERRY MITCHELL, THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS 25 (1999) (listing congressional creation of five different government corporations during Wilson’s presidency including Emergency Fleet Corporation, U.S. Grain Corporation and Sugar Equalization Board); see also MOE REPORT, supra note 608, at 2 (noting prominent administration official’s opinion that federal government should serve as a holding company for various corporations).

621. **See** MITCHELL, supra note 620, at 30. The Commodity Credit Corporation (CCC), the Federal Housing Administration (FHA) and the Tennessee Valley Authority (TVA) were all created in 1933. **See id.**

622. **Id.** at 32.
Brownlow Commission, which had been so disapproving of the idea of the independent agency.\textsuperscript{623}

Public corporations have been utilized frequently because of their unique organizational structure. They are run by a board of directors or governors that is only partially composed of members who are appointed by the President, with the advice and consent of the Senate.\textsuperscript{624} Since they are removed from the tripartite system, they operate outside the structures of checks and balances and are exempt from many constitutional demands and federal statutes.

Public corporations have often been used as policy or organizational experiments.\textsuperscript{625} They are thought to be an ideal vehicle to address various areas of public concern. They are owned by the government, operate like businesses and have been used to build stadiums, operate airports and manage mass transit systems. If a public corporation fails, a new one can easily be created.\textsuperscript{626}

Like independent agencies, public corporations have been created in an ad hoc manner.\textsuperscript{627} Their consistency lies in their independence, which has often been a useful tool for Congress. Politicians highlight their supervision and control over the corporations when the corporation’s programs are effective and when it is to the advantage of the politician, but they can also distance themselves from the entities when problems materialize.\textsuperscript{628}

\textsuperscript{623} See id. at 33 (stating that government corporation was useful during emergencies and for daily operation of various economic services).

\textsuperscript{624} In 1998, Amtrak’s original Board of Directors was replaced by a “Reform” board with seven members—all of whom are appointed by the President with the advice and consent of the Senate. See 49 U.S.C. § 24302 (Supp. IV 1998). There are three Board members for TVA and each are appointed by the President with the advice and consent of the Senate. See 16 U.S.C. § 831a (1994). The United States Postal Service is overseen by an eleven-member Board of Governors, nine of whom are appointed by the President with the advice and consent of the Senate. See 39 U.S.C. § 202 (1994). The FDIC has five Board members, of which three are presidential appointees. See 12 U.S.C. § 1812 (1994). Of Comsat’s fifteen Board members, three are appointed by the President with the advice and consent of the Senate. See 47 U.S.C. § 733(a) (1994). In contrast, all eleven Board members of LSC and the nine members of the Board for Corporation for Public Broadcasting are presidential appointees. See 47 U.S.C. § 396(c) (1994).

\textsuperscript{625} See id. at xiv (explaining government corporations as experiments in every respect).

\textsuperscript{626} See id. at 32 (conveying Roosevelt’s philosophy of administrative recreation).

\textsuperscript{627} See MITCHELL, supra note 620, at 47 (stating that they have been created because of entrepreneurial activity, pressure, willingness expressed by public officials and social benefit).

\textsuperscript{628} See id. at 95 (listing inconsistencies in practices associated with Board governance).
2. Government Sponsored Enterprises

Government-sponsored enterprises (GSEs) are even further removed from governmental control than the public corporation. Examples of GSEs are the Federal National Mortgage Association (Fannie Mae), Student Loan Marketing Association (Sallie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac).

GSEs were created in an effort to provide financing for groups that could not obtain adequate service through private credit channels. These entities create secondary markets in which primary lenders' interests in obtaining funds are integrated with the capital markets' supply of money.

The structure of GSEs combines the characteristics of both private and public organizations. The GSE is under private ownership, but it operates under government supervision and exists to serve the public interests mandated by Congress. Also, GSEs are governed by federal charter rather than articles of incorporation and are not directly managed by the government. The GSEs are not subject to the FOIA or SEC registration re-

632. See Carrie Stradley Lavargna, Government-Sponsored Enterprises Are "Too Big to Fail": Balancing Public and Private Interests, 44 Hastings L.J. 991, 997 n.23 (1993) ("Congress has chartered eleven enterprises to finance sectors of society that had not been adequately served by the private credit markets, including housing, agriculture, and education."). Congress continues to consider the creation of new enterprises to support markets that are inadequately serviced by the public. See id. (citing Udayan Gupta, Venture Capitalists Raised 75% More Money Last Year, WALL ST. J., Jan. 29, 1993, at B2). The GSEs purchase loans from primary lenders and create portfolios by pooling the loans. They essentially convert the mortgages into tradeable securities which are sold to investors in the capital market.
633. See Lavargna, supra note 632, at 997-98 (describing creation of secondary markets that facilitate flow of credit to lenders).
634. This causes issues contrary to common law rules of corporate governance.

The federal government's control over an institution differs significantly depending on whether that institution is an agency or instrumentality. The government manages an agency directly through the federal management hierarchy. As a general rule, an agency is subject to... federal procurement laws, and to the federal budget and other direct federal management controls. By contrast, an instrumentality is a privately owned institution that is supervised but not directly managed by the government.
requirements, are exempt from the bankruptcy code, are immune from provisions under the Federal Tort Claims Act, and are exempt from state and local income taxes. They are able to borrow at lower rates than private corporation, but despite the belief of many, they are not backed by the full faith and credit of the United States.

This said, the GSE resembles the independent agency in several respects. For example, Congress uses GSEs to insulate programs from the executive branch, which ultimately has allowed Congress greater control over the entities. Although the President retains the power to appoint and remove the directors authorized by statute, he does not have the ability to remove directors that he has not appointed without specific statutory authorization.

The fact that these GSEs are privately held with public purposes has caused intense debate as to whether or not they are making the most of the governmental benefits that they receive. The GSEs receive an indirect governmental subsidy since they are able to avoid many of the expenses incurred by commercial lenders. Although GSEs were originally established to address problems in specific sections of the capital market, many are currently seeking ways to infiltrate the primary market. This perceived interest to expand into primary markets and the lack of congressional accountability has led many commentators to believe that privatization may be the only means by which the GSEs will be “forced to face the full costs of competition” in the primary markets.

Id. at 323.

636. See Froomkin, supra note 610, at 558.

637. See id. at 613 (explaining that President’s removal power derives primarily from appointment power).

638. See id. at 613.

639. As previously stated, GSEs do not have to expend funds to comply with the SEC registration requirements because they are exempt from local and state tax and they receive favorable interest rates.


The charters of the GSEs are phrased in ambiguous terms, leaving them a good deal of latitude to expand their activities. Currently the GSEs appear to be broadening their business through nonmortgage investments, subprime mortgages, computer-based automated underwriting, and mortgage insurance. The GSEs argue that these new activities are within their charters and are also beneficial to homeownership and homeowners. Potential competitors would like to see the GSEs restricted to their original activities.

McKinley argued that the GSEs’ profit-related expansion should be held in check by regulators such as the Department of Housing and Urban Development and the Office of Federal Housing Enterprises Oversight. Since these groups in addition to Con-
Despite these concerns, certain properties of the government-sponsored enterprise suggest that the existence of these quasi-governmental entities will be guaranteed into the 21st century and beyond. Their freedom to act with a level of autonomy outside of the normal bureaucratic channels has allowed Congress the ability to effectuate public policy goals, through their dominance of the secondary markets, without being directly accountable for the actions of the entities. They have become an indispensable segment of the American economy, providing them with a "too big to fail" status, thus ensuring that they will continue to exist in one form or another.\footnote{One commentator asserts that these organizations have become such an indispensable part of our economy that "their failure would have a far worse effect on the economy than would the cost of rescuing them." Lavargna, supra note 632, at 992 n.3 (citation omitted).}

CONCLUSION

When Attorney General Tom C. Clark gave his endorsement to the draft legislation that was to become the Administrative Procedure Act, he concluded that the bill "appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government."\footnote{One commentator asserts that these organizations have become such an indispensable part of our economy that "their failure would have a far worse effect on the economy than would the cost of rescuing them." Lavargna, supra note 632, at 992 n.3 (citation omitted).} The emergence of the independent administrative agencies reflect somewhat the same considerations. Of particular note in this process is the development of the multi-member commissions, multi-member supervisory agencies, and executive branch independent agencies, and the development of their processes and their place in the administrative state.\footnote{One commentator asserts that these organizations have become such an indispensable part of our economy that "their failure would have a far worse effect on the economy than would the cost of rescuing them." Lavargna, supra note 632, at 992 n.3 (citation omitted).}

The administrative process owes more to experience than doctrine. That is especially true of the internal operations of agencies, where there is often little more than ambiguous and incomplete legislation to govern or guide agency practice. As in the constitutional realm, established practice is im-
independent, although not determinative, because it reflects an accommodation among affected interests of the way business can be conducted without unduly infringing on the prerogatives of others. A structure or practice that begins as a means of simply solving a problem, or asserting power, or experimentally addressing a political dilemma, can either become accepted, or challenged and rejected. But if accepted, the approach becomes a tradition; that tradition, over time, can take on the trappings of precedent and eventually obtain the sanction of law.

In the past few decades we have seen a resurgence of efforts by various administrations to centralize the administrative state. In part, this reflects resurgent visions of presidential power exemplified by the theory of the unitary executive. Notwithstanding the constitutional underpinnings of some theory of a unitary - that is to say centralized - executive, there are structural tensions in the modern administrative state that appear to keep the independent mode alive. The administrative state is too protean for the executive to always desire, or indeed always be able, to patrol all its far reaches. And, Congress is too balkanized to effectively control at all times thorough oversight and legislation. Indeed, on occasion, both Congress and the President have found it necessary to consciously forgo accountability in order to advance important agendas, as evidenced by the Defense Base Closure and Realignment Act of 1990. Ironically, this diffusion of accountability and control may serve to increase presidential power by allowing the President to better manage political conflict.

The independent agency form has undergone various structural changes

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645. See supra Part II.B.1.

646. See Edward J. Markey, Congress to Administrative Agencies: Creator, Overseer, and Partner, 1990 Duke L.J. 967, 969. "In reality, Congress can oversee, in a vigorous fashion, relatively few of the day-to-day activities of the administrative agencies within its oversight boundaries. Congress is a stimulus-response body, and we need a lot of stimulus before taking action to reign in an agency . . . ." Id.


in recent decades, and will probably experience even more changes now that administrative agencies are charged with a "new paradigm" where "the goals of regulation have become the promotion of competition and maximization of consumer choice."649 The tensions that create a spur to decentralization of authority and accountability will no doubt continue. It is our view that in the next century, the function filled by the independent agency will also be filled, from time to time, by public corporations, GSEs, and what the British quaintly call *quangos*, as Congress continues to experiment with institutional arrangements.650 This blurring of public and private regulatory roles is reflective of a general shift toward a more porous understanding of the public/private distinction in American jurisprudence.

In 1835, during debates over the power of the President to remove the Secretary of the Treasury summarily, Daniel Webster was of the view that, as an original proposition, he would not have accorded the President that power. Nevertheless, based on the first forty-five years of the country's history, he conceded that the President had such power. The Decision of 1789, in his view, "has been established by practice, and recognized by subsequent laws, as the settled construction of the Constitution."651 The role, place and operation of independent agencies have a comparable pedigree.

APPENDIX652

*Multi-Member Boards and Commissions*

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

Mission and General Statutory Reference: The Federal Reserve Board (the Board) is the central bank of the United States. It conducts the na-


650. *See infra* Part V-D.


652. In this Appendix, we have attempted to be inclusive but the lack of comprehensive information makes the task difficult. We may have inadvertently omitted some agencies that qualify under our definition and welcome comment on our choices. The information contained in the Appendix was reviewed in preliminary form by the Office of General Counsel, or other staff office, within each agency. However, responsibility for the accuracy of the material rests entirely with the authors.
INDEPENDENT FEDERAL AGENCIES

INDEPENDENT FEDERAL AGENCIES

The Board of Governors of the Federal Reserve System carries out its responsibilities through an independent Federal Open Market Committee. Membership: The Board consists of seven members appointed by the President with the advice and consent of the Senate. No more than one member may be appointed from any one Federal Reserve district. The full term of a Board member is fourteen years, and the seven terms are staggered so that one expires in every even-numbered year. A member may not be appointed after having served a full term. The President may remove members for cause.

Quorum and Voting Requirements: A majority of the Board members constitutes a quorum for the purposes of taking Board action. This is not true, however, in the following two contexts. First, Board action with respect to the waiver of reserve ratio limits in extraordinary circumstances and the imposition of supplemental reserves under section 19(b) of the Federal Reserve Act requires the affirmative vote of five members. Second, Board action with respect to advances, discounts, and rediscounts under sections 10A, 11(b) and 13 respectively of the Federal Reserve Act, requires the affirmative vote of five members. The Board has the power to delegate any of its authority, except with regard to rulemaking and monetary policy decisions.

Disqualification and Recusal Procedure: No special procedures.

Chairman's Powers: The Chairman, subject to Board supervision, serves as its "active executive officer." The Chairman and Vice-chairman are designated for four-year terms by the President from among the Board members, subject to Senate confirmation, and may be redesignated as long as their terms as Board members have not expired. The full Board, rather than the Chairman, has the authority to appoint members of the Board's official staff. The Board also approves the agency's budget.

