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Administrative Conference of the United States

Sourcebook of United States Executive Agencies

David E. Lewis
Jennifer L. Selin

Vanderbilt University

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About the Administrative Conference of the United States

The Administrative Conference is an independent federal agency dedicated to improving the fairness, efficiency and effectiveness of federal agency processes and practices through consensus-driven applied research. The Conference is a public-private partnership whose members include: the Chairman and 10 other presidential appointees, who comprise the Council; 50 senior government officials drawn from federal agencies, boards, and commissions; and 40 public members drawn from the private sector, including academia, who reflect a wide diversity of views and backgrounds. The work of the Conference is also supported by a small, full-time staff in the Office of the Chairman.

To fulfill its mission, the Conference and its staff perform a variety of functions. One of the chief activities of the Conference is conducting research that, in turn, serves as the foundation for identifying best practices and issuing formal recommendations to agencies, Congress, or the Judicial Conference. These recommendations have addressed a wide variety of administrative and regulatory issues, from the Conference's seminal work developing a practical framework to advance the use of alternative dispute resolution by federal agencies to more recent efforts aimed at e-Rulemaking, video hearings, and other innovative agency practices. Since its inception in 1968, the Conference has issued over 200 such recommendations—several of which Congress has enacted into law, and numerous others have been followed by agencies and courts. The Conference also serves as a central resource for agencies, as well as other federal officials, by providing nonpartisan, expert advice and publishing reference guides on administrative procedural or regulatory topics. Conference staff also engages in extensive outreach by, for example, appearing as speakers and conducting workshops and forums (often in collaboration with other federal agencies or private sector groups) to promote best practices or further the implementation of its recommendations.

Administrative Conference
of the United States
Office of the Chairman

Sourcebook of United States Executive Agencies

David E. Lewis
Jennifer L. Selin

Vanderbilt University

First Edition

DECEMBER 2012
(Second Printing: March 2013)

This report was prepared for the Administrative Conference of the United States pursuant to a consultant contract with the Office of the Chairman. While it has been widely circulated for comment, the views expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees.

Chairman's Foreword

This volume honors important traditions and events. The first is the Administrative Conference's commitment to publishing significant reference works—labeled "sourcebooks"— that are invaluable tools for agencies, executive officials, members of Congress, and the general public. A complete list of prior Conference sourcebooks and other publications can be found on our website.

This *Sourcebook* also honors a 32-year-old classic by Ronald Moe of the Congressional Research Service, called *The Federal Executive Establishment: Evolutions and Trends*, published by the Senate Governmental Affairs Committee in May 1980. The Moe report described and analyzed the "growth, development and operation" of federal agencies, and has proven an indispensable reference tool for government officials and academics alike, as I can personally attest.

The present volume expands, deepens, and updates the research in the Moe report, while acknowledging the debt owed to CRS and the Senate Committee for publishing in-depth research on governmental organizations. The report has been prepared by the Office of the Chairman, which means that it is not the result of the formal approval process used by the Council and the Assembly of the Administrative Conference for Conference recommendations, although numerous Conference members provided their input as the work progressed. But the Office of the Chairman designation elides the work of individuals who should be recognized. At the Conference, this includes our Research Director, Gretchen Jacobs, and Deputy General Counsel, David Pritzker, who reviewed and edited various drafts along the way to publication. It also includes Jeffrey Lubbers, now Special Counsel, who brought to my attention the Moe report many years ago when Jeff was the Conference's Research Director.

The laboring oars on this project belonged to our consultants, David Lewis and Jennifer Selin. At my urging and cajoling,

Professor Lewis enthusiastically undertook this project and shared the research burden with his colleagues and graduate students at Vanderbilt University. The hours put into crafting this work are far too numerous to count, and they include a presentation by Professor Lewis on a preliminary draft to congressional staff in August 2012.

* * *

The purpose of this volume is to make government work better, which is the overall mission of the Conference. For agency general counsels, congressional staff, executive officials, and members of the judiciary, this is the place to broaden understanding of how agencies are organized. For those involved in reorganization and reform of administrative agencies, it will be a treasure trove of sources and ideas. It does not answer all questions, of course, but it answers many, including some that readers may not even have been asking. It is the latter kind of answers that often lead reformers to innovative and creative solutions, to "imagine another reality" in Thomas Mann's words.

I am proud of the many efforts that produced this work, and I commend it to all who are committed to understanding and improving the administrative process.

Paul R. Verkuil

About the Authors

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Jennifer L. Selin is a Ph.D. student in political science at Vanderbilt University. Ms. Selin's current projects examine how differences in internal features of administrative agencies importantly and predictably influence the extent of political control exercised by the President and Congress. Her research has been presented at national political science meetings and published in the *American Journal of Political Science*. Ms. Selin also holds a J.D. from Wake Forest University and practiced administrative law prior to joining Vanderbilt's Department of Political Science.

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Corrections to First Edition

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Page	Correction
114 – Table 13, col. (3)	Under column (3): Deleted CFPB and added USITC to list of agencies.
126 – Table 16, fn. a	Last sentence deleted from footnote a.
126 – Table 16, col. 2	First sentence in second row of middle column under heading "Chief Information Officer" revised to read: "The statute's CIO requirements (44 U.S.C. § 3506(a)) apply broadly to "agencies" as defined in 44 U.S.C. § 3502(1): any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including EOP, but with certain other exclusions), or any independent regulatory agency."
127 – Table 17, Note	The last three sentences of the Note were deleted.

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Part I

Introduction

This report describes the agencies of the federal executive establishment[1] and their diverse characteristics, motivated by the belief that a comprehensive examination of the executive establishment will aid in efforts to pinpoint problems and clarify the consequences of different design choices for agency performance. It is written as a resource for members of Congress and their staffs, agency officials, and the general public. The report describes the diversity of federal agencies, their place in the executive establishment and structural characteristics, and how these features matter for political control and agency performance. Perhaps the most famous review of executive organization in United States history, the report of the President's Committee on Administrative Management (commonly referred to as the Brownlow Committee), described how the executive establishment had developed "without a plan or design like barns, shacks, silos, tool sheds, and garages of an old farm."[2] The old farm metaphor, while a better characterization of the New Deal executive establishment than the current one, is useful. This report is intended to be like a map that marks the different buildings in relation to one another and to the farm. It provides details about the different uses and designs of the buildings, how the farm has developed, and how all the buildings relate together. The report describes the evolution of the current executive establishment, looks backward to understand what now exists, and analyzes trends to see what may be coming.

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1. This report uses the term federal executive establishment rather than executive branch. This choice reflects the fact that numerous federal agencies do not fit neatly in the executive branch. They have been created to be outside the direct control of the chief executive, and to a lesser extent Congress, and many push the boundaries of what is considered a federal agency. *See* S. Comm. on Governmental Affairs, 96th Cong., The Federal Executive Establishment: Evolution and Trends (Comm. Print 1980) (report authored by Ronald C. Moe of the Congressional Research Service) [hereinafter Moe Report]. *See, infra,* Part II for further discussion.

2. President's Committee on Administrative Management: Report of the Committee with Studies of Administrative Management in the Federal Government 32 (1937) [hereinafter President's Comm. on Admin. Mgmt.].

A. Need for This Report

A report describing the contours of the executive establishment is particularly useful now since some of the largest debates in politics in the two years leading up to the 2012 election have been about structural issues—the creation of the Consumer Financial Protection Bureau (CFPB) within the Federal Reserve System;[3] the President's proposal to resuscitate presidential reorganization authority;[4] proposals by candidates for elected office to reform substantially or eliminate whole departments and agencies.[5] Any effort to think holistically about the structure of the executive establishment must begin at a fundamental level with an authoritative accounting of federal governmental units and how they are organized.

Part of the importance of these debates stems from the recognition that the structures of federal agencies, from their location to features of their internal design and reporting requirements, partly determine who has influence over non-statutory policy decisions and how well federal agencies perform in carrying out

3. 12 U.S.C. § 5491 (2012).
4. Press Release, Office of the Press Secretary, White House, President Obama Announces Proposal to Reform, Reorganize, and Consolidate Government (Jan. 13, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov (accessed September 3, 2012).
5. Ed O'Keefe, *What do the Departments of Commerce, Education and Energy Think of Rick Perry's Plan?*, Wash. Post, November 10, 2011, *available at* http://www.washingtonpost.com/blogs/federal-eye/post/what-do-the-departments-of-commerce-education-and-energy-think-of-rick-perrys-plan/2011/11/10/gIQAXiSe8M_blog.html (accessed September 3, 2012).

statutorily mandated responsibilities.[6] Agency design choices also reflect national priorities. Structural choices serve to upgrade some matters for government attention and downgrade others. Whether a program is placed higher or lower in the hierarchy of an agency or whether an agency is an orphan in a larger agency with a decidedly different mission may determine what government does and how well it does it. Agency structure determines who gets to make decisions and how well those decisions will be implemented. It determines whether agencies will be responsive to the White House, Congress, or key groups and who has access to decisionmakers. This is important both when there is broad agreement about what course agencies should pursue and important disagreements among the President and members of the House and Senate. This report describes these structures and their effects.

There is currently no authoritative treatment of the structure and organization of the federal executive establishment. The last effort to create such a treatment was in 1980 when Dr. Ronald C. Moe of the Congressional Research Service produced *The Federal Executive Establishment: Evolution and Trends* at the request of the Senate Committee on Governmental Affairs.[7] However, much has

6. For recent treatments about how the structure of federal agencies influences both policy and performance, see, for example, B. Dan Wood and John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. Pol.176 (2004); David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997 (2003) [hereinafter Lewis, Agency Design]; Peri E. Arnold, Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996 (2nd ed. 1998); Harold Seidman, Politics, Position, and Power: The Dynamics of Federal Organization (1998); Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* Can the Government Govern? (J.E. Chubb and P.E. Peterson eds., 1989) [hereinafter Moe, *Bureaucratic Structure*]; Mathew D. McCubbins, Roger Noll & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989); Herbert Emmerich, Federal Organization and Administrative Management (1971).
7. Moe Report, *supra* note 1.

changed since 1980.[8] Admirable projects have subsequently described different components of the executive establishment, but no works replicate the comprehensive view of this earlier work.[9] Each year the Government Printing Office publishes the *United States Government Manual*,[10] which is the official handbook of the federal government. Yet, the *Manual* is not written to provide information systematically

8. These changes encompass bureaucratic organization, oversight, and personnel. The structure of the bureaucracy has changed; new units have been added to the federal executive establishment and many other units have been substantially reorganized. For example, Congress elevated the Veterans Administration to an executive department and created the Department of Homeland Security. The Civil Aeronautics Board was eliminated and the Social Security Administration was removed from the Department of Health and Human Services. The financial regulatory apparatus has been completely revamped twice in response to the Savings and Loan Scandal and the economic crisis of 2008. In addition, the diversity in the federal bureaucracy has increased as Congress has added to the executive establishment agencies with unusual structural features such as funding autonomy. The development of more sophisticated congressional oversight techniques such as the imposition of complicated reporting relationships with other agencies and Congress illustrates a congressional reaction to the complexity of the federal executive establishment. Congress has enacted legislation aimed at improving congressional monitoring and economy and efficiency in federal management through government-wide mandates. Finally, there also have been changes in the executive establishment's personnel system. Across the board, the President and Congress have increased the number of appointees and relaxed civil service rules by experimenting with pay for performance and devolving personnel authority to agencies. The composition of the federal workforce is changing so that contract workers perform an increasingly large percentage of agency work. Just as the federal executive establishment has developed since 1980, researchers have also learned a lot about agency design and its effects on outputs and performance. Researchers have identified different features of agency design and how different design choices enhance or reduce the influence of different political actors. *See* William G. Howell and David E. Lewis, *Agencies by Presidential Design*, 64 J. Pol. 1095 (2002); Lewis, Agency Design, *supra* note 6; Nolan McCarty, *The Appointments Dilemma*, 48 Am. J. Pol. Sci. 413 (2004); McCubbins et al., *supra* note 6; Moe, *Bureaucratic Structure*, *supra* note 6; Wood and Bohte, *supra* note 6.

9. Kevin. R. Kosar, Cong. Research Serv., RL30365, Federal Government Corporations: An Overview (June 8, 2011) [hereinafter Kosar, Gov't Corp.]; Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000); *but see* Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)* (NYU School of Law, Public Law Research Paper No. 12-44, 2012) (forthcoming Cornell L. Rev. 2013) [hereinafter Datla and Revesz, *Deconstructing Independent Agencies*].

10. *E.g.*, Nat'l Archives & Rec. Admin., The United States Government Manual (2011) [hereinafter NARA, Gov't Manual].

on the structure and design of federal agencies.[11] Every four years congressional committees with jurisdiction over federal personnel policy publish the *Plum Book,* but this document is designed to help the President and Congress make a careful evaluation of positions available for political appointment, rather than to describe the structure of the executive establishment.[12]

B. Methodology

A team of researchers worked over several months to provide the materials that are the basis of this report. At least two researchers read through the portions of the U.S. Code authorizing each federal department and agency.[13] Researchers noted statutory features of each agency along with a statutory reference for each feature. A total of 55 statutory characteristics of agencies were tracked for the 10 components of the Executive Office of the President (EOP), the 15

11. The *Government Manual* details agency structure in simple organization charts and agency descriptions that are limited to a small number of characteristics. Not all agency entries include the same design details, and the *Manual* does not provide many important details about agency structure such as fixed terms, term lengths, and the number of appointees. *See id*.