655. See id. § 461(b)(3)-(4)(A).
656. See id. § 347a.
657. See id. § 248(k).
658. Id. § 242.
OMB Bypass Provisions: Under the provisions of the Federal Reserve Act, the Board operates free from the direct control of the Executive Branch. The Board does not submit legislation or testimony on legislation to OMB for clearance. Under 12 U.S.C. § 250, no federal officer or agency can require the Board to submit legislative recommendations, testimony, or comments for approval or review prior to their submission to Congress, provided that such communication to Congress include a statement that views expressed therein do not necessarily reflect the views of the President.

Litigation Authority: The Board has independent litigation authority with regard to enforcement, supervision, and regulation of financial institutions, and the administration of Board operations.\textsuperscript{659} The Board’s own lawyers handle Freedom of Information Act cases filed in the U.S. District Court for the District of Columbia (and occasionally in other districts as well), but ordinarily appear along with the U.S. Attorney’s Office in other districts.

BOARD OF VETERANS’ APPEALS

Mission and General Statutory Reference: The Board of Veterans’ Appeals (the Board) is in the Department of Veterans Affairs and reviews benefit claims appeals and renders decisions regarding those appeals.\textsuperscript{660}

Membership: The Board is the component of the Department of Veterans Affairs responsible for entering the final decision on behalf of the Secretary in claims for entitlement to veterans’ benefits. It consists of a Chairman, a Vice Chairman, and an unlimited number of Board members.\textsuperscript{661} The Chairman is appointed by the President with the advice and consent of the Senate and serves for a term of six years. The Chairman serves at the Assistant Secretary level and may be appointed to more than one term. At the close of fiscal year 1999, there were sixty-one members of the Board. The Secretary designates one member as Vice Chairman. The Vice Chairman performs functions specified by the Chairman and serves “at the pleasure of the Secretary.”\textsuperscript{662} The Vice Chairman is compensated as a member of the Senior Executive Service. Other members of the

\textsuperscript{659} See id. § 248(p).
\textsuperscript{661} See id. § 7101(a) (1994).
\textsuperscript{662} Id. § 7101(b)(4).
Board are appointed by the Secretary, with approval of the President, based upon the recommendations of the Chairman.\textsuperscript{663} Board members are the only federal employees at this level who require Presidential approval for appointment. Board members (other than the Chairman) have no limits on their terms, but must be "recertified" at least once every three years under performance standards developed by the Chairman with the approval of the Secretary. Board members (other than the Chairman and the Vice Chairman) are paid at rates equivalent to the rates payable under 5 U.S.C. § 5372 (i.e., comparable to that of administrative law judges).

**Quorum and Voting Requirements:** A proceeding instituted before the Board may be assigned to an individual member of the Board or to a panel of not fewer than three members of the Board.\textsuperscript{664} When a proceeding is assigned to a panel of Board members, the decision is by the majority vote of panel members.\textsuperscript{665} Proceedings before the Board are nonadversarial in nature and less formal than court proceedings. Nevertheless, certain statutory and regulatory prerequisites must be fulfilled before an appeal is properly before the Board.\textsuperscript{666} However, formal procedures apply for the docketing of appeals and hearings,\textsuperscript{667} as well as for the conduct of hearings, motions practice, and other procedures.\textsuperscript{668}

**Disqualification and Recusal Procedure:** Any Board member must recuse himself or herself if he or she has participated in the matter or where there are other circumstances that might give the impression of bias. The Board Chairman, on his or her own motion, may disqualify a member from acting on a particular case.\textsuperscript{669}

**Chairman’s Powers:** A Chairman, who is directly responsible to the Secretary of Veterans Affairs, directs the Board’s activities.\textsuperscript{670} The Chairman alone has the authority to select key staff officials which include Board Members and administrative personnel without obtaining the prior approval of the members. Pursuant to 38 U.S.C. § 7101A, the Secretary of Veterans Affairs, with approval of the President of the United States based upon rec-

\textsuperscript{663} See id. § 7101A(a).
\textsuperscript{664} See id. § 7102(a).
\textsuperscript{665} See 38 C.F.R. § 19.7(c) (1999).
\textsuperscript{667} See id. § 7107.
\textsuperscript{668} See also 38 C.F.R. pts. 19-20 (1999).
\textsuperscript{669} See id. § 19.12(c).
\textsuperscript{670} See 38 U.S.C. § 7101(a).
ommendation of the Chairman, appoints members of the board, including the Vice Chairman. In practice, the Chairman often seeks the advice of Board members when recommending the appointment of new Board members. But that decision is purely discretionary. The Board’s budget is a component of the Department’s overall budget, submitted by the Secretary to Congress. The Chairman is responsible for forwarding budget recommendations to the Secretary.

OMB Bypass Provisions: The Board’s budget and legislative submissions are processed through the Department of Veterans Affairs.

Litigation Authority: The Board has no authority to litigate appeals of its decisions. The General Counsel of the Department of Veterans’ Affairs represents the Secretary before the U.S. Court of Appeals for Veterans Claims.

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Mission and General Statutory Reference: The Chemical Safety Board (the Board) is an independent safety board that investigates the cause or probable cause of any accidental chemical release resulting in a fatality, serious injury or substantial property damage, establishes mandatory rules for reporting accidental chemical releases, and conducts research and issues reports concerning the safety of chemical production.

Membership: Five members appointed by the President, with the advice and consent of the Senate, for a five-year term, on the basis of “technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation.” Members may be removed from office for inefficiency, neglect of duty, or malfeasance in office.

Quorum and Voting Requirements: A majority of the Board constitutes a quorum.

Disqualification and Recusal Procedure: No special procedures.

671. See id. § 7101A(a).
673. Id. § 7412(r)(6)(B).
Chairman's Powers: The Chairman is the Board's chief executive officer and exercises the Board's executive and administrative functions, subject to the Board's overall direction. When the Board was without a chairman, it delegated some administrative responsibilities to each of its four members but did not designate an "Acting Chairman."

OMB Bypass Provisions: Board budget and legislative proposals, testimony or comments, and recommendations or studies submitted to the Administration, must be submitted concurrently to Congress. No Board budget estimates, legislative recommendation or testimony, or other recommendation or study is subject to review by any federal agency and no government official may require prior approval of budget requests or estimates, legislative recommendations, prepared testimony, comments, or recommendations or reports.674

Litigation Authority: The Department of Justice represents the Board in the federal courts.

COMMODITY FUTURES TRADING COMMISSION

Mission and General Statutory Reference: The Commodity Futures Trading Commission (the Commission) is an independent agency of the United States Government that regulates U.S. commodity futures and options markets to prevent manipulation, abusive trading practices, and fraud.675

Membership: Five members, appointed by the President with the advice and consent of the Senate, serve staggered five-year terms. The President "shall select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights and interests"676 covered by the statute, with appropriate balance among the knowledge of the commissioners.677 No more than three Commissioners may belong to the same political party. A member may continue to serve until his successor is appointed and qualified but only up to the expiration of the next session of Congress subsequent to the

674. See id. § 7412(r)(6)(R).
677. See id. § 4a(a)(1)(ii).
expiration of his term. There are no express statutory provisions governing removal of Commissioners from office.

**Quorum and Voting Requirements:** Statute contains no explicit quorum provision except that a vacancy in the Commission “shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.” Commission regulations define a quorum simply as “at least the minimum number of Commissioners required to take action,” i.e., three members. A majority of the quorum of the Commission is required for purposes of taking Commission action. However, when it is not feasible to convene a quorum, the senior Commissioner available may take emergency action, subject to review by the full Commission. In case of a tie, no action is taken but, in the case of review of adjudicatory matters, the decision below is affirmed.

**Disqualification and Recusal Procedure:** No specific procedures. However, in one case the Commission did rule on a request that it disqualify two of its members.

**Chairman’s Powers:** The President, with the advice and consent of the Senate, appoints a member as Chairman who serves at the President’s pleasure. The President may at any time appoint a different member as Chairman, with the advice and consent of the Senate. The Chairman is the chief administrative officer. The Commission appoints the General Counsel and an Executive Director, both of whom report directly to the Commission and serve at the pleasure of the Commission. Executive and administrative functions are generally exercised solely by the Chairman, according to budget categories, plans, programs and priorities established and approved by the Commission. The Chairman’s appointment of heads of major administrative units is subject to approval of the Commission. There is no specific statutory provision governing their removal.

**OMB Bypass Provisions:** Bypass of prior OMB review on both budgetary and legislative matters is secured by means of a concurrent transmittal requirement under 7 U.S.C. § 4a(h)(1)(2). Additionally, section 4a(h)(2) specifically states that the Commission is exempt from prior review or ap-

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678. *Id.* § 4(a)(b).
680. *See id.* § 140.11(a).
681. James A. Carr, CFTC Docket No. 77-6, 1977 CFTC LEXIS 76, at *7 n.8 (denying motion to recuse the Commission member).
proval of testimony, recommendations, or comments on legislation by any
officer or agency.

**Litigation Authority:** Commission attorneys are authorized to represent
the Commission "in courts of law whenever appropriate [and] assist the
Department of Justice in handling litigation concerning the Commission in
courts of law." 682 The Commission has an informal agreement with the
Department of Justice to refer to it those cases of common concern to all
agencies, such as Freedom of Information, Privacy Act and Sunshine Act
cases, individual damage actions against members or employees, and suits
involving personnel matters.

**CONSUMER PRODUCT SAFETY COMMISSION**

**Mission and General Statutory Reference:** The Consumer Product Safety
Commission (the Commission) is an independent regulatory commission
that issues and enforces standards to protect the public against unreason-
able risk of injury or death associated with consumer products, develops
voluntary industry standards, and, as necessary, bans products, obtains the
recall of products, or arranges for their repair. 683

**Membership:** Five members, appointed by the President with the advice
and consent of the Senate, serve staggered seven-year terms. Since fiscal
year 1987, however, Congress has funded only three commissioner posi-
tions in the Commission's annual appropriations act. In making appoint-
ments, the statute directs the President to consider "individuals who [are
qualified] by reason of their background and expertise in areas related to
consumer products and protection of risks to safety." 684 Not more than
three of the Commissioners may be affiliated with the same political party.
Commissioners may continue to serve after the expiration of their term un-
til a successor takes office, but for no more than one year. A Commis-
sioner may be removed from office by the President for "neglect of duty or
malfeasance in office but for no other cause." 685 The Commission annually
elects a Vice Chairman to act in the Chairman's absence, disability, or va-
cancy of the office.

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682. 7 U.S.C. § 4a(c).
685. Id.
Quorum and Voting Requirements: Three Commissioners constitute a quorum. However, two Commissioners may constitute a quorum if there are only three members serving. If, due to vacancies, only two members of the Commission are serving, those two constitute a quorum for six months. 686 Generally, the Commission issues a press release a few hours after a Commission decision meeting or one day after a ballot vote. Commissioners may issue separate statements to be provided when the press release is issued. However, announcement of the Commission's decision is not delayed for a Commissioner's separate statement. Commissioners have their own staffs who assist in the preparation of their statements. The Commission has no provision for proxy voting. Many administrative functions are delegated to the staff. The Commission's Directive System (available in the Commission's reading room) sets forth procedures for delegating authority. However, the authority to issue subpoenas cannot be delegated.

Disqualification and Recusal Procedure: No specific procedures.

Chairman's Powers: The Chairman is appointed by the President with the advice and consent of Senate. The Chairman serves as the principal executive officer with authority that includes the expenditure and use of funds and the appointment and supervision of personnel. 687 However, budget requests and appointments of senior staff (e.g., the Executive Director, the General Counsel, and various Associate Executive Directors) require Commission approval. No appointment of any officer or employee may be subject to review or prior approval of anyone within the Executive Office of the President.

Pursuant to 15 U.S.C. § 2053(g)(1)(A), the Chairman appoints officers of the Commission, subject to the approval of the Commission. Section 2053(g)(1)(B)(i) further states that no individual may be appointed to such a position on an acting basis for a period longer than ninety days unless such appointment is approved by the Commission. Likewise, the Chairman may not submit requests for appropriations to Congress or the OMB without the Commission's prior approval.

OMB Bypass Provisions: Bypass of OMB review on budgetary and legislative matters is secured by means of a requirement for concurrent trans-
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mittal and a prohibition on prior executive review of the Commission’s legislative communications. 688

Litigation Authority: The Commission has limited authority to represent itself in United States district courts. 689

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Mission and General Statutory Reference: The Defense Nuclear Facilities Safety Board (the Board) is an independent establishment in the executive branch that provides technical safety oversight of the Department of Energy’s (DOE) defense nuclear facilities. It makes recommendations with respect to DOE defense nuclear facilities, investigates any event or practice that may adversely affect public health and safety, reviews designs of DOE defense nuclear facilities and recommends to the Secretary of Energy any necessary modifications to ensure adequate protection of the public health and safety. 690

Membership: Five members serve staggered five year terms and are appointed by the President with the advice and the consent of the Senate. No more than three members of the Board may be affiliated with the same political party. In making appointments, the statute directs the President to consider “United States citizens who are respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board.” 691 The President designates a Chairman and Vice Chairman of the Board from among the Board’s members. Board members may be reappointed. However, any member appointed to fill a vacancy occurring prior to the end of the term of office for which such member’s predecessor was appointed shall only be appointed for the remaining portion of such term. Furthermore, a member may continue to serve after the expiration of his or her term until a successor has taken office.