12. *E.g.*, Staff of S. Comm. on Homeland Sec. & Gov't Affairs, 110th Cong., Policy and Supporting Positions (Comm. Print 2008), *available at* http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2008/pdf/GPO-PLUMBOOK-2008.pdf [hereinafter 2008 Plum Book].

13. Each researcher on the team was assigned approximately 15 agencies to research. Each researcher on the team found the original public law that established the agency and that law's corresponding updated section in the U.S. Code. Once each researcher completed coding each agency's statute, he or she sent it to the team lead. The team lead also coded the statutes for each of the agencies. After the team lead received the completed coding from the team, she compared the two coded versions of the data for each agency and resolved any discrepancies in the coding. The only exception to this pattern was for agencies that were the responsibility of the team lead.

executive or "Cabinet" departments,[14] and 81 independent agencies.[15] Researchers noted the location of each agency in relation to elected officials and each other (e.g., EOP, executive department, independent agency), features of agency governance (e.g., commission, fixed terms, number of political appointees), agency powers (e.g., power to raise funds, independent litigating authority), and aspects of agency political oversight (e.g., OMB and congressional reporting requirements, congressional committee jurisdiction).[16] A brief codebook for the data is included in Appendix C. Full data, including data in accessible formats and statutory references for all coding, are publicly available from the Administrative Conference of the United States.

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14. The President's cabinet is an informal institution traditionally comprised of the secretaries of the executive departments and other officials the President may designate. In this report, the term "cabinet department" is shorthand for one of the 15 executive departments that comprise the primary units of executive administration. They are headed by departmental secretaries and are so denominated in law. Ronald C. Moe, Cong. Research Serv., RL 30673, The President's Cabinet: Evolution, Alternatives, and Proposals for Change (2000) [hereinafter Moe, President's Cabinet].

15. This report follows a variation of the definition of "agency" in the Administrative Procedure Act (APA), *see* 5 U.S.C. § 551(1), to identify all federal entities outside the legislative and judicial branches which are headed by one or more Senate-confirmed appointees.

16. To the extent practicable, the team lead checked the final justifications with existing academic research on agency structure. Any discrepancies between the team's coding and existing research are footnoted in supplementary materials. If discrepancies exist, they are often the result of the team using the provisions of the statutory law described above to code the structural features of the agency. By relying on the portions of the United States Code related to agency structure, it is possible that other statutory provisions outside of the establishing statute impose additional requirements on the agency or specify additional structural features of the agency. In addition, not all structural features are detailed in statute. Many are determined by agency action. Agencies promulgate regulations to implement law and clarify areas where statutory law is unclear. For example, many commission statutes are silent on the question of what constitutes a quorum in an agency, yet such rules are necessary for the functioning of the agency. Agencies subsequently clarify this uncertainty in regulation or bylaw. Finally, case law sometimes gives agencies features that differ from what is in a statute. For example, the statute authorizing the Securities and Exchange Commission does not include "for cause" protections for the removal of commissioners. Yet, the courts have recognized the existence of "for cause" protections in the agency even absent explicit mention in statute. *See*, *e.g.*, Wiener v. United States, 357 U.S. 349 (1958); S.E.C. v. Blinder, Robinson, & Co., 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 488 U.S. 869 (1988). The choice to rely on statutory law was made for the sake of consistent coding across all agencies and to capture the agreed-upon structural arrangement made between Congress and the President.

Mapping the federal executive establishment is an immense task, encompassing history, law and political science. The topics are varied, from the federal personnel system to political oversight of administration. Each of these topics has been a fertile research area for some time. The purpose of the report is not to replicate or redo the important work done by Congressional Research Service scholars, Government Accountability Office studies, or academics. Rather, this work borrows heavily from existing sources in mapping out the executive establishment, identifying key trends, and collecting for the first time data on key ways that agencies differ from one another and relate together. In the same way that a map of the United States cannot provide detail about how to get around in downtown San Francisco, this report cannot delve deeply into some important and complex areas of government and administration. This does not suggest that a map of the United States or a street map of San Francisco is not useful. Rather, the purposes of the maps are different. Thus, this report takes a "map of the United States" level analysis of the federal executive establishment and, where possible, refers readers to other works more akin to street maps.

In creating such a map, it is impossible to avoid some micro-level debates of law and policy. Seemingly simple decisions such as what counts as an agency and whether the relevant details of agency design are statutory characteristics or operations in practice are complicated questions of law and policy. For reasons that are described below, this report defines federal agencies as federal executive instrumentalities headed by one or more political appointees nominated by the President and confirmed by the Senate. The report focuses primarily on agency authorizing statutes in its description of the federal executive establishment. These choices will be unsatisfying to some, and this is natural given that issues of law (i.e., is this the right legal definition?) and policy (i.e., is this useful?) are the subject of disagreement. The report naturally will be more appropriate and useful for some tasks than others, and its existence will hopefully spur related work and nicely complement existing sources.

C. Structure of This Report

The report is divided into two main sections. The first section presents an overview of the federal executive establishment. It describes the agencies designed to be directly responsive to the President and Congress and those designed in various ways to be insulated from the direct influence of elected officials. The report provides historical context to explain how the executive establishment has changed over time and the main ways that agencies differ from one another. This section also describes the personnel system that governs the employees who populate the agencies of government. This section of the report notably highlights the transformation of the personnel system from one unified system to multiple different systems. It also describes the increasing diversity of agency types and structures in the executive establishment. The second section details how agencies get created, reorganized, and terminated. It provides extensive details on the different features of agency design that distinguish among agencies. It focuses specifically on those features that insulate agencies from presidential and congressional control. The report concludes with a brief discussion of the changes in the executive establishment and suggests a broad reconsideration of the federal personnel system and design of the executive establishment.

Part II

What is the Federal Executive Establishment?

The United States Constitution provides for three separate branches. Under textbook understandings of this structure, the legislative branch creates laws, the executive branch executes the laws, and the judicial branch adjudicates disputes and preserves fidelity to the laws and Constitution. The Constitution does not, however, prescribe such a strict separation of powers. The federal government structure is better understood, in the words of Richard Neustadt, as a system of "separated institutions sharing power."[17] The President has a constitutional role in the legislative process through the President's power to recommend legislation, veto legislation (subject to congressional override), and provide information to Congress on the state of union. Congress oversees the execution of laws since it creates and funds federal programs and agencies. Congress confirms nominees and determines how lower level officials will be selected. It also conducts hearings and investigates the actions of public officials. Judges adjudicate the actions of legislators and executive branch officials. The Constitution provides for a system where all three branches supervise and direct the activities of the agencies of government.

While executive branch agencies are responsible for carrying out most federal laws, employees in the legislative and judicial branches also do so. For example, the legislative branch includes what in common language would be called agencies as well, such as the Government Accountability Office (GAO), the Congressional Budget Office, and the Library of Congress, in addition to legislators, their staffs, and other officers of the legislature. Congress created most but not all of these agencies to serve the legislature as staff

17. Richard E. Neustadt, Presidential Power and the Modern Presidents: The politics of leadership from Roosevelt to Reagan 29 (1990); *see also* Lloyd M. Short, The Development of National Administrative Organization in the United States 14 (1923).

agencies.[18] For example, the GAO's self-described mission is to serve Congress by investigating how the U.S. government spends federal revenues.[19] The judicial branch includes the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission, in addition to the courts and their judges and officers.[20] These units provide administrative support for the federal courts, offer the basic management support for the court system, and supply education and research about the court system and sentencing principles and guidelines. On the other hand, some administrative units provide support for all three branches of government. The Government Printing Office is responsible for publishing official information for and about all three branches. The U.S. Botanic Garden, another instrumentality of the legislative branch, is a national botanic garden that "informs visitors about the importance, and often irreplaceable value, of plants to the well-being of humans and to earth's fragile ecosystems."[21] Neither agency self-evidently needs to be located in the legislative branch.[22]

The bulk of federal administration is housed in the executive branch. Article II of the Constitution provides that "the executive power shall be vested in a President of the United States of America,"[23] and historically the functions of government have been carried out by federal employees working either in one of the executive departments or in scores of independent agencies (i.e., not a component of the Executive Office of the President or one of the executive departments) housed in the executive branch, all overseen

18. The legislative branch also includes the Architect of the Capitol, Botanic Garden, Copyright Office, Medicaid and CHIP Payment and Access Commission, Open World Leadership Center, and Stennis Center for Public Service.
19. *See* U.S. Government Accountability Office, *About GAO: Making a Difference for Congress and the Nation* (accessed July 6, 2012), available at http://www.gao.gov/about/gao_at_a_glance_2010_english.pdf (accessed July 6, 2012).
20. *See* http://www.uscourts.gov/FederalCourts.aspx.
21. United States Botanic Garden, *About Us*, *available at* http://www.usbg.gov/about-us (accessed July 6, 2012).
22. Congress, there is no reason why program evaluation of this type is necessarily a legislative activity. This begs the question of why this responsibility is housed in an agency in the legislative branch. The obvious answer is that Congress does not trust the executive branch to evaluate its own agencies and programs. Allen Schick, *Congress and the 'Details' of Administration*, 36 Pub. Admin. Rev. 521 (1976).
23. U.S. Const. art. II, § 1.

and supervised by the three branches.[24] Some of the agencies created outside the executive departments were referred to by the Brownlow Committee as the "headless fourth branch of government"[25] because they are designed to be insulated from presidential and, to a lesser extent, congressional control.

Some agencies do not fit comfortably into *any* of the three branches. Rather, they have been designed to be insulated from the control of elected officials. Many organizations connected to the federal government, such as federally chartered non-profits or mixed-ownership government corporations, even stretch the definition of an agency. While entities designed to be more or less insulated from the President or Congress are perhaps less responsive day-to-day to the directions of these elected officials, this does not imply that they are not democratically accountable. These entities still must comply with the law as it has been enacted and are subject to the investigations and inquiries of the two branches as well as additional legislation and informal pressure.

Thus, to capture adequately the organizational breadth of our federal governmental system, this report uses the term "federal executive establishment" (or "executive establishment"), which is in keeping with the terminology used in the 1980 *Moe Report*.[26] The term "federal executive establishment" is used here in the broadest sense both to reflect the diversity in federal organizations, as well as the fact that many federal entities do not neatly reside in the executive branch.

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24. The executive departments are defined by statute. *See* 5 U.S.C. § 101 (2012) (defining the executive departments as the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans' Affairs, and Homeland Security). What constitutes an "independent" agency is the subject of some disagreement with which the report deals.
25. President's Comm. on Admin. Mgmt., *supra* note 2, at 40.
26. Moe Report, *supra* note 1.

In 2012 the federal executive establishment employed approximately 2.85 million civilians[27] in either a part or full-time capacity, excluding an unknown number of persons working in the intelligence agencies. By comparison, the legislative branch employed 30,900 persons and the judicial branch 32,000.[28] The military services

27. The data for the federal executive establishment are calculated starting with data from the Central Personnel Data File (CPDF). According to CPDF data on the Office of Personnel Management's FedScope website, the federal executive establishment includes 2.13 million federal civilian employees. This figure, however, excludes foreign nationals working overseas (40,000), Public Health Service Commissioned Officer Corps (6,500), and the Federal Reserve (2,331). In addition, it excludes Foreign Service employees (15,000), the White House Office (including Executive Residence and Office of the Vice President) (534), the Postal Regulatory Commission (73), the Tennessee Valley Authority (12,883), the intelligence agencies and the U.S. Postal Service (645,950). For the purposes of counting federal civilian employees, it bears noting that the foregoing totals exclude government contractors, employees of federal entities that are not staffed by federal employees (e.g., federally sponsored non-profits), and what OPM refers to as "non-appropriated fund employees." Office of Personnel Management. *Central Personnel Data File*, *available at* www.fedscope.opm.gov (accessed July 6, 2012) [hereinafter OPM, *FedScope*]; Office of Personnel Management, *FedScope Data Definitions: About EHRI-SDM* (July 14, 2011), *available at* http://www.fedscope.opm.gov/datadefn/DataDefinitions.pdf. To the OPM CPDF (FedScope) data, figures for omitted federal employees noted above were added by referencing other sources. *See* U.S. General Accounting Office, GAO/NSIAD-95-50FS, *Overseas Presence: Staffing at U.S. Diplomatic Posts* (1994), a*vailable at* http://www.gao.gov/assets/90/89820.pdf (data on foreign nationals); http://www.state.gov/documents/organization/177397.pdf (FY 2011 annual report providing data on the Foreign Service); Kennon H. Nakamura, Cong. Research Serv., RL34668, Proposals for a New Foreign Service Compensation System in the 110th Congress 3 n.6 (2008), *available a*t http://www.fas.org/sgp/crs/row/RL34668.pdf (data on Foreign Service personnel working in agencies other than the State Department); Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2013, 9 (2012), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-eop-budget1.pdf (accessed July 10, 2012) (data for White House Office); Email from Michael Ravnitsky, Postal Regulatory Service, to David E. Lewis, William R. Kenan, Jr. Professor of Political Science, Vanderbilt University (July 6, 2012) (on file with authors) (data for Postal Regulatory Commission); U.S. Dep't of Health and Human Serv., *U.S. Public Health Service Commissioned Corps*, *available at* http://www.usphs.gov/ (accessed August 18, 2012) (data for the Public Health Service); Email from Federal Reserve Board to Mark Richardson, Graduate Student, Political Science, Vanderbilt University (July 12, 2012) (on file with authors) (data for the Federal Reserve).