Quorum and Voting Requirements: Three members of the Board constitute a quorum. However, a lesser number of Board members may hold hearings. The Board has no provision for proxy voting. With one excep-

688. See id. § 2076(k)(1)-(2).
tion, every vote of the Board has been unanimous since the agency’s creation.

Disqualification and Recusal Procedure: No special procedures.

Chairman’s Powers: The Chairman serves as the chief executive officer of the Board. Subject to the Board’s overall direction the Chairman has authority that includes the use and expenditure of funds, the appointment and supervision of employees of the Board, and the organization of any administrative units established by the Board. The Board tends to defer to the Chairman on administrative matters but he keeps them advised and works cooperatively. In accordance with 42 U.S.C. § 2286(c)(3), the Chairman may delegate any of his functions to any other member or to any appropriate officer of the Board. The Vice Chairman acts as Chairman in the event of the absence of the Chairman or in the case of a vacancy in the office of the Chairman.

OMB Bypass Provisions: “Whenever the Board submits or transmits to the President or the Director of Management and Budget any legislative recommendation, or any statement or information in preparation of a report to be submitted to the Congress . . . the Board shall submit at the same time a copy thereof to the Congress.” Its annual request for appropriations is sent to OMB for approval and inclusion in the President’s budget.

Litigation Authority: The Department of Justice represents the Board in the federal courts.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mission and General Statutory Reference: The Equal Employment Opportunity Commission (Commission) promotes equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws, and education and technical assistance.

Membership: Five members, appointed by the President with the advice and consent of the Senate, serve staggered five-year terms. No more than three of the Commissioners can be members of the same political party.

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692. See id. § 2286(c)(2).
693. Id. § 2286h-1.
Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.695

The President designates one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman.696

Other Presidential Appointees: General Counsel. The General Counsel of the Commission is appointed by the President with the advice and consent of the Senate for a term of four years.697

Quorum and Voting Requirements: Three members of the Commission constitute a quorum.698 Without a quorum, the Commission cannot engage in activities that require the approval of a majority of the Commissioners. In case of a tie vote, a proposal fails and no action is taken. The Commission does not employ the use of dissenting opinions. If a Commissioner disapproves a decision, but is in the minority, the decision is issued without a dissenting opinion. The Commission does not employ proxy voting. Any person claiming to be aggrieved can file a charge of discrimination or request that an individual Commissioner issue a charge for an inquiry into individual or systematic discrimination.699 All charges are either dismissed or investigated. If, upon completion of an investigation, the Commission finds cause to believe that discrimination has occurred, it attempts to resolve the matter informally. If attempts at conciliation fail, the Commission may bring a civil action.

Disqualification and Recusal Procedure: No special procedures. However, because individual commissioners have statutory authority to initiate investigations, the Commission’s rules provide that, where a member of the Commission has filed a Commissioner charge, he or she shall abstain from

696. See id.
697. See id. § 2000e-4(b).
698. See id. § 2000e-4(c).
699. See 29 C.F.R. § 1601.6(a) (2000).
participation in the Commission determination upon completion of the investigation. Such cases are known as “Commissioner charges.”

Chairman’s Powers: The Chairman is responsible for the administrative operations of the Commission, and except as provided in 42 U.S.C. 2000e-4(b), shall appoint such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist the Commission in the performance of its functions and duties. The Chairman does not usually request the opinions of other Commission members. The Chairman must fix personnel compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, United States Code, relating to classification and General Schedule pay rates, provided that assignment, removal, and compensation of hearing examiners be in accordance with sections 3105, 3344, 5362, and 7521 of Title 5, U.S.C. Agency budgets are approved by the Commission prior to submission.

OMB Bypass Provisions: The Commission must comply with all OMB directives applicable to the Executive Branch.

Litigation Authority: The General Counsel is responsible for conducting enforcement litigation on behalf of the Commission under the Americans with Disabilities Act of 1991, Title VII, Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963. The General Counsel has such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. Attorneys appointed under 42 U.S.C. § 2000e-4 may, at the direction of the Commission, represent the Commission in any court, provided, however, that the Attorney General conduct all litigation in the Supreme Court to which the Commission is a party.

FARM CREDIT ADMINISTRATION

Mission and General Statutory Reference: The Farm Credit Administration (FCA) is an independent agency in the executive branch of the Gov-
ernment that is responsible for regulating and examining the banks, associations, and related entities that constitute the Farm Credit System. The FCA Board (Board) may take enforcement power to obtain corrective action if an institution violates statutes or regulations or operates in an unsafe or unsound manner.

Membership: Policymaking is vested in a full-time, three-member Board appointed by the President with the advice and consent of the Senate. Board Members serve staggered, six-year terms, and may not be reappointed after serving a full term or more than three years of a previous member’s term. The President designates one of the members as Chairman.

Quorum and Voting Requirements: The Board may transact business only when a quorum, i.e., two members, is present. There is no provision in the Farm Credit Act for the Board Members to vote by proxy. A majority of the Board may act even if the minority delays in completing any dissenting statements.

Disqualification and Recusal Procedure: No special procedures.

Chairman’s Powers: The Chairman serves as the agency’s Chief Executive Officer and may appoint the agency’s staff, fix pay levels, and direct the staff. The appointment of the heads of major administrative units is subject to the Board’s approval. In accordance with 12 U.S.C. § 2245, the powers of the Chairman as CEO that are necessary for day-to-day management, may be exercised and performed by the Chairman through such other officers and employees of the Administration as the Chairman shall designate. The Chairman, however, may not delegate powers specifically reserved to the Chairman by the Farm Credit Act without the approval of the FCA Board.

OMB Bypass Provisions: The FCA sends its appropriation request to OMB for inclusion in the President’s budget request, but not for approval. All legislative information, such as testimony and reports, go directly to Congress without OMB clearance.

707. See id. § 2242(c).
708. See id. § 2245(c)(2)(A).
709. See id. § 2245(b).
Litigation Authority: The Department of Justice represents the FCA in the federal courts. Nonetheless, Farm Credit Administration attorneys assist with the preparation of pleadings and presentation of the case and ordinarily prepare legal memoranda and litigation reports. Referrals to the Department of Justice are handled informally or by letter. There are no agency regulations regarding such referrals.

The Farm Credit Act also provides that, except with regard to litigation before the Supreme Court, attorneys designated by the Chairman shall represent the Farm Credit Administration in any civil proceeding or civil action brought in connection with the administration of conservatorships and receiverships. Section 2244(c) also provides that “[a]ttorneys designated by the Chairman may represent the Farm Credit Administration in any other civil proceeding or civil action when so authorized by the Attorney General under provisions of title 28.”

FEDERAL COMMUNICATIONS COMMISSION

Mission and General Statutory Reference: The Federal Communications Commission (the Commission) regulates interstate and international communications by radio, television, wire, satellite and cable.

Membership: Five members, appointed by the President with the advice and consent of the Senate, serve staggered five-year terms. The maximum number of Commissioners from any party is a number equal to the least number that would constitute a majority. A member may serve until his successor takes the oath of office but not past expiration of the next session of Congress subsequent to the end of the fixed term. There is no statutory provision concerning removal of Commissioners from office.

Quorum and Voting Requirements: Three Commissioners constitute a quorum for purposes of taking Commission action. As a general matter, so long as a quorum is present, Commission action may be taken by a majority of the members present. In case of a tie, no Commission action is taken. If a tie occurs with respect to an application for review of action taken by delegated authority, or a petition for reconsideration of prior

710. See id. § 2244(c).
711. Id.
713. See id. § 154(h).
714. See id. § 155(c)(4)-(6).
Commission action, the previous decision stands. The Commission permits proxy voting.

**Disqualification and Recusal Procedure:** The Commission exercises the right to disqualify one of its members.

**Chairman’s Powers:** The Chairman serves as the chief executive officer. A Managing Director, appointed by the Chairman with the Commission’s approval, is vested with whatever administrative and executive authority the Chairman may designate. There is no provision for a Vice Chairman. In case of vacancy, absence, or disability, the Commission may temporarily designate one of its members as acting chairman. The Commission’s budget and the appointment and removal of senior staff must be approved by the Commission.

**OMB Bypass Provisions:** The Commission is required by 47 U.S.C. § 154(k) to submit an annual report to Congress that includes specific legislative recommendations. This is to include, as well, all legislative proposals submitted for approval to OMB. While this provision does not appear to confer a legislative bypass on the Commission, the Commission does not ordinarily submit legislation or reports or testimony on legislation to OMB for clearance.

**Litigation Authority:** The Department of Justice is responsible for the conduct of district court litigation to which the Commission is a party. This includes Freedom of Information Act and Sunshine Act lawsuits, employment discrimination actions and actions brought to enforce Commission orders. The U.S. Attorneys offices also bring criminal prosecutions for violations of the Communications Act; in those cases the Commission is technically not a party. In the above cases, the U.S. Attorneys represent the Commission in court while Commission attorneys ordinarily prepare pleadings, legal memoranda and litigation reports. Commission attorneys may also appear in court to assist with the presentation of the case.

715. See id. § 405.
716. See id. § 155(c)(3); see also Newark Radio Broad. Ass’n v. FCC, 763 F.2d 450 (D.C. Cir. 1985).
Referrals to the Department of Justice are handled informally or by letter. There are no agency regulations regarding such referrals.

Appeals of district court cases are handled by the Department of Justice with the assistance of Commission attorneys; however, the Commission does exclusively handle appeals under section 402(b) of the Communications Act relating to radio and television licensing and Bell Operating Company (BOC) entry into the long distance market. Appeals under section 402(a) of the Communications Act, involving review of Commission final actions unrelated to radio and television licensing or entry of Bell Operating Companies into the long-distance market, are governed by the Judicial Review Act. While 28 U.S.C. § 2348 generally provides that the Attorney General is responsible for and has control of the interests of the Government in all court proceedings, the Commission, as the agency in interest, appears as a respondent represented by its own attorneys. Commission counsel, maintaining a close liaison with the Department of Justice, prepare briefs and present oral arguments in these cases.

Section 402(j) of the Communications Act and section 2350(a) of the Judicial Review Act give the Commission the right to file petitions for writ of certiorari. Under current practice, the Commission coordinates its petitions with the Solicitor General.

FEDERAL DEPOSIT INSURANCE CORPORATION

Mission and General Statutory Reference: The Federal Deposit Insurance Corporation (FDIC) insures customer deposits at FDIC-insured depository institutions, examines and supervises FDIC-insured state-chartered banks that are not part of the Federal Reserve System, and manages receiverships. The FDIC also has examination authority and back-up enforcement authority for state member banks that are supervised by the Federal Reserve Board, national banks that are supervised by the Office of the Comptroller of the Currency, and savings associations supervised by the Office of Thrift Supervision.

Membership: The management of the FDIC is vested in a five-member Board of Directors (the Board). The President with the advice and consent of the Senate appoints three members of the Board for a term of six years (Appointive Directors). At least one of these Appointive Directors

720. See also 47 U.S.C. § 154(f)(1).
must have state bank supervisory experience. In the event of a vacancy on
the Board, the President may appoint another Board member to fill the va-
cancy or the acting Comptroller of the Currency or the acting Director of
the Office of Thrift Supervision shall fill for the remainder of the term. An
appointive director may continue to serve after the expiration of his or her
term until successors have been appointed and qualified.

In addition to the three Appointive Directors, there are two *ex officio*
members of the Board: the Comptroller of the Currency and the Director of
the Office of Thrift Supervision. As *ex officio* members, they do not serve
specific terms. No more than three of the five Board members may be
members of the same political party.

**Chairman’s Powers:** One of the Appointive Directors shall be designated
by the President, with the advice and consent of the Senate, to serve as
Chairperson of the Board for a term of five years. Another of the Ap-
pointive Directors is designated by the President, with the advice and con-
sent of the Senate, to serve as Vice Chairperson. In the event of a vacancy
in the position of Chairperson, the Vice Chairperson acts as Chairperson.

**Other Presidential Appointees:** Inspector General.724

**Quorum and Voting Requirements:** A majority of the members of the
Board of Directors in office constitutes a quorum for the transaction of
business.725 In the event there are only four members in office, three of the
four members constitute a quorum. In the event there are only three mem-
bers in office, two of the three members constitute a quorum. In the event
there are only two members in office, those two members constitute a quo-
rum. In the event there is only one member in office, that member consti-
tutes a quorum. A majority vote of the Board is necessary to transact busi-
ness. In the event of a tie vote, a motion does not carry. For purposes of
determining whether there is a quorum for the transaction of business,
those Board members present “both voting and nonvoting” are counted.
The vote of the majority of the members present and voting at a meeting at
which a quorum is present is considered Board action.

**Disqualification and Recusal Procedure:** No specific procedures.

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725. See FDIC BYLAWS, art. IV, § 6(d).
Chairman’s Powers: The Chairperson serves as the chief executive officer. The Board has reserved to itself all authority not expressly delegated.\textsuperscript{726} However, within the limitations of law, the Board has delegated certain functions to standing and other special committees and to designated officers and agents of the Corporation. The Board has delegated to the Chairperson the authority to manage the day-to-day operations of the Corporation and the general powers and duties usually vested in the office of the chief executive officer of a corporation.\textsuperscript{727} However, the hiring and removal of officers of the Corporation (i.e., Division and Office Directors) must be approved by the Board. The Board determines the terms of such officers and the Chairperson determines their compensation. In addition to the authority delegated by the Board, the Chairperson has statutory responsibilities with regard to other narrowly defined matters.\textsuperscript{728} The Board has delegated authority for administrative complaints to the Division of Supervision and the Division of Compliance and Consumer Affairs,\textsuperscript{729} but certain action is reserved by statute to the Board.

OMB bypass: The Federal Deposit Insurance Corporation is required to submit an annual report to Congress. Under 12 U.S.C. § 250, no federal officer or agency can require the FDIC to submit legislative recommendations, testimony, or comments for approval or review prior to their submission to Congress, provided that such communications to Congress include a statement that the views expressed therein do no necessarily represent the views of the President. The FDIC is funded through its administration of two insurance funds insuring banks and savings and loan institutions, respectively, and, except for the Office of the Inspector General, does not receive appropriated funds. OMB does not provide line-item review nor is the FDIC subject to OMB apportionment control.\textsuperscript{730}

Litigation Authority: The FDIC is authorized “to sue and be sued,” and file complaints and defend, by and through its own attorneys independent of the Department of Justice.\textsuperscript{731} It also represents itself in FOIA and similar litigation. As a matter of practice, and largely for reasons of conven-

\textsuperscript{726} See FDIC BYLAWS, art. IV, § 5.
\textsuperscript{727} See FDIC BYLAWS, art. VI, § 4.
\textsuperscript{730} See 12 U.S.C. § 1827(c).
FEDERAL ELECTION COMMISSION

Mission and General Statutory Reference: The Federal Election Commission (the Commission) administers and enforces the federal statutes governing the financing of federal elections.\(^{732}\)

Membership: "Six members, appointed by the President with the advice and consent of the Senate," serve staggered six-year terms.\(^{733}\) No more than three Commissioners may be of the same political party. A member may serve after the expiration of his or her term until a successor has been appointed. An individual nominated after 1997 to serve as a Commissioner may serve only a single term. There is no statutory provision governing removal but one court’s decision has construed the statute to confer "for cause" protection on Commission members.\(^{734}\)

Quorum and Voting Requirements: Four of the Commission’s six members must vote in the affirmative for the Commission to take action.\(^{735}\) If the Commission splits 3-3, the matter is dismissed or otherwise fails to go forward. All decisions of the Commission must be made by a majority vote, except that the affirmative vote of four members of the Commission is required to: (1) participate in litigation; (2) render advisory opinions; (3) develop forms and prescribe rules; (4) conduct investigations and hearings, encourage voluntary compliance through the civil enforcement process and report apparent violations to the appropriate law enforcement authorities; and (5) take action to administer and enforce the public financing statutes. A Commissioner may not delegate his or her vote or decisionmaking authority.

Disqualification and Recusal Procedure: Each commissioner determines requests for disqualification or recusal.

Chairman’s Powers: The Commissioners elect a Chairman from among their members, who serves for one year as Chairman. A commissioner


\(^{733}\) 2 U.S.C. § 437c(a)(1).

\(^{734}\) FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993).

\(^{735}\) See 2 U.S.C. § 437c(c).
may serve as Chairman only once during his or her term. The Chairman and the Vice Chairman must be affiliated with different political parties. The Vice Chairman acts as Chairman in the absence of disability of the Chairman or when there is a vacancy in the Office of the Chairman. The Commissioners jointly select the Staff Director and General Counsel and the Chairman plays no special role in the selection process. Choice of a Staff Director and General Counsel requires the affirmative vote of the Commissioners.

**OMB Bypass Provisions:** Whenever the Commission submits any budget estimate or request to the President or OMB, it must concurrently transmit a copy to Congress. The Commission is required to submit an annual report to the President and each House of Congress that contains any legislative recommendations the Commission considers appropriate. Under 2 U.S.C. § 437d(d)(2), concurrent submission is also required whenever the Commission submits any other legislative recommendation, testimony, or comments on legislation requested by Congress, the President, or OMB. Section 437d(d)(2) also provides that no agency or officer of the United States may require the Commission to submit its legislative recommendation, testimony, or comments for approval prior to its submission of such material to Congress.

**Litigation Authority:** The Commission has authority to initiate, defend, or appeal any civil action to enforce the provisions of the Federal Election Campaign Act and chapters 95 and 96 of the Internal Revenue Code through its General Counsel. The General Counsel represents the Commission in litigation at the District Court and Circuit Court levels, including Freedom of Information Act litigation. He also represents the Commission before the Supreme Court in cases arising under the Title 26 provisions but Supreme Court litigation arising under Title 2 is handled by the Solicitor General. The Department of Justice represents the Commission in certain proceedings such as tort litigation.

**FEDERAL ENERGY REGULATORY COMMISSION**

**Mission and General Statutory Reference:** The Federal Energy Regulatory Commission (the Commission) is an independent regulatory commission that is within the Department of Energy. It regulates interstate aspects

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736. See id. § 437d(d)(1).
737. See id. § 437d(a)(6).
of the electric power, natural gas, oil pipeline, and hydroelectric industries.\textsuperscript{739}

**Membership:** Five members, appointed by the President with the advice and consent of the Senate, serve staggered five-year terms. No more than three members may belong to the same political party. Terms expire on June 30. However, a Commissioner may serve up to the end of the Congress in which his or her term expires, unless he or she is replaced before the end of the session. Commissioners may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

**Quorum and Voting Requirements:** Three members constitute a quorum and a majority of the quorum is required to take Commission action. The Commission’s enabling statute provides that “\[a\]ctions of the Commission shall be determined by a majority vote of the members present.”\textsuperscript{740} The Commission cannot undertake any official business when no quorum is present or the membership is equally divided. In the case of a tie vote, no action is taken. However, a tie vote on rehearing serves to leave the original action in place. The Commission automatically takes review of all aspects of an initial decision as to which timely exceptions and briefs are filed. In the absence of exceptions, the Commission has ten days in which to decide whether to initiate review. Review may be initiated by majority vote.\textsuperscript{741} The Commission has no express rule as to whether the majority may issue a decision if the minority delays in completing any separate statements. In practice, members are afforded a reasonable time to complete a dissenting statement. If a compelling reason exists to issue a decision without further delay, the majority could issue it with a statement that a dissent will be issued at a later time. Typically, Commissioners complete dissents without assistance from staff other than their own personal staffs. On the infrequent occasions when a dissenting commissioner requests assistance from the Commission’s advisory staff, such assistance is provided. The Commission has no provisions for proxy voting and it is not employed.

**Disqualification and Recusal Procedure:** No special provisions. Regulations require only that written notification of any recusal decision be provided to the Commission’s ethics officer.\textsuperscript{742}

\textsuperscript{740} Id. § 7171(e).
\textsuperscript{741} See id. § 7171(e).
\textsuperscript{742} See 5 C.F.R. § 3401.103 (2000).
Chairman's Powers: One member is designated by the President as Chairman. The Chairman is empowered to designate (in advance) any other member as Acting Chairman to act during the Chairman's absence. The Chairman is responsible for administrative and executive functions, the appointment of personnel, including hearing examiners and an executive director, as he deems necessary. The Chairman has authority to distribute business among personnel and administrative units. Occasionally the Commission may delegate authority during the course of an individual proceeding, such as by authorizing Commission staff to undertake certain actions in connection with the proceeding. The Chairman also maintains the authority to approve the Commission's budget.

OMB Bypass Provisions: Bypass of prior OMB review on legislative matters is secured by means of a statutory concurrent transmittal provision. The Commission sends its annual appropriation request to OMB for approval and inclusion in the President's budget.

Litigation Authority: Unless otherwise provided by 28 U.S.C. § 518, which relates to litigation before the Supreme Court, attorneys designated by the Chairman may represent the Commission in civil actions brought by or against the Commission. However, pursuant to its authority under 28 U.S.C. § 516, the Department of Justice conducts litigation on behalf of the Commission in civil suits that are not based on Commission orders, such as suits under the employment discrimination laws and the Freedom of Information Act.

FEDERAL HOUSING FINANCE BOARD

Mission and General Statutory Reference: The Federal Housing Finance Board (the Board) is an independent agency in the executive branch whose primary duty is to ensure that the Federal Home Loan Banks operate in a financially safe and sound manner. To the extent consistent with the safety and soundness charge, the other statutory duties of the Finance Board are to (1) supervise the Banks; (2) ensure that the Banks carry out their housing finance mission; and (3) ensure that the Banks remain "adequate."
quately capitalized and able to raise funds in the capital markets. The Finance Board recently reorganized and renumbered its regulations.

Membership: The Federal Home Loan Bank Act vests management of the Finance Board in a five-member Board of Directors consisting of four members appointed by the President with the advice and consent of the Senate to serve staggered seven-year terms, and one ex-officio member, the Secretary of Housing and Urban Development. The four appointed directors must possess “extensive experience or training in housing finance or . . . a commitment to providing specialized housing credit” and at least one appointed director must be chosen from “an organization with more than a two-year history of representing consumer or community interests on banking services, credit needs, housing, or financial consumer protections.” The President designates an appointed director as Chair. Not more than three of the five directors may be from the same political party. New directors appointed to fill a vacancy before the expiration of a term are appointed to fulfill the remainder of the unexpired term. Each director may continue to serve until a successor is appointed and qualified. The statute does not contain an express removal provision.

Quorum and Voting Requirements: A majority of the Board of Directors constitutes a quorum and Board action requires an affirmative vote of a majority of the directors voting once a quorum is established. Directors may participate in meetings by telephone.

Disqualification and Recusal Procedure: None.

Chairman’s Powers: “Management of the Board is vested by statute in the Board . . . .” For ease of administration and management, the Board has adopted a delegation of authority that authorizes the Chair to effect the overall management, functioning, and organization of the Finance Board. The managing director is authorized to manage the agency’s day-to-day operations, including authority to appoint, remove, promote, direct, set compensation for, and pay Finance Board personnel.

749. Id. § 1422a(a)(3)(B)(iii).
752. Id. § 1422a(b)(2)(B).
753. Id. § 1422a(b)(1).
754. See Chairman’s Order No. 95-OR-6 (Oct. 10, 1995).
OMB Bypass Provisions: Bypass of OMB review on legislative matters is secured by means of a prohibition on prior executive review contained in 12 U.S.C. § 250. The Finance Board derives its funds, which are neither Government funds nor appropriated monies, from assessments levied on the Banks and from other sources. The funds are not subject to apportionment.

Litigation Authority: The Bank Act authorizes the Finance Board to act in its own name and through its own attorney in enforcing the Bank Act or Finance Board regulations and in any action, suit or proceeding in which the Finance Board is a party that involves the agency’s regulation or supervision of any Bank. The Department of Justice handles all other litigation that may involve the Finance Board.

FEDERAL LABOR RELATIONS AUTHORITY

Mission and General Statutory Reference: The Federal Labor Relations Authority (FLRA) adjudicates appeals concerning unfair labor practices and representation petitions, disputes concerning the negotiability of collective bargaining agreement proposals, and exceptions to grievance arbitration awards relating to federal-sector labor-management relations. The Office of General Counsel is the FLRA’s independent investigative and prosecutorial component.

Membership: The FLRA is composed of three full-time members appointed by the President for five-year terms, with the advice and consent of the Senate. A member may serve until the member’s successor takes office, or the expiration of the next session of Congress subsequent to the end of the member’s fixed term, whichever comes earlier. A member may be removed by the President only upon notice and hearing, and only for inefficiency, neglect of duty, or malfeasance in office. Members shall not engage in any other business or employment or hold another office or position in the Federal government except as provided by law. Not more than two of the members may be of the same political party. The President appoints one member to serve as Chair.

756. See id. § 1422b(c).
757. See id. § 1422b(a).
759. See id. § 7104(f)(2)(A)-(B).
760. See id. § 7104(c)(1)-(2).
761. See id. § 7104(b).
INDEPENDENT FEDERAL AGENCIES

The Federal Service Impasses Panel (Panel) is an entity within the FLRA. The Panel has seven presidential appointees who serve on a part-time basis, one of whom serves as Chair. The Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations over conditions of employment under the statute, the Federal Employees Flexible and Compressed Work Schedules Act, and the Panama Canal Act of 1979. The FLRA also houses the Foreign Service Labor Relations Board and the Foreign Service Impasse Disputes Panel. These entities administer the labor-management relations program and resolve impasses for Foreign Service employees in the U.S. Information Agency, the Agency for International Development, and the Departments of State, Agriculture, and Commerce. Their composition is set out at 22 U.S.C. § 4106 and § 4110.

Other Presidential Appointees: General Counsel. The President, with the advice and consent of the Senate, appoints a General Counsel for a term of five years. The General Counsel is the FLRA’s independent investigative and prosecutorial component. The FLRA’s General Counsel investigates alleged unfair labor practices and prosecutes unfair labor practice complaints. The statute states that the General Counsel “may be removed at any time by the President.” The General Counsel has unreviewable discretion to decline to issue unfair labor practice complaints. The General Counsel also has direct authority over the FLRA’s regional office employees.