28. Curtis W. Copeland, Cong. Research Serv., RL34685, The Federal Workforce: Characteristics and Trends (2011) (referencing data for the legislative and judicial branch employment from 2009) [hereinafter Copeland, Federal Workforce]; United States Courts, *Administrative Office of the United States Courts*, *available at* http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx (accessed July 6, 2012).

are comprised of approximately 1.41 million persons.[29] In addition to full and part-time federal employees, private contract employees paid by the federal government also perform substantial work for the federal government, as do state and local employees and other workers whose salaries are paid by federal grant dollars.[30]

A. What is a Federal Agency?

Determining what constitutes a federal agency is not an easy task, but a necessary one if one wants to map the federal executive establishment. While it is clear that agencies exist within the Executive Office of the President, within the executive departments, and outside of the executive departments, cataloging administrative agencies is difficult because so many varying definitions abound. Congress defines what an "agency" is in relation to particular laws rather than provide one overarching definition. For example, the Administrative Procedure Act (APA), which governs most federal agencies, provides one of the broadest and most widely-used definitions for administrative agencies. The APA provides that "agency" means:

> each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include

29. Department of Defense, *Statistical Information Analysis Division*, *available at* http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1112.pdf (accessed August 18, 2012).

30. The federal government does not systematically keep track of the number of contract employees. One source estimated the number of contract employees at 7.6 million. *See* Paul C. Light, *The New True Size of Government*, (NYU Wagner Graduate School of Public Service, Organizational Performance Initiative, No. 2, 2006) [hereinafter Light, *New True Size of Gov't*], *available at* http://wagner.nyu.edu/performance/files/True_Size.pdf. The Taxpayers Right to Know Act (H.R. 3609), considered by the 112th Congress, would require agency heads to track the number of federal employees and contractors required to implement every federal program and service in their agency. Eric Katz, *The Price Tag for a Proposal to Root Out Program Duplication: $100 Million*, Gov't Executive, July 5, 2012, available at http://www.govexec.com/management/2012/07/price-tag-proposal-root-out-program-duplication-100-million/56643/. To measure the true size of government, one would also want to measure the number of employees paid by federal grants, which Light put at 7.6 million in 2005. *See* Light, *New True Size of Gov't*.

> the Congress, the courts of the United States, the governments of the territories or the possessions of the United States, the government of the District of Columbia, agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, courts martial and military commissions, military authority exercised in the field in time of war or in occupied territory[.][31]

By this definition, any instrumentality of government that is not otherwise located in the legislative or judicial branch would seem to be an agency. Yet, what about an enterprise such as the Federal Agricultural Mortgage Corporation that is governed by a board in which two thirds of the members are selected by private shareholders rather than the President?[32] Even more difficult are cases where Congress has created private corporations or venture capital funds. They pursue public ends as private entities.

Courts have recognized that the APA's definition of agency is not entirely clear,[33] and there has been a substantial amount of litigation over which government entities fall within the APA's purview.[34] Since what constitutes an agency under the APA is governed on a case-by-case basis through litigation, there is no

31. 5 U.S.C. § 551(1) (2012). The definition also excludes functions performed as a result of mortgage insurance law.
32. *See* 12 U.S.C. § 2279aa-2(b)(2) (2012).
33. *See, e.g.,* Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971) ("The statutory definition of 'agency' is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.").
34. Most of this litigation involves the Freedom of Information Act (FOIA) and the Government in the Sunshine Act. *See, e.g.,* Franklin v. Massachusetts, 505 U.S. 788 (1992) (the President is not an "agency" subject to the provisions of the APA); Citizens for Responsibility and Ethics in Wash. v. Office of Admin., 566 F.3d 219 (D.C. Cir. 2009) (the Office of Administration within the Executive Office of the President is not an agency covered by FOIA); Energy Research Found. v. Def. Nuclear Facilities Safety Bd., 917 F.2d 581 (D.C. Cir. 1990) (the Defense Nuclear Facilities Safety Board is an "agency" within the meaning of the Sunshine Act); Rushforth v. Council of Econ. Advisers, 762 F.2d 1038 (D.C. Cir. 1985) (the Council of Economic Advisers is not an "agency" for the purposes of FOIA or the Sunshine Act); Nicholson v. Brown, 599 F.2d 639 (5th Cir. 1979) (the definition of "agency" for the purposes of FOIA is broad enough to encompass military authority).

authoritative list of government agencies. Every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency.[35] This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 96 independent executive units and 220 components of the executive departments.[36] An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.[37]

When Congress creates programs, it most often delegates responsibility for these programs to a component of an executive department or independent agencies of various types. However, the recipient of delegated authority need not be a federal agency since Congress delegates authority to states, local governments, and private sector entities as well. States and local governments help implement key federal programs such as Medicaid and No Child Left Behind. Congress empowers private litigants to pursue a public function in the enforcement of federal laws by altering economic incentives for such behavior and opening up access to federal courts.[38] It is clear that state and local governments and private sector firms are not federal agencies, but since the 1960s, Congress has delegated authority to entities that are neither typical government agencies nor completely private organizations or local governments.[39] These entities take a

35. Department of Justice, *Data*, *available at* http://www.foia.gov/data.html.
36. NARA, Gov't Manual, *supra* note 10.
37. United States General Services Administration, *Federal Executive Branch*, *available at* http://www.usa.gov/Agencies/Federal/Executive.shtml (accessed July 10, 2012).
38. Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 Am. J. Pol. Sci. 821 (2008).
39. The appeal of non-traditional agency structures stems from a number of factors. First, these agencies often have the patina of a private sector firm and the symbolic sense that they are somehow more efficient than a government agency. Their use is consistent with management trends popularized in the last two decades. Second, these structures avoid the existing rules and regulations attached to federal management and also limit presidential and congressional influence. Kevin R. Kosar, Cong. Research Serv., RL30533, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics (2011) [hereinafter Kosar, Quasi Gov't].

variety of forms: government-sponsored enterprises (GSEs) such as the Federal National Mortgage Association (Fannie Mae), joint federal-state regional development agencies such as the Appalachian Regional Commission, federally funded research centers such as the Rand Corporation, venture capital funds such as OnPoint Technologies (Army) and Red Planet Capital (NASA) (which are nonprofits created by the U.S. Government to invest in companies whose products might be of use to the federal government), and congressionally chartered nonprofit organizations such as the National Academy of Public Administration. Disentangling which of these entities is an "agency" is difficult, particularly since many are wholly or partly owned and directed by private sector actors.[40]

Given such definitional difficulties, the term "federal agency" (or "agency") in this report refers to a clearly delineated set of federal entities for which precise contours can be drawn. *"Agency," as used here, refers to a federal executive instrumentality headed by one or more political appointees nominated by the President and confirmed by the Senate (the instrumentality itself rather than its bureaus, offices or divisions).*[41] Entities connected to the government of the District of Columbia and international and multi-lateral organizations, such as the United Nations or International Monetary Fund, whose governance is a shared enterprise between the United States and other nations, have been excluded.