Quorum and Voting Requirements: Two members constitute a quorum for purposes of taking FLRA action. A vacancy in the Authority membership shall not impair the right of the remaining members to exercise all of the powers of the FLRA. In the case of a tie, no FLRA action is taken. When exceptions to the decisions of the administrative law judges (ALJs) are filed, the decisions may be affirmed, modified or reversed in whole or in part by the Authority. If no exceptions are filed to an ALJ’s decision, the decision is adopted by the Authority and, without precedential significance, becomes final and binding if no request for review is filed with the FLRA within 60 days of issuance of the regional director’s decision.

762. See id. § 7119(c)(1).
763. See id.
765. Id. § 7104(f)(1).
766. See id. § 7104(f)(3).
767. See id. § 7104(d)(1994).
FLRA is authorized to delegate to subordinate officers the authority to perform such duties and make such expenditures as the FLRA may deem necessary.  

Disqualification and Recusal Procedure: No special procedures.

Chairman's Powers: The Chair of the FLRA serves as its chief executive and administrative officer. The Chair is also a member of the National Partnership Council established by Executive Order No. 12,871 to promote labor-management partnerships in the Federal service. The Chair also heads the Foreign Service Labor Relations Board, and appoints the members of the Foreign Service Impasse Disputes Panel.

OMB Bypass Provisions: The FLRA is required by 5 U.S.C. § 7104(e) to submit an annual report to Congress, which shall include information as to cases heard and decisions rendered. This provision does not confer a legislative bypass on the FLRA.

Litigation Authority: Except as provided by 28 U.S.C. § 518, relating to Supreme Court litigation, "attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority." The Office of the Solicitor represents the Authority in court proceedings before all United States Courts of Appeals and Federal District Courts. The FLRA Solicitor represents the FLRA in the Supreme Court in appropriate cases, by delegation of the Solicitor General and the United States Attorney General.

FEDERAL MARITIME COMMISSION

Mission and General Statutory Reference: The Federal Maritime Commission (the Commission) is responsible for regulating oceanborne transportation between the United States and foreign countries.

768. See id. § 7105(d)-(e).
770. Id.
Membership: Five Commissioners are appointed by the President with the advice and consent of the Senate, for staggered five-year terms. No more than three commissioners may belong to the same political party. The President designates one Commissioner to serve as Chairman. Commissioners are removable by the President for inefficiency, neglect of duty, or malfeasance in office.

Quorum and Voting Requirements: The affirmative vote of a majority of the members of the Commission is required to dispose of any matter before the Commission. For purposes of holding a formal meeting for the transaction of Commission business, the actual presence of two Commissioners shall be sufficient. Proxy votes of absent members are permitted. A vacancy or vacancies in the Commission shall not impair the power of the Commission to execute its functions. The Commission has the authority "to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business or matter." However, the Commission shall retain a discretionary right to review any action taken as a result of the Commission's delegation of its functions upon its own initiative or petition of a party or intervenor to the action. The majority may issue its decision without the dissenting opinion if there is a delay. Federal Maritime Commission Order 87, section 3.10 (February 6, 1981), states that reports accompanied by concurring and/or dissenting opinions, where practicable, shall be served no later than thirty-five (35) workdays following the Commission decision. A deviation from this procedure can only be accomplished by majority vote of the commission. Any assistance to a dissenting Commissioner would be provided by his or her counsel.

Disqualification and Recusal Procedure: Parties may file an affidavit of personal bias or disqualification against any "presiding or participating officer" and the Commission determines the matter as part of the record and decision in the case. The term "presiding officer" includes "any one or

776. 46 C.F.R. § 502.149.
more of the Members of the Commission (not including the Commission when sitting as such)."\textsuperscript{777}

\textbf{Chairman's Powers}: The Chairman serves as chief executive and administrative officer of the agency. The Chairman must consult with Commission members before appointing key agency officials. Only after consultation with other members may these key officials be appointed. The Chairman has authority to approve the budget himself.

\textbf{OMB Bypass Provisions}: The Commission does not enjoy bypass of OMB review on budgetary matters. Although there appears to be no formal provision for bypass on legislative matters, one has developed in practice.

\textbf{Litigation Authority}: The Commission has authority to represent itself in actions in the U.S. Courts of Appeals to review its rules, regulations, or final orders.\textsuperscript{778} The Department of Justice is responsible for the conduct of district court litigation to which the Commission is a party.\textsuperscript{779} However, the Commission may represent itself in district court and appellate court upon notice or approval of the Attorney General with regard to seeking injunctions.\textsuperscript{780}

\begin{center}
\textit{FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION}
\end{center}

\textbf{Mission and General Statutory Reference}: The Federal Mine Safety and Health Review Commission (the Commission) is an adjudicatory agency that provides administrative trial and appellate review of mine safety and health enforcement actions brought by the Department of Labor’s Mine Safety and Health Administration.\textsuperscript{781} Most cases deal with civil penalties assessed against mine owners and the Commission determines whether a health or safety violation occurred and if the proposed penalty is appropriate.

\textbf{Membership}: Five members serve staggered six-year terms and are appointed by the President with the advice and consent of the Senate. There is no provision limiting the number of Commissioners who can be affiliated

\begin{itemize}
\item \textsuperscript{777} 46 C.F.R. § 502.25.
\item \textsuperscript{779} See 28 U.S.C. § 516 (1994).
\item \textsuperscript{780} See 46 U.S.C. app. §§ 1705(k), 1710a(h) (1994).
\item \textsuperscript{781} See 30 U.S.C. § 823 (1994).
\end{itemize}
with the same political party. A member may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.\textsuperscript{782}

\textbf{Quorum and Voting Requirements:} The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, and two members shall constitute a quorum of any group designated.\textsuperscript{783} There is no other quorum requirement. On one occasion when no quorum was present, the Commission simply waited until a quorum was available. After a Commission ALJ has rendered a decision that constitutes his or her final disposition of the proceedings, the Commission, by an affirmative vote of two Commissioners, may direct review by either granting a petition for discretionary review within forty days after the issuance of the decision, or by directing review on its own motion within thirty days after the issuance of the decision.\textsuperscript{784} If the Commission does not grant review, the decision of the ALJ becomes a final decision of the Commission forty days after its issuance.\textsuperscript{785} After directing review, Commission action on exceptions to the ALJ’s decision may be taken only by a majority vote, provided a quorum is present. When the Commission is equally divided, two in favor of affirming the administrative law judge’s decision and two for vacating or reversing the decision, the decision stands as if affirmed.\textsuperscript{786} The Commission issues majority and dissenting opinions simultaneously. In one reported case, the majority and dissenting opinions were issued on different dates.\textsuperscript{787} A dissenting Commissioner’s opinion is drafted by the Commissioner and/or his or her counsel. However, in some circumstances, the Commissioner may also receive staff assistance, particularly if the Commissioner’s view adopts the staff recommendation.

\textbf{Disqualification and Recusal Procedure:} Each Commissioner decides the question of recusal for himself or herself. The Commission’s rules provide that “[a] party may request a Commissioner . . . to withdraw on grounds of personal bias or other disqualification.”\textsuperscript{788} If a Commissioner declines to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{782} See id. § 823(b)(1).
\item \textsuperscript{783} See id. § 823(c).
\item \textsuperscript{784} See id. § 823(d)(1)-(2).
\item \textsuperscript{785} See id. § 823(d)(1).
\item \textsuperscript{787} See Contests of Respirable Dust Sample Alteration Citations, 17 F.M.S.H.R.C. 1819 (1995) (majority opinion); Contests of Respirable Dust Sample Alteration Citations, 17 F.M.S.H.R.C. 1883 (1995) (dissenting opinion).
\item \textsuperscript{788} 29 C.F.R. § 2700.81(b) (1999).
\end{itemize}
\end{footnotesize}
withdraw, he or she "shall so rule upon the record, stating the grounds for his ruling."789

Chairman’s Powers: The President designates one of the members to serve as Chairman. The Chairman is responsible for the administrative operations of the Commission.790 The Chairman may appoint key staff officials without prior approval of other members of the Commission, and in the past this authority has been exercised. Similarly, the other members of the Commission do not approve budget requests before their submission.

OMB Bypass Provisions: The Commission does not possess a budgetary bypass of OMB review. Legislative bypass is not particularly relevant to the Commission because, as an adjudicatory agency, it refrains from making legislative recommendations or offering testimony.

Litigation Authority: As a matter of discretionary policy, the Commission has left to the litigating parties who appear before it the task of defending Commission decisions in the United States Courts of Appeal, where Commission decisions are reviewed or enforced. The Commission has an understanding with the Department of Justice that should the Commission wish to file a brief or otherwise defend its decisions, the Commission would coordinate its efforts with the Department of Justice. The Commission, however, does file routine procedural motions, through the Office of General Counsel, in the Courts of Appeal. Under the Mine Act, the Department of Labor has specific litigating authority in the areas of injunctive relief and enforcement of Commission orders and decisions.791 The Commission has subpoena enforcement authority in the United States District Courts.792 Litigation involving personnel matters, although rare, has been and would be handled by the Office of the General Counsel. The Commission has not had occasion to be involved in Freedom of Information Act and Sunshine Act lawsuits. In such lawsuits, however, defense would be coordinated between the Commission’s Office of General Counsel and the Department of Justice.

789. Id. § 2700.81(c).
791. See id. §§ 816(b), 818 & 822.
792. See id. § 823(e).
INDEPENDENT FEDERAL AGENCIES

FEDERAL TRADE COMMISSION

Mission and General Statutory Reference: The Federal Trade Commission (the Commission) enforces a variety of federal antitrust and consumer protection statutes.\textsuperscript{793}

Membership: Five members serve staggered seven-year terms and are appointed by the President with the advice and consent of the Senate. Commissioners may serve until a successor is appointed and qualified. No more than three commissioners may be from one political party. Commissioners may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Quorum and Voting Requirements: There is no statutory quorum requirement. However, under Commission rules, a quorum is a majority of the members.\textsuperscript{794} When a majority does not form for or against a motion within one month of the most recent vote cast, the motion fails for lack of a majority. The Commission’s rules do not authorize proxy voting but permit Commissioners to direct members of their staffs to report their vote. Review of an ALJ decision is not discretionary but is required where a party has filed a timely notice of appeal. Commission rules permit the Commission to place an ALJ decision on its own docket for review.

Disqualification and Recusal Procedure: Disqualification or recusal rests in the first instance with each individual Commissioner.\textsuperscript{795}

Chairman’s Powers: The President designates a Chairman from among the membership. The executive and administrative functions of the Commission are vested in the Chairman subject to the general policies established by the Commission. Appointment of heads of various major administrative units is subject to approval of the Commission. The Commission has authorization to revise budget estimates and to determine the distribution of appropriated funds. The Commission may delegate functions to divisions of the Commission, hearing examiners, and other employees and retains a discretionary review authority that may be triggered by a vote of the majority less one. The Chairman has the authority to designate which


\textsuperscript{794} See 16 C.F.R. § 4.14(b) (2000).

\textsuperscript{795} See id. § 4.17(b)(3).
personnel, including Commissioners, are to perform these delegated functions.

**OMB Bypass Provisions:** The Commission has no statutory legislative bypass provision. However, it ordinarily does not submit legislation, reports on legislation, or testimony to OMB for clearance. The Commission does submit its annual request for appropriations to OMB for approval and inclusion in the President's budget.

**Litigation Authority:** Section 56 of the Federal Trade Commission Act, (the Act) specifically authorizes the Commission to represent itself by its own attorneys in four categories of cases: (1) suits for injunctive relief under Section 53 of the Act; (2) suits for consumer redress under Section 57(b) of the Act; (3) petitions for judicial review of Commission rules or orders; and (4) suits to enforce compulsory process under Sections 46 and 49 of the Act. Section 56 also provides that with respect to "any civil action involving this subchapter (including an action to collect a civil penalty)," the Commission may represent itself if the Attorney General does not agree to do so after forty-five days notice. This catchall provision enables the Commission to prosecute and defend by its own attorneys a wide variety of cases that the Department of Justice declines to litigate (particularly civil penalty actions under Sections 5(l) and 5(m) of the Act). The Commission is authorized to represent itself in suits to enforce civil investigative demands. In addition, the Department of Justice may appoint Commission attorneys as special United States Attorneys to represent the United States in litigation conducted by the Department of Justice. The Commission also participates as amicus curiae in cases raising impor-

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798. See id. § 56(a)(2)(B).
799. See id. § 56(a)(2)(C).
800. See id. §§ 46(a)(2)(D), 49.
802. See id. § 57b-1(e).
tant issues under antitrust and consumer protection laws. The Justice Department ordinarily represents the Commission in cases of common concern to all agencies, such as Freedom of Information Act, tort or personnel litigation.

Separate provisions govern representation before the Supreme Court. Section 56(a)(3), defines certain circumstances under which the Commission may appear in the Supreme Court “in any civil action in which the Commission represented itself [in the courts below] pursuant to [Sections 56(a)(1) or (2)].” Specifically, the Commission may represent itself if it requests authority to do so from the Solicitor General within ten days of the lower court judgment and the Solicitor General, within sixty days after entry of the judgment, either authorizes the Commission’s appearance, declines to represent the Commission, or fails to respond to the request.

**MERIT SYSTEMS PROTECTION BOARD**

**Mission and General Statutory Reference:** The Merit Systems Protection Board (the Board) adjudicates appeals by federal employees of major personnel actions taken against them, including removals or demotions, decisions by the Office of Personnel Management in retirement matters, certain personnel actions involving discrimination or reprisal for whistle-blowing, and actions brought by the Office of Special Counsel involving alleged prohibited personnel practices or violations of the Hatch Act. The Board also reviews certain significant actions by the Office of Personnel Management, such as regulations, and conducts studies of the merit system. The MSPB was established by the Civil Service Reform Act of 1978.

**Membership:** The Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping non-renewable seven-year terms. Members whose terms expire may continue to serve until a successor is appointed and qualified but the extension is limited to one year. Members can be removed only for inefficiency, neglect of duty, or malfeasance in office.

**Quorum and Voting Requirements:** Two of the Board’s three members constitute a quorum. When, because of a vacancy, recusal or other reason, the Board is unable to decide a matter, the decision, recommendation or or-

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der under review is deemed the final decision of the Board. When the matter does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition. When the Board itself is unable to decide a matter, any decisions issued shall not be deemed precedential. The Board has no provision for operation with only one member.

**Disqualification and Recusal Procedure:** Individual members of the Board decide questions of recusal or disqualification.

**Chairman’s Powers:** The Chairman serves as chief executive and administrative officer of the Board. The Chairman has authority to appoint senior staff and prepare the Board’s budget without the approval of the Board. The Board may delegate “the performance of any of its functions” to a Board employee.\(^{806}\)

**OMB Bypass Provisions:** The Board may transmit information to Congress without prior OMB clearance.\(^{807}\) Legislative recommendations, and budget requests and proposals, are transmitted simultaneously to the President and Congress.\(^{808}\)

**Litigation Authority:** Board attorneys may represent the Board except as to matters in the Supreme Court. However, the Department of Justice handles cases of common concern to all agencies, such as Freedom of Information Act litigation.

**NATIONAL CREDIT UNION ADMINISTRATION**

**Mission and General Statutory Reference:** The National Credit Union Administration (NCUA) supervises, examines and insures federal credit unions, and those state credit unions that apply and qualify for insurance.\(^{809}\)

**Membership:** The NCUA Board (the Board) is comprised of three members who are “broadly representative of the public interest,” have “education, training or experience” in financial services, and are appointed by the President to six-year terms with the advice and consent of the Senate.\(^{810}\)

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806. See 5 U.S.C. § 1204(g).
807. See id. § 1205.
808. See id. § 1204(k)-(l).
Not more than two members of the Board may be members of the same political party. Not more than one member of the Board shall have recent experience as a credit union committee member, officer, director, employee or institution-affiliated party.\footnote{See \textit{id.} \S 1752a(b)(2)(B).} Members may not be appointed to succeed themselves, unless they have not served a full six-year term. Any Board member may continue to serve after the expiration of his or her term until a successor is qualified. The President designates a Chairman and the Board may designate one of its members as Vice Chairman.

\textbf{Quorum and Voting Requirements:} A majority of the Board constitutes a quorum.\footnote{See 12 U.S.C. \S 1752a(d) (1994).} The agreement of two of the three members is required for Board action. There is no statutory or regulatory provision that prohibits a majority of the Board from issuing its decision if the minority delays completing a dissenting statement. Although a Board member who disagrees with a decision may state such disagreement at a meeting, written dissenting statements are not issued. Proxy voting is prohibited.

\textbf{Disqualification and Recusal Procedure:} No special procedures.

\textbf{Chairman's Powers:} The Chairman is the spokesman for the Board, represents the Board and the NCUA in its official relations with other branches of government, determines each member’s area of responsibility and reviews such assignments biannually. The Chairman is the presiding officer at meetings and makes procedural rulings, although, upon appeal, a majority decision by the Board determines any disputed ruling.

The authority to appoint senior staff, with the exception of each board member’s personal staff, is reserved to the Board. However, the Chairman does have the authority to select the Executive Director given the prior agreement by the Board. The Chairman also maintains the authority for all Board human resource decisions in the event of an emergency. Any such actions taken by the Chairman will remain effective for thirty days or until the next closed Board meeting. Budget approval authority is reserved to the Board. The Executive Director, reporting to the Chairman, may approve the reprogramming of up to $150,000 of budget amounts per quarter under powers delegated by the Board, given that all necessary circumstances are met.

\footnote{See id. \S 1752a(b)(2)(B).}
\footnote{See 12 U.S.C. \S 1752a(d) (1994).}
OMB Bypass Provisions: Bypass of OMB review on legislative matters is secured by means of a prohibition on prior executive review.\textsuperscript{813} The NCUA is funded through assessments leveled on Credit Unions and does not receive appropriated funds.

Litigation Authority: NCUA engages in litigation without the Department of Justice only when it acts as liquidating agent or conservator for a credit union. Otherwise, the Department of Justice is responsible for the conduct of federal court litigation brought by or against the NCUA in its capacity as a federal agency.

\textit{NATIONAL INDIAN GAMING COMMISSION}

Mission and General Statutory Reference: The National Indian Gaming Commission (NIGC) is an independent agency established within the Department of the Interior and administers a comprehensive system of regulation of gambling activities on Indian lands. Among other things, it monitors gaming operations, approves all contracts for the management of such operations by non-tribal parties, conducts background investigations on management company officials and principal investors, audits the books and records of gaming operations, and brings enforcement action to ensure compliance with the statute and regulations.\textsuperscript{814}

Membership: Three members serve three-year terms. Members may serve until a successor is appointed. The Chairman is appointed by the President with the advice and consent of the Senate. The two remaining Commissioners are appointed by the Secretary of the Interior. Two members must be enrolled in an Indian tribe. No more than two Commissioners can be of the same political party. The Commission selects its own Vice Chairman.

Quorum and Voting Requirements: Two members are required to constitute a quorum. The effect of a tie vote depends on the particular matter before the Commission. For example, if the Commission were voting on whether to promulgate a rule, a tie vote would result in no rule being promulgated. In other circumstances, however, a tie vote may allow a Chairman's decision to stand or require the Chairman to take different actions to obtain the desired results. There is no proxy voting; however, members may participate in meetings via telephone. The Commission is responsible

for numerous overall activities including approval of the budget, adoption of regulations, establishment of the gaming fee rate, issuance of subpoenas and final closure orders. Staff assistance is available to dissenters upon request. The Commission's manual delegates certain authorities. Additionally, the Chairman delegates by memorandum.

Disqualification and Recusal Procedure: No special procedures.

Chairman's Powers: The Chairman may issue orders temporarily closing gaming activities; levy and collect civil fines for violations of the Indian Gaming Regulatory Act, its implementing regulations; and tribal gaming ordinances, approve tribal gaming ordinances; and approve gaming management contracts. The Chairman is also responsible for appointing and supervising Commission staff. The Commission, upon recommendation by the Chairman, has power to approve the Commission's annual budget. The Commission also has authority to establish fees to be paid to the Commission by certain gaming activity.

OMB Bypass Provisions: Any request for appropriations is subject to the approval of the Secretary of the Interior and is included as part of the budget request of the Department.

Litigation Authority: The Department of Justice represents the Commission in the federal courts.

NATIONAL LABOR RELATIONS BOARD

Mission and General Statutory Reference: The National Labor Relations Board (the Board) conducts secret-ballot elections to determine whether employees want union representation and investigates and adjudicates claims of unfair labor practices by employers and unions.

Membership: Five members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate. The statute is silent on party membership but by tradition two of the five seats on the Board have been reserved for individuals who are not members of

816. See id. § 2706(a)(1).
the President’s party. There is no provision for members to serve after their terms expire pending the appointment of a new member, although members are eligible for reappointment. The President may remove a member, upon notice and hearing, for neglect of duty or malfeasance in office, but not for any other cause.

Other Presidential Appointees: General Counsel. The President also appoints a General Counsel with the advice and consent of the Senate, for a term of four years. The General Counsel has final authority to investigate charges and institute complaints involving unfair labor practices.820 He also exercises general supervision over all attorneys employed by the Board (other than ALJs and legal assistants to Board members) and the officers and employees of the thirty-three regional offices.821 He also has such other duties as may be delegated by the Board. Appeals from decisions of regional directors for the failure to institute an unfair labor practice complaint are of right and go to the General Counsel or his or her designee. Appeals of a regional director’s decision not to proceed on a representation petition are discretionary and lie with the Board.

Quorum and Voting Requirements: Three members constitute a quorum for purposes of taking Board action and two members constitute a quorum of three-member panels.822 In those instances where the Board has fallen below three members, the Board has declined to rule on pending contested matters until a third member has been appointed. Inasmuch as the statute provides for five Board members with three constituting a quorum, tie votes generally occur only when there is one vacancy on the Board or when a member is disqualified from participating. The Board members do not vote on whether to take review of a decision by an ALJ because an appeal from such a decision is a matter of right.823 Since 1976 the Board has had a procedure that permits majority decisions to be issued without awaiting a dissenting opinion in the event that the dissenting opinion was not circulated in a timely manner (generally four weeks from approval of the majority draft). However, this procedure has never actually been implemented in any case. The statute provides that each member shall have his or her own staff of attorneys to review cases and prepare drafts of opinions, and members routinely rely on their staffs for assistance in drafting both majority and dissenting opinions. The statute permits the Board to delegate any or

821. Id.
822. See id. § 153(b).
823. See id. § 160(c).
all of its powers to a panel of three of its members, and such delegations are made routinely in deciding unfair labor practice and representation (election) cases. In addition, the Board has delegated limited authority to its Executive Secretary to rule on procedural motions respecting the filing of formal documents, such as requests for extensions of time. Board procedures assure personal participation of the Board members in the decision of all other contested issues, and subordinates are not issued general proxies with respect to such matters.

Disqualification and Recusal Procedure: Individual Board members decide questions of recusal or disqualification.

Chairman’s and General Counsel’s Powers: The President designates one member to serve as Chairman. The statute is silent as to the Chairman’s authority. As a practical matter, all key decisions, such as approval of the budget and the appointment and removal of some senior staff, are made by the Board collegially. The General Counsel investigates alleged unfair labor practices and prosecutes unfair labor practice complaints. The General Counsel has unreviewable discretion to decline to issue unfair labor practice complaints. The General Counsel also has direct authority over NLRB regional office employees.

OMB Bypass Provisions: The Board does not assert a budgetary or legislative bypass of OMB review.

Litigation Authority: The Board enjoys independent litigating authority under its statute. The Board also handles its own FOIA and EAJA litigation. The Department of Justice is involved in Supreme Court litigation and non-program litigation, such as tort claims and other suits for damages.

NATIONAL MEDIATION BOARD

Mission and General Statutory Reference: The National Mediation Board (the Board) is an independent agency in the executive branch of the Government that mediates disputes for the airline and railroad industries. Strikes, lockouts and other forms of self-help in these industries may occur
only after the Board has determined that further mediation would not be successful and after a cooling-off period of thirty days following the Board's release from mediation. The Board also certifies employee representatives in the airline and railroad industries. 829

Membership: Three members appointed by the President with advice and consent of the Senate to three-year terms. No more than two members may be of the same political party. Individuals appointed to fill a vacancy may only serve for the unexpired portion of the term. Members may serve after expiration of their term until a successor is qualified. Members may be removed by the President for "inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." 830

Quorum and Voting Requirements: Two members constitute a quorum.

Disqualification and Recusal Procedure: No specific procedures.

Chairman's Powers: The Board annually selects its own chairman. 831 The Board may delegate "any portion of its work, business, or functions" to an individual Board member or staff member. 832

OMB Bypass Provisions: The Board sends its annual appropriation request to the OMB for approval and inclusion in the President's budget. The Board also submits testimony and legislative recommendations to OMB for clearance.

Litigation Authority: The Department of Justice represents the Board in the federal courts.

NATIONAL TRANSPORTATION SAFETY BOARD

Mission and General Statutory Reference: The National Transportation Safety Board (the Board) is an independent establishment of the United States Government that investigates all civil and most public aircraft accidents and significant accidents in other modes of transportation. It also serves as an adjudicatory body providing administrative trial and appellate review of decisions by the Federal Aviation Administration, assessing civil penalties, and reviewing decisions by the Federal Aviation Administration

830. Id. § 154(First).
831. See id. § 154(Second).
832. Id. § 154(Fourth).
or the U.S. Coast Guard affecting the certificates of any carrier, airman, mechanic, or mariner.\textsuperscript{833}

**Membership:** The Board is composed of five members, who serve staggered five year terms and are appointed by the President with the advice and consent of the Senate. No more than three Board members may be of the same political party.\textsuperscript{834} At any given time, no fewer than three members of the Board must be individuals who have been "appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation."\textsuperscript{835} Any individual appointed to fill a vacancy occurring on the Board prior to the expiration of the term of office for which his predecessor was appointed is appointed for the remainder of that term. Upon the expiration of his term of office, a member shall continue to serve until his successor is appointed and shall have qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

**Quorum and Voting Requirements:** Three members of the Board constitute a quorum for the transaction of any function of the Board,\textsuperscript{836} and official action can be taken by a majority of a quorum. Although the Board permits proxy voting, a proxy may not be used to establish a quorum for a Board meeting. Official action can be taken at a Board meeting or by notation. Items discussed at a meeting are usually adopted or disapproved by voice vote at the meeting. However, a member who will be absent from the meeting may request that the Chairman hold the record open for his or her later vote, and in such cases adoption or disapproval would not occur at the Board meeting. An absent member may vote by proxy. The proxy must include the member's voting intent and the holder of the proxy determines whether any changes to the item at the board meeting has not affected the item that the proxy should not be voted. Any member can change his or her vote, or "recalendar" an item for discussion within twenty-four hours of the Board's vote. When the Board is equally divided, no official action can be taken. Where official action is taken, a member can file a dissenting or concurring statement. The member's special assistant or the Board's staff are available to assist in its drafting.\textsuperscript{837} The Board

\textsuperscript{834} See 49 U.S.C. § 1111(b) (1994).
\textsuperscript{835} Id.
\textsuperscript{836} See id. § 1111(f).
\textsuperscript{837} See generally 49 C.F.R. § 800.21-800.27 (1999) (explaining delegations of author-
has also delegated the investigation of certain aircraft accidents to the Federal Aviation Administration, although the Board retains ultimate responsibility for the investigation and makes all “probable cause” determinations.  