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40. Of course, Congress also delegates authority to international organizations whose governance is shared among nations. The United States shares governance in a number of international organizations, both multi-national (e.g., the United Nations, Asian Development Bank) and bilateral (e.g., International Boundary Commission, United States and Canada). These entities were not evaluated as part of the executive establishment for purposes of this report.

41. The source for Senate-confirmed positions was the *Plum Book*. *See* 2008 Plum Book, *supra* note 12. While this report was being written, Congress passed the Presidential Appointment Efficiency and Streamlining Act (PAESA) of 2011, Pub. L. No. 112-166 (2012) (signed by the President on August 10, 2012). In this Act, Congress reduced the number of positions requiring Senate confirmation by more than 160 positions. This influences the total number of Senate-confirmed positions which, in turn, affects whether some entities are considered agencies for purposes of this report. The original (pre-Act) list of agencies has been continued in this report even though several agencies' appointees no longer require Senate confirmation, but note in the extended appendix those agencies will no longer have Senate-confirmed appointees as a result of this Act. *See also* Table 5 (identifying some of the agencies outside executive departments whose agency heads no longer require Senate confirmation under PAESA).

B. What This Report Omits

This report also focuses primarily on the top leadership and activities of agencies in the Executive Office of the President, executive departments, and independent agencies rather than their component bureaus, divisions, and committees. Inside federal agencies are hundreds of bureaus, administrations, divisions, offices, and committees that are characterized in this report in a general way. For purposes of clarity, however, it is important to acknowledge what is largely omitted. For example, the General Services Administration coordinates and tracks more than 1,000 federal advisory committees employing over 70,000 persons.[42] The overwhelming majority of these committees are attached to specific departments and agencies. In addition, among federal agencies there are hundreds of interagency committees created to facilitate cooperation among agencies on policies and issues that are shared across the executive branch.[43] These units of the executive establishment get little attention in this report. The executive departments and independent agencies get attention primarily as agencies in themselves rather than their sub-agency bureaus and offices.

This report self-consciously relies primarily on the statutory language of authorizing statutes rather than administrative practice. So, for example, when the report lists features of agencies such as

42. *See* General Services Administration, *Federal Advisory Committee Act (FACA) Management Overview*, *available at* http://www.gsa.gov/portal/content/104514 (accessed August 22, 2012) (providing background on the implementation of the Federal Advisory Committee Act); *see also* Susan Moffitt, Making Policy Public: Deliberative Bureaucracy in the American State (unpublished manuscript, on file with Brown University) (detailing advisory commissions); Seidman, *supra* note 6, at 197-202 (discussing advisory commissions).

43. In 1971, the President's Advisory Council on Executive Organization (Ash Council) estimated that there were 850 interagency committees. Moe Report, *supra* note 1, at 8. These committees emerge from the fact that government functions do not fit neatly into a limited number of departments and agencies. For example, the Department of Homeland Security, the Department of Agriculture, and the Centers for Disease Control are all concerned with the importation of agricultural foodstuffs. There are intelligence agencies attached to the Secret Service, Department of Defense, Central Intelligence Agency, and Federal Bureau of Investigation. When the government needs coordination on broad policy areas scattered across multiple departments, the solution is either a czar or interagency committee. The committees are sometimes created by statute and other times created by executive action.

"for cause" protections from removal or quorum requirements for multi-member bodies, it relies on agency authorizing statutes rather than commission rules, administrative common law, or agency practice. The choice to rely on statutory law was made for the sake of consistent coding across all agencies and to capture the agreed-upon structural deal made between Congress and the President. The reliance on statutory language has the virtue of comparability and consistency across agencies, but also has the vice of omitting how agencies may be similar or different in practice in some cases. The Securities and Exchange Commission provides an example. Its statutes do not include explicit "for cause" protections against the removal of commissioners, but courts have determined that the commissioners have such protections.[44] By focusing on which agencies' statutes include explicit "for cause" provisions, the report does not explain the reality of how commissioner tenure may operate in practice.

The report relies primarily, but not exclusively, on statutory differences as a starting point for comparison. For a few areas of interest, notably those relating to OMB review of budgets, legislative proposals, testimony, and regulations, the report references OMB publications to categorize agencies. Researchers also relied on outside information in describing which agencies have adjudicatory authority and which committees are involved in confirming agency nominees and overseeing agency reports and activities. Efforts to survey all federal agencies about agency practices and features beyond statutes would be a worthy endeavor but exceeds the scope of this report. All readers of the report are encouraged to remember the statutory focus of the report when observing differences across agencies.

44. *Blinder*, 855 F.2d 677 (recognizing implicit "for cause" protection for SEC Commissioners because the SEC, as with the FTC, is an administrative body created by Congress to carry into effect legislative policies).

Part III

Overview of the Federal Executive Establishment

The federal executive establishment is comprised of several main parts. It includes the Executive Office of the President, the executive departments, and independent agencies of various types—independent administrations, independent commissions, and government corporations and other agencies. By far the most significant part is the executive departments. The vast majority of federal employees work in an executive department and most federal authority is carried out by an executive department or one of its component units. These entities may be identified under a variety of terms such as agency, bureau, administration, division or service. Close to ninety percent of federal personnel work in one of 15 executive departments.[45] The remainder work in an agency in the Executive Office of the President (EOP) or some type of independent agency. Agencies in the EOP primarily assist the President in carrying out constitutional or statutory responsibilities, and most employees in these agencies see it as their job to work for the President. The latter category of agency falls outside the executive departments (i.e., is not formally a component of one of the 15 executive departments), is not subject to the direction of a departmental secretary, and often includes characteristics that limit presidential and, to a lesser extent congressional, influence over agency decisionmaking and actions.[46] These "independent" agencies come in a variety of forms: administrations, commissions, government corporations, or other hybrid agencies.[47]

This section reviews the agencies in the different parts of the

45. Of the federal employees that work in an executive department, over sixty percent work in one of three departments—Defense, Veterans Affairs, or Homeland Security.
46. As this report will discuss below, there are some independent agencies that look very much like executive departments, and some agencies inside executive departments with features that insulate them from the control of the President.
47. What constitutes an "independent" agency is the subject of some debate, with some scholars focusing on the location of agencies and others relying on structural features, particularly "for cause" removal protections, to define an independent agency. *See infra* Part III.C.

executive establishment and describes the personnel system that defines and populates these agencies. Within these agencies there are two broad classes of employees governed by different rules for selection and removal: 1) political appointees and 2) career civil servants. The former are selected by political officials, usually from outside the career civil service, and they provide policy direction to the agency. The latter are employees whose hiring, firing, promotion, and demotion are governed by merit and protected by federal law and regulation.[48]

A. Executive Office of the President

The modern executive establishment includes a robust constellation of agencies whose primary purpose is to aid the President in carrying out the President's constitutional and statutory responsibilities.[49] The development of a statutorily specified staff for the President is a relatively modern phenomenon. Early presidents paid for White House staff from their personal salaries.[50] Congress did not appropriate money for presidential staff until 1857.[51] Historically, presidential staffs were small, comprised of secretaries, clerks, stenographers, and messengers. Presidents often employed relatives or acquaintances to work for them in the White House.

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48. There is one primary government-wide civil service system and numerous agency-specific systems, but all are loosely organized around merit principles. Agency-specific systems have been added to provide managers more flexibility in responding to market pressures for wages and to give them more flexibility in managing the workforce.

49. Harold C. Relyea, *The Executive Office Concept*, *in* The Executive Office of the President: A Historical, Biographical, and Bibliographical Guide 3 (Harold C. Relyea ed., 1997) [hereinafter Relyea, *Executive Office*]. As with other categorizations and typologies, there are exceptions. In 1974, Congress established the Office of Federal Procurement Policy within the Office of Management and Budget. Yet, this agency was intended to be congressionally oriented and reports to Congress. *See* Moe Report, *supra* note 1, at 13; Seidman, *supra* note 6, at 43-44.

50. John P. Burke, The Institutional Presidency 4 (1992). John Hart argues that the lump sum provided presidents was actually intended by Congress to cover the President's salary and expenses and that their intention was to pay for a small staff. Over time, however, the distinction between the President's salary and money for the President's expenses in that lump sum was lost. John Hart, The Presidential Branch 13-14 (2nd ed. 1995).

51. In 1833, Congress appropriated money for a secretary to help sign land patents on the President's behalf, but Congress did not consider this person as part of the President's staff. Hart, *supra* note 50, at 17.

Dramatic changes in the nation expanded the role and size of the national government and the management responsibilities of the President. A combination of factors including, but not limited to, the mobilization for the Civil War, industrialization, massive immigration, technological change, and widespread pressure to lessen the impacts of economic booms and busts and systemic disruptions to major national systems (transportation, economy, trade) generated pressure for an expanded scope of activities for the national government. Public pressure for greater government involvement resulted in new federal programs and new agencies and federal employees to implement them. The small national government in 1860, comprised of six executive departments and a handful of minor agencies, had grown to ten executive departments and a score of powerful independent agencies by 1920.[52] The expansion of the national government generated new difficulties in the federal management of agencies and spending. With the nudging of presidents, Congress granted the President increasing resources to manage the executive branch and other responsibilities.[53] In 1921 Congress enacted the Budget and Accounting Act of 1921, which created the Bureau of the Budget.[54] While formally housed in the Department of the Treasury, during the period from 1921 to 1939, presidents used the bureau to collect and manage budget estimates from federal agencies and coordinate activities of the departments and agencies.[55]

The creation of a permanent professional staff formally attached to the presidency did not come until 1939.[56] In response to the Great Depression, President Roosevelt and Congress embarked on a dramatic New Deal domestic program that substantially expanded

52. Among the independent agencies established during this period were the Civil Service Commission, the Interstate Commerce Commission, the Federal Reserve, and the Federal Trade Commission.
53. Moe Report, *supra* note 1, at 4-5; Louis Fisher, Presidential Spending Power 31 (1975).
54. Pub. L. 67-13, 42 Stat. 20 (1921).
55. Short, *supra* note 17, at 437. The President was provided the ability to select the director and assistant director of the Bureau of the Budget without Senate confirmation. Hart, *supra* note 50, at 32.
56. *See generally* Matthew J. Dickinson, Bitter Harvest: FDR, Presidential Power and the Growth of the Presidential Branch (1996) (providing an excellent history of the growth of presidential staffing during this period).

federal employment and the federal executive establishment. Scores of new agencies were created to put the New Deal program into effect. Between 1933 and 1944, federal employment exploded from 603,587 to 3,332,356 workers.[57] With New Deal expansion, however, came concerns about management. After the 1936 election, in which federal management was an issue, President Roosevelt appointed the aforementioned Brownlow Committee to study the organization and management of the federal executive establishment.[58] In 1937 the Committee presented its report and recommended an expansion in presidential staff. Congress ultimately acceded to these recommendations and enacted the Reorganization Act of 1939.[59] Reorganization Plan No. 1 formally created the EOP in 1939.[60] The new EOP included among its initial components the White House Office, the Bureau of the Budget (later OMB), and the National Resources Planning Board.[61]

1. Current Structure of the EOP

The EOP is best understood as a warehouse that contains many distinct agencies and offices rather than as an agency in its own right. Since its creation, the EOP has included anywhere from 3 to 17 presidential staff agencies.[62] Every President since Roosevelt inherited an EOP and White House Office staff structure from previous administrations. Some aspects of the existing

57. Historical Statistics of the United States 5-127 (Carter et al. eds., 2006).
58. Burke, *supra* note 50, at 6.
59. The recommendations of the report initially were entangled in larger political disagreements between the President and Congress stemming from Roosevelt's attempt to enlarge the size of the Supreme Court ("court packing"). Harold C. Relyea, Cong. Research Serv., 98-606, The Executive Office of the President: An Historical Overview 6-8 (2008) [hereinafter Relyea, CRS]; Burke, *supra* note 50, at 7; Hart, *supra* note 50, at 28.
60. Under the authority of the Reorganization Act of 1939, the President was empowered to submit reorganization plans to Congress. These plans for reorganizing the government (i.e., creation, reorganization, and elimination of agencies) would go into effect after 60 days unless both chambers of Congress had passed a concurrent resolution disapproving the plan. Reorganization Act of 1939, Pub. L. 76-19, 53 Stat. 561, 562-63 (1939).
61. Several months later, in September 1939, President Roosevelt issued Executive Order 8248, which organized the EOP and detailed its initial components. Exec. Order No. 8248, 4 Fed. Reg. 3864 (Sept. 12, 1939).
62. *See* Relyea, CRS, *supra* note 59, at 12-24 (providing a comprehensive list of EOP agencies created, reorganized, and eliminated since 1939).

structure worked well for the new presidents, and other parts were inconsistent with the changing political and electoral incentives of presidents. Presidents ignored parts of the EOP and made institutional adjustments by creating new units, eliminating or merging others.[63] These entities may be identified under a variety of terms such as bureau, administration, division, or service. More than 50 different units have been included in the EOP at one time or another since its creation in 1939, with a majority persisting only one or two administrations.[64] Often it was the parts created by Congress in statute that were ignored or needed alteration. For example, President Truman needed a while to warm to the National Security Council, and President Eisenhower ultimately added a national security advisor to manage this apparatus.

Among federal agencies, EOP agencies are usually the most responsive to the President. While some components of the EOP such as the Office of Management and Budget are still comprised largely of career employees, a larger percentage of employees in EOP agencies are political appointees than in other agencies.[65] EOP agencies also generally lack the structural characteristics of some federal agencies that can insulate them from presidential control such as party balancing limitations on political appointees or fixed terms.[66] The commissions in the EOP have strong chairs and no protections from removal. Employees in the EOP also differ from other federal employees because of the common recognition of their primary loyalty to the President as opposed to Congress or their departments or agencies. Other federal employees in the executive departments or independent agencies may have only a limited personal loyalty to the President and may see their work as being more directly tied to congressional committees and agencies.

63. Terry M. Moe, *The Politicized Presidency*, *in* The New Direction in American Politics, (J.E. Chubb and P.E. Peterson eds., 1985) [hereinafter Moe, *Politicized Presidency*].
64. Relyea, CRS, *supra* note 59; Hart, *supra* note 50, at 38.
65. Among EOP agencies, the White House Office, Executive Residence, National Security Council, and Office of the Vice President are staffed entirely by persons who serve at the pleasure of the President. Bradley H. Patterson, To Serve the President: Continuity and Innovation in the White House Staff (2008).
66. As will be discussed below, presidential appointments to many commissions are limited by the requirement that no more than a bare majority be from one political party. Lewis, Agency Design, *supra* note 6.

While Congress is responsible for creating a number of agencies inside the EOP, Congress historically has given the President a significant amount of freedom in the structure and management of the EOP, contributing to the President's ability to create a responsive EOP.[67] Presidents may create new units in the EOP and temporarily use existing appropriated funds to pay for the operations of the unit.[68] Ultimately, however, Congress must approve the new unit by explicitly authorizing it or approving appropriations that have been supported by budget documents that describe the new unit. Congress, however, only rarely contests these funds. Historically, Congress has been deferential to presidential choices involving EOP agencies in the same way that the President has been reluctant to modify legislative branch appropriations.

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67. Relyea, CRS, *supra* note 59; Relyea, *Executive Office*, *supra* note 49; Hart, *supra* note 50, at 148.

68. This requirement was added by Senator Russell (D-GA) in response to President Roosevelt's creation of the President's Committee on Fair Employment Practices. The Russell Amendment states:

> No part of any appropriation or fund made available…shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such an agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it.

Pub. L. 78-359, 58 Stat. 387 (1944). This provision has been amended and now reads:

> (a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence. (b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section.

31 U.S.C. § 1347 (2012) The amended provision has been interpreted to require only that an agency's existence be included in larger budget justifications presented to Congress. See Lewis, Agency Design, *supra* note 6, at 82.

Table 1. Agencies in the Executive Office of the President

EOP Component	Staff Size FY 2012	Budget $Million	Origin	Date
Council of Economic Advisers	26	4	Statute	1946
Council on Environmental Quality	24	3	Statute	1970
Executive Residence	96	12	RO Plan	1939
National Security Staff	14	75	RO Plan	1949
Office of Administration	220	120	RO Plan	1977
Office of Management and Budget	511	89	Statute	1921
Office of Federal Procurement Policy			Statute	1974
Office of Information and Regulatory Affairs			Statute	1980
Office of National Drug Control Policy	98	28	Statute	1988
Office of Science and Technology Policy	29	6	Statute	1976
Office of the United States Trade Representative	248	49	Statute	1975
White House Office	474	70	RO Plan	1939
Domestic Policy Council			Executive Order	1993
Office of National Aids Policy				
Office of Faith Based & Neighborhood P'ships			Executive Order	2001
Office of Social Innovation & Civic Participation				
National Economic Council			Executive Order	1993
Office of Cabinet Affairs				
Office of Communications				
Office of Digital Strategy				

Table 1. Agencies in the Executive Office of the President, continued

EOP Component	Staff Size FY 2012	Budget $Million	Origin	Date
White House Office, continued				
Office of the First Lady				
Office of Legislative Affairs				
Office of Management and Administration				
Office of Public Engagement & Intgvt. Affairs				
Office of Public Engagement				
Office of Intergovernmental Affairs				
Office of Urban Affairs				2009
Office of Scheduling and Advance				
Office of the Staff Secretary				
Office of the Vice President				
Oval Office Operations				
Presidential Personnel Office				
White House Counsel				

Note: Date is year when unit became a part of the EOP. For information on White House Office structure, *see* White House, *Executive Office of the President*, *available at* www.whitehouse.gov/administration/eop (accessed July 29, 2012); Relyea, CRS, *supra* note 59; Hart, *supra* note 49, at 242-44; *see also* Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Government, Fiscal Year 2013, 1207-18 (for staff and budget data from OMB). There are other components of the Office of Management and Budget. OIRA and OFPP are included as examples because of their prominence in rulemaking and contracting.

The EOP currently includes 10 units that employ 1,965 persons.[69] Table 1 includes a list of the components of the EOP along with staff size and budgets as well as dates they were added to the EOP. The most visible component of the EOP is the White House Office. The White House Office is a complex institution in its own right. According to one count, it includes 135 distinct offices from the Office of Legislative Affairs to the staff of the Executive Residence.[70] Importantly, it includes what are commonly referred to as "West Wing" staff such as the Chief of Staff, White House Counsel, and Press Secretary, as well as a number of other assistants and deputy assistants to the President.[71] In some accountings the White House Office also includes an office for the Vice President.[72] The term "White House" or "White House Staff" can refer to different entities and persons depending upon the context. Sometimes the term "White House" is synonymous with the Executive Office of the President. In other cases, the "White House" means simply the White House Office or the White House Office plus a few other units in the EOP such as the National Security Council.[73] For persons working in

69. United States Census Bureau, *The 2012 Statistical Abstract: The National Data Book*, Table 499—Federal Civilian Employment by Branch and Agency, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0499.pdf (accessed July 25, 2012) (citing U.S. Office of Personnel Management, *Federal Civilian Workforce Statistics—Employment and Trends*, *available at* http://www.opm.gov/feddata/). When the authors checked this cite, this publication was available only through 2009. The staff of the Executive Residence is included as a separate organizational unit in the dataset accompanying this report.

70. *See generally* Patterson, *supra* note 65.

71. The White House Staff is comprised of persons working on the payroll of the White House Office, as well as persons working for other agencies such as the Secret Service and National Park Service with permanent attachments to the work of the White House. Employees on the payrolls of other federal agencies are also regularly detailed from the agency to work in the White House. This makes determining the exact number of persons working in the White House at any time difficult. The White House is required annually to send to the House Oversight and Government Reform and Senate Governmental Affairs committees a list of White House employees and detailees. The list is to include names and salaries of each employee except those whose listing "would not be in the interest of national defense or foreign policy of the United States." 3 U.S.C. § 113 (2012).

72. Harold C. Relyea, *The Executive Office of the Vice President*, 40 Pres. St. Quarterly 821 (2010).

73. In his accounting of the White House, for example, Bradley Patterson defines the "whole White House" as the White House Office plus the Executive Residence, Office of Policy Development, National Security Council, and Office of the Vice President. He does so based upon the fact that these other units are distinct from other EOP agencies in at least four different ways. First, their employees serve entirely at the pleasure of the president. Second, they have no independent legal