Disqualification and Recusal Procedure: The Board’s rules provide that motions seeking to disqualify a member be filed with the Board. However, the prevailing practice appears to leave the decision over disqualification or recusal exclusively in the hands of the individual member. In one somewhat unusual case, the Board itself ruled on a motion seeking to disqualify “any Board member” who had any association with certain labor associations.

Chairman's Powers: The President designates, by and with the advice and consent of the Senate, an individual to serve as the Chairman of the Board. The President, without Senate confirmation, also designates an individual to serve as Vice Chairman. The term of Chairman and Vice Chairman is two years. The Chairman is the chief executive and administrative officer of the Board. When necessary, the Vice Chairman is authorized to act as Chairman. The Chairman of the Board selects key staff officials. Such selections are not subject to the approval of the other Board members, although in practice, the Chairman often consults with senior career employees before making his selections. Although the Chairman alone approves the final budget before it is transmitted to OMB, a draft is sent to the other Board Members.

OMB Bypass Provisions: Whenever the Board submits or transmits any budget information, recommendations, comments, or testimony regarding legislation to the President or the Office of Management and Budget, it is required to concurrently submit a copy of the material to Congress. No officer or agency of the United States has any authority to require the Board to submit its budget requests or estimates or its legislative comments or
recommendations for approval or review prior to the submission of that material to Congress.  

Litigation Authority: The Department of Justice is responsible for the conduct of civil litigation to which the Board is a party. District Court litigation includes cases that the Board brings to enforce its subpoena authority, 44 removal of actions against the agency brought by private litigants in state courts, and tort claims. Court of Appeals cases include petitions for review of Board orders. 45 By an express delegation of authority on a case by case basis from the Attorney General through the Director of the Civil Division’s appellate staff, the Federal Aviation Administration is responsible for the defense of Board orders affirming the FAA’s action in certificate enforcement appeals. Referrals to the Department of Justice are handled informally or by letter in cases involving District Court litigation. Petitions for Court of Appeals review of Board orders are transmitted to the Administrator, who is, by statute, a named respondent. 46

NUCLEAR REGULATORY COMMISSION

Mission and General Statutory Reference: The Nuclear Regulatory Commission (NRC) is an independent regulatory commission that regulates commercial nuclear power reactors, nonpower research, test and training reactors, fuel cycle facilities, medical, academic and industrial uses of nuclear materials, and the transport, storage and disposal of nuclear materials and waste. Among other things, the NRC licenses the construction and operation of nuclear reactors and other nuclear facilities, and the possession, use, processing, handling and export of nuclear material. 47

Membership: Five members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate. No more than three commissioners may belong to the same political party. 48 There is no provision for members to sit after their term has expired. The President may remove any member for inefficiency, neglect of duty, or malfeasance in office. The President designates one member as Chairman, who serves at the pleasure of the President.

843. See id. § 1113(c).
844. See id. § 1113(a)(4).
845. See id. § 1153(a).
848. See id. § 5841(b)(2).
Other Presidential Appointees: Inspector General.849

Quorum and Voting Requirements: Three members constitute a quorum.850 Action may be taken by a majority of those present.

Disqualification and Recusal Procedure: Individual commissioners decide questions of recusal or disqualification.851

Chairman's Powers: By the Reorganization Plan No. 1 of 1980,852 the Chairman appoints certain heads of major administrative units, subject to the approval of the Commission, and the Chairman or a member of the Commission may initiate an action for removal, subject to the approval of the Commission, of a number of heads of major administrative units and panels, including the Executive Director for Operations. Others are named by the Chairman, after consultation with the Executive Director, subject to the approval of the Commission. The function of appointing, removing, and supervising the staff of various offices, such as the General Counsel, are delegated by the reorganization plan to the respective heads of these offices. All Commission functions pertaining to an emergency at a requested facility are specifically vested in the Chairman. Development of budget estimates for Commission consideration lies with the Chairman but the Commission must approve budget proposals for submission to OMB.853

OMB Bypass Provisions: The Commission asserts a legislative bypass, which describes the Commission as an independent regulatory agency.854 However, the Commission does submit its authorization and appropriations legislative proposals for clearance. It does not acknowledge clearance authority by OMB in any other matters, including bills, supporting testimony and legislative reports.

Litigation Authority: The Commission has litigation authority to represent itself in the Courts of Appeals.855 The Commission works with the

854. See id. § 5841(a)(1).
INDEPENDENT FEDERAL AGENCIES

Department of Justice and the local U.S. Attorneys Office in any case litigated in federal District Court.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Mission and General Statutory Reference: The Occupational Safety and Health Review Commission (the Commission) is an adjudicatory agency that provides administrative trial and appellate review of workplace safety and health enforcement complaints brought against employers by the Department of Labor’s Occupational Safety and Health Administration.856

Membership: Three members serve staggered six-year terms and are appointed by the President with the advice and consent of the Senate. Members are chosen from among persons who are qualified by reason of training, education, or experience to carry on the functions of the Commission. A vacancy caused by death, resignation, or removal of a member prior to the expiration of the term for which the member was appointed shall be filled only for the remainder of the unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one of the members as Chairman. There is no provision for a Vice Chairman.

Quorum and Voting Requirements: Two of the Commission’s three members constitute a quorum. Official action can be taken only on the affirmative vote of at least two members. An ALJ, appointed by the Commission, decides proceedings instituted before the Commission. The decision of the ALJ becomes the final order of the Commission within thirty days, unless any individual Commissioner directs, within that period, that the ALJ’s decision be reviewed by the full Commission. An ALJ’s decision goes into effect if a Commissioner does not specify review of the ALJ’s decision. The Commission has no regulations governing proxy voting.

Disqualification and Recusal Procedure: The question of disqualification of a Commission member is left to the member concerned.857

Chairman’s Powers: The Chairman is responsible for the administrative operations of the Commission. The Chairman appoints ALJs and other employees as she deems necessary to assist in the performance of the Commission’s functions, and fixes their compensation according to law.

OMB Bypass Provisions: The Commission does not have a provision for bypass of legislative or budgetary review by OMB.

Litigation Authority: The Department of Justice represents the Commission in the federal courts.

POSTAL RATE COMMISSION

Mission and General Statutory Reference: The PRC is an independent establishment of the executive branch of the Government of the United States that issues formal recommended decisions regarding proposed changes by the Postal Service in postal rates, fees, and mail classification.\(^\text{858}\)

Membership: Five members serve staggered six-year terms and are appointed by the President with the advice and consent of the Senate. Commissioners are chosen on the basis of professional qualifications and may be removed only for cause. No more than three commissioners may be affiliated with the same political party.\(^\text{859}\)

Quorum and Voting Requirements: The Commission follows the rule that a majority constitutes a quorum and that action may be taken by a majority of the quorum. There are no statutory provisions governing the conduct of meetings. No decisions are delegated to staff offices. The Commission, which employs no ALJs or other subordinate hearing officers, sits en banc in cases set for hearing and issues its decision directly following briefing and oral argument. Additionally, the Commission has authority to make rules and regulations and to establish procedures, subject to the Administrative Procedure Act, and take any other action necessary and proper to perform its functions, free of supervision by the Postal Service.\(^\text{860}\) When the membership is equally divided, a positive action may not ensue. Commission decisions are governed by strict statutory time limits and, by practice, the Commission puts primary emphasis on publishing all its decisions within these time frames. In theory, a dissent may issue after a majority decision, but this has not occurred. A dissenting member may get staff as-

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860. See id. § 3603.
assistance in preparing his or her dissent. Proxy voting is permitted but not frequently used.

**Disqualification and Recusal Procedure:** No special procedures.

**Chairman's Powers:** The Chairman is designated by the President and serves at the pleasure of the President. The Commission annually elects a Vice-Chairman from among its members. The Chairman is the principal executive officer of the Commission. He is responsible for the appointment of personnel, except heads of major administrative units whose appointments must be approved by a majority the Commission, the supervision of personnel, the assignment of work, and the use and expenditure of funds. The Chairman may appoint all other employees, generally does not seek the advice of the Commission prior to hiring these individuals, and may assign responsibilities to employees within the agency. Each commissioner is consulted during the internal process of developing a draft budget and the budget is considered and approved at a public meeting.

**OMB Bypass Provisions:** The Commission is not subject to normal budget procedures because all its operating expenses are obtained from the Postal Service Fund. It does not submit budget requests to OMB or Congress. Rather, it submits all budget requests to the Governors of the United States Postal Service for approval and receives payment from the Postal Service Fund. The Commission participates in OMB review as a matter of long standing practice, though such review is not binding on the Commission. Thus, the Commission supplies reports on legislation as requested by OMB and submits its draft reports on legislation to OMB when they are requested by members of Congress.

**Litigation Authority:** The Commission has no special statutory litigation authority, and is, in the absence of special arrangements, represented by the Attorney General. Referrals to the Department of Justice are handled informally. Commission legal personnel prepare or help prepare pleadings and otherwise assist the Department of Justice. Special arrangements have been made where the Commission and the Postal Service were on opposite sides of a controversy. In one such case, the Department of Justice decided to present the Postal Service position, but attached a memorandum giving the Commission's opposite view. In another situation, the Department of

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861. See id. § 3601(d).
862. See id. § 3604(a).
863. See id. § 3604(d).
Justice allowed both the Commission and the Postal Service to represent themselves.

RAILROAD RETIREMENT BOARD

Mission and General Statutory Reference: The Board is an independent agency in the executive branch that administers a retirement, unemployment and sickness benefit program for railroad workers and their families.864 Because the Board is made up of representatives of the parties to the disputes determined by the Board, it is not an agency within the meaning of the Administrative Procedure Act.865 Therefore, it is not subject to statutes such as the Regulatory Flexibility Act or the Federal Advisory Committee Act. However, the Board is subject to the Sunshine Act and the Freedom of Information Act.

Membership: Three members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate. One member is appointed based on the recommendations of railway labor; one member is appointed based on the recommendations of railway management; and one, the Chairman, is appointed without recommendation from either railway labor or management. The Chairman must not be in the employment of or be financially or otherwise interested in any railroad employer or railroad labor organization. A member serves until a successor has been appointed and confirmed.

Other Presidential Appointees: Inspector General.866

Quorum and Voting Requirements: A quorum of the Board consists of a majority of those members in office.867 However, all rules, regulations or decisions of the Board require the approval of two members.868 The majority will generally permit a dissenting member to prepare any dissenting statement before issuing the majority opinion. A Board member can obtain staff assistance in drafting any dissent. Authority is delegated to subordinate officials of the Board by Board Order.

Disqualification and Recusal Procedure: No specific provisions.

868. See id. § 231f(b)(5).
Chairman’s Powers: No statutory provisions. Appointment and removal of senior staff officers is by the Board collegially. The Chief Financial Officer prepares a draft budget that is reviewed by a staff panel but must be approved by the Board as a whole.

OMB Bypass Provisions: Whenever the Board submits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, prepared testimony, or comment on legislation to the President or the Office of Management and Budget, the Board sends a concurrent copy of the submission to the Congress. The Board sends its regulations to OMB for review under Executive Order No. 12,866.

Litigation Authority: Judicial review of decisions of the Board is available by the filing of a petition for review in the appropriate United States Court of Appeals. The Department of Justice has delegated to the Board the authority for representing the Board in these cases. These appeals are handled by the legal staff of the Board.

SECURITIES AND EXCHANGE COMMISSION

Mission and General Statutory Reference: The Securities and Exchange Commission (the Commission) administers the federal securities laws, and regulates firms engaged in the purchase or sale of securities, investment companies, and people who provide investment advice.

Membership: Five members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate. No more than three Commissioners can be of the same political party. In making appointments, members of different political parties are to be appointed alternately as nearly as is practicable. A member may serve until his or her successor is appointed and has qualified up to the expiration of the next session of Congress subsequent to the expiration of the term. No provision is made for a member’s removal.

869. See id. § 231ff(f).
871. See 45 U.S.C. §§ 231g, 355(f).
Quorum and Voting Requirements: The Exchange Act does not define a quorum of the Commission. In 1995, the Commission adopted a rule that provides that a quorum consists of three members; provided, however, that if the number in office is less than three, a quorum consists of the number of members in office; and provided further that on any matters of business as to which the number of members in office, minus the number of members who are disqualified to consider such matter, is two, then two members constitute a quorum for purposes of such matter. The effect of a tie vote depends on the particular matter before the Commission. For example, if the Commission were voting on whether to promulgate a rule or bring an enforcement action, a tie vote would result in no rule being promulgated and no action being brought. However, if the Commission were reviewing a sanction imposed by an ALJ in an administrative proceeding, a tie vote would result in the dismissal of the proceeding.

Disqualification and Recusal Procedure: Each commissioner decides the question for himself or herself. The Commission’s rules provide that a Commissioner “should disqualify himself in the event he obtained knowledge prior to becoming a member of the facts at issue before him in a quasi-judicial proceeding, or in other types of proceeding in any matter involving parties in which he has any interest or relationship directly or indirectly.”

Chairman’s Powers: There is no statutory reference to the selection of a Chairman. However, under section 3 of the Reorganization Plan No. 10 of 1950, the function of the Commission with respect to choosing a Chairman from among the members was transferred to the President. The Reorganization Plan also transferred to the Chairman from the Commission the administrative and executive functions of the Commission, including the appointment and supervision of personnel, the distribution of business, and the use and expenditure of funds. Appointment by the Chairman of the heads of major administrative units is subject to the approval of the Commission. The Chairman is to be governed by general policies established by the Commission and by regulatory decisions, findings, and determinations as the Commission may by law make. The Commission retains its

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875. 17 C.F.R § 200.60.
functions as to revising budget estimates and determining the distribution of appropriated funds according to major programs and purposes. The Commission has been delegated functions and has been provided a timely-requested right of review for any party adversely affected in certain respects.\textsuperscript{877} The vote of any one member of the Commission is sufficient to bring any delegated matter to the Commission for review.

\textbf{OMB Bypass Provisions:} Bypass of OMB review on legislative matters is secured by means of a prohibition on prior executive review contained in 12 U.S.C. § 250. The SEC submits its appropriations request to OMB for approval.

\textbf{Litigation Authority:} The Commission has independent litigation authority and handles litigation with its own attorneys at both the trial and appellate levels.\textsuperscript{878} In the Supreme Court, the Commission participates through the Office of the Solicitor General. The Commission’s litigation authority is contained in a number of statutes. For instance, section 21(d) of the Securities and Exchange Act of 1934, authorizes the Commission to initiate actions in Federal court to obtain injunctions and other regulated entities.\textsuperscript{879} In administrative proceedings, the Act authorizes the Commission to issue cease and desist orders to enforce the requirements of the Securities Act, the Securities Exchange Act, the Investment Company Act, and the Investment Advisors Act. The act also provides for temporary orders that are designed to prevent the dissipation or conversion of assets or significant harm to investors.\textsuperscript{880} The Commission also defends actions brought against it or its current or former members and employees for acts arising from the performance of their duties.

The Commission has authority to seek remedies for violations of the Act. The Commission is also authorized to seek writs of mandamus and other orders, and to enforce its subpoenas.\textsuperscript{881} The Securities Enforcement Remedies and Penny Stock Reform Act of 1990,\textsuperscript{882} authorizes the Commission to seek civil money penalties in district court actions and to impose money penalties in administrative proceedings brought against broker dealers, investment advice. The Commission does not have a memorandum of

\begin{itemize}
\item \textsuperscript{877} See 15 U.S.C. § 78d-1(a)-(b).
\item \textsuperscript{878} See SEC v. Robert Collier & Co., 76 F.2d 939, 940 (2d Cir. 1935).
\item \textsuperscript{879} 15 U.S.C. § 78u(d)(1).
\item \textsuperscript{880} See id. § 78u-3(c)(1).
\item \textsuperscript{881} See id. § 78u(c)-(e).
\end{itemize}
understanding with the Department of Justice, but, in specific cases, the Commission staff and the Department of Justice may exchange letters.

SURFACE TRANSPORTATION BOARD

Mission and General Statutory Reference: The Surface Transportation Board (the Board) is an independent agency established within the Department of Transportation and is responsible for the economic regulation of interstate surface transportation, primarily railroads.883

Membership: Three members serve staggered five-year terms and are appointed by the President with the advice and consent of the Senate. No more than two commissioners may belong to the same political party. A member may continue to serve no more than one year after the term of office ends, and no more than two terms. At least two members must have a professional background in transportation and at least one member shall have professional or business experience in the private sector. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

Quorum and Voting Requirements: A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board. When the membership is equally divided, no action may be taken by the Board. A majority agency decision may be issued prior to the release of any dissenting statement. If requested, a dissenting member may obtain staff assistance in preparing his or her dissent. The Board does not provide for proxy voting but does allow absentee voting. Authority is delegated within the agency generally by a notice published in the Code of Federal Regulations and/or the Federal Register.

Disqualification and Recusal Procedure: Issues of disqualification or recusal are for each affected member to consider and determine himself or herself.

Chairman’s Powers: The President shall designate one member to serve as Chairman. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President. The Board annually selects a Vice Chairman who serves as acting Chairman in the absence of the Chairman. The Chairman appoints and supervises the officers and employees of the Board, except that appointment of the heads of major administrative units requires the approval of the Board

pursuant to 49 U.S.C. § 701(c)(2)(A)-(B). Under 49 U.S.C. § 701(c)(2)(D), the Chairman prepares requests for appropriations but they require prior approval of the Board. The Chairman supervises the expenditure of such funds. Subject to the general policies, decisions, findings, and determinations of the Board, the Chairman is responsible for administering the Board.

**OMB Bypass Provisions:** The Board is decisionally independent and not subject to Executive Branch supervision or review. Bypass of prior OMB review on budgetary and legislative matters is secured by means of concurrent transmittal under 49 U.S.C. § 703(g) and 31 U.S.C. § 1108(f). Additionally, those provisions establish that no officer of an agency may impair communications between the Board and Congress concerning budget estimates or requests.

**Litigation Authority:** The Board has the right to represent itself in any civil action involving any function carried out by the board. Moreover, under the so-called Hobbs Act, the Board is authorized to appear as a party in its own right in any proceeding involving the validity of any Commission order or requirement. The Board also has authority to initiate and litigate enforcement actions in courts independently of the Department of Justice, pursuant to 49 U.S.C. §§ 11702, 14702 and 15902.

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Mission and General Statutory Reference:** The United States International Trade Commission (ITC) determines the impact of imports on U.S. industries and directs actions against certain unfair trade practices, such as patent, trademark and copyright infringement. It investigates and publishes reports on U.S. industries and publishes and updates the Harmonized Tariff Schedule of the United States.

**Membership:** Six commissioners serve staggered nine-year terms and are appointed by the President with the advice and consent of the Senate. No more than three of the commissioners may belong to the same political

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884. See id. § 701(c)(2)(E).
885. See id. § 703(c).
886. See id. § 703(g).
party. Members of a different political party are to be appointed "alternately as nearly as may be practicable." A person who has served for more than five years may not be reappointed. A member may continue to serve until his successor is appointed and qualified.

Quorum and Voting Requirements: A majority of the Commissioners in office constitutes a quorum and the Commission may function notwithstanding vacancies. Unless otherwise provided for by statute, a tie vote is the same as a "no" vote; the motion or other attempted action fails for lack of majority. However, by statute, one half the number of Commissioners voting can authorize the institution of an investigation and, in the case of an equally divided Commission, under sections 201 and 406 of the Trade Act of 1974, the President may consider the determination of either group of Commissioners to be the determination of the Commission. In antidumping and countervailing duty cases, by statute, an evenly divided Commission vote shall be treated as an affirmative determination. By published Commission rule, a vote in favor of review by only one Commissioner is all that is necessary to require review by the full Commission of all or part of an initial determination of an ALJ in matters under section 337 of the Tariff Act of 1930. The Commission majority may issue its determination even if the minority delays in completing any dissenting statements. A dissenting Commissioner can obtain staff assistance in preparing any dissenting views. There is no statutory provision for voting by proxy. The Commission’s organic statute contains no specific provision for the Commission to delegate its functions; the Commission delegates responsibilities generally through the use of directives and other internal rules.

Disqualification and Recusal Procedure: No special procedures.

Chairman’s Powers: The President shall designate a Chairman and Vice Chairman for two year terms. He may not designate for Chairman (1) a Commissioner who has less than 1 year of continuous service as a commissioner as of the date the designation is being made, or (2) a Commissioner who is a member of the same political party as Chairman for the immediately preceding term. He may not name as Vice Chairman a member of the same political party as the Chairman. If the President does not appoint a Chairman by the beginning of the term, the Commissioner with the longest period of continuous service as a commissioner who is of a different party from the Chairman for the immediately preceding term will serve as Chairman until a presidentially-designated Chairman takes office. If a Commissioner does not complete a term as Chairman or Vice Chairman due to certain specified causes, the president shall designate a Commis-
The Commissioner of the same political party to serve the remainder of the term. The Vice Chairman acts as Chairman in case of the absence or disability of the Chairman. During any period in which there is no Chairman or Vice Chairman, the Commissioner having the longest period of continuous service as a commissioner shall act as Chairman.

The Chairman of the Commission is authorized to "appoint and fix the compensation of such employees of the Commission as he deems necessary." However, the Chairman's decisions in this regard "shall be subject to disapproval by a majority vote of all the commissioners in office." The Chairman's appointment powers do not extend to the personal staff of each Commissioner. The Chairman formalizes an annual budget that is subject to the approval of a majority of all the commissioners.

An Executive Resources Board (ERB) within the Commission recruits and evaluates candidates for senior staff positions and makes recommendations to the Chairman who makes the final hiring decisions.

**OMB Bypass Provisions:** The Commission is specifically excluded from the provisions of the Budget and Accounting Act of 1921 and directs that the Commission's estimated expenditures and proposed appropriations be included without revision in the President's budget. Moreover, the Commission asserts an informal legislative bypass and does not, consequently, clear testimony or comments through OMB. Assertion of an informal legislative bypass is based on 19 U.S.C. § 2232 which, besides providing the Commission with a budgetary bypass, states that the Commission shall not be considered to be a department or establishment for purposes of the Budget and Accounting Act.

**Litigation Authority:** Section 333(g) of the Tariff Act of 1930 authorizes the Commission to represent itself in judicial proceedings through its own attorneys. Alternatively, the Commission can request that the Attorney General represent it in such proceedings.

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891. Id. § 1331(a)(1)(C).
892. See id. § 1331(a)(2)(B).
SOCIAL SECURITY ADMINISTRATION

Mission and General Statutory Reference: The Social Security Administration (SSA) is an independent agency in the executive branch of the Government that administers the Old Age and Survivor Insurance Program, the Disability Insurance Program, and the Supplemental Income Program. It issues Social Security numbers, processes claims and determines eligibility, maintains beneficiary rolls covering nearly forty-four million people, and dispenses benefits totaling nearly $29 million monthly. 895

Appointment and Removal Provisions: The Commissioner is appointed by the President with the advice and consent of the Senate to a six-year term. A successor appointed to fill an unexpired term serves only for the remainder of the term. A Commissioner whose successor does not take office immediately after the Commissioner’s term may continue in office until the successor assumes office. The Commissioner may be removed by the President only for “neglect of duty or malfeasance in office.” 896 A Deputy Commissioner is also appointed by the President to a six-year term with the advice and consent of the Senate but there is no provision for removal. 897 The Chief Actuary is appointed by the Commissioner but does not have a fixed term, and may be removed only “for cause.”

Other Presidential Appointees: Inspector General. 898 Deputy Commissioner. 899 Two of the members from the public who serve on the Board of Trustees of the Trust Fund. 900 Three of the seven members of the Social Security Advisory Board. 901

OMB Bypass Provisions: The Commissioner’s budget must be submitted to Congress by the President without revision together with the President’s annual budget for the Administration. 902 Legislative matters are subject to OMB clearance and approval.

896. Id. § 902(a)(3).
897. See id. § 902(b)(1)-(2).
898. See id. § 902(d).
899. See id. § 902(b).
901. See id. § 903(c)(1)(A).
902. See id. § 904(b)(1).
Litigation Authority: The Social Security Administration does not have independent litigation authority.

OFFICE OF SPECIAL COUNSEL

Mission and General Statutory Reference: The Office of Special Counsel (OSC) investigates and prosecutes allegations of prohibited personnel practices, with an emphasis on protecting federal government whistleblowers. It is authorized to file complaints with the Merit System Protection Board seeking corrective action remedies, such as reinstatement and back pay, and disciplinary action against individuals who commit prohibited personnel practices. It also provides a secure channel through which federal workers may disclose information about workplace improprieties, misuse of funds, fraud and abuse, and substantial dangers to the public health or safety. OSC also provides advisory opinions on the Hatch Act dealing with political activities by federal employees, and enforces the Hatch Act before the MSPB.\textsuperscript{903}

Appointment and Removal Provisions: The Special Counsel is appointed by the President with the advice and consent of the Senate to a five-year term. The Special Counsel may continue to serve for up to one year after the date the term would otherwise expire if a successor has not yet been appointed and confirmed. A successor appointed to fill an unexpired term serves only for the remainder of the term. The successor must be "an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position."\textsuperscript{904} The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

OMB Bypass Provisions: Freedom from OMB review is secured by a provision for concurrent transmittal of reports and testimony to Congress and the President or other executive branch agencies.\textsuperscript{905} However, as a matter of practice, the Special Counsel has not used its OMB bypass authority and, instead, sends its budget to OMB for inclusion in the President's budget.

\textsuperscript{904} 5 U.S.C. § 1211(b).
\textsuperscript{905} See id. § 1217.
Litigation Authority: The Office of Special Counsel does not have independent litigation authority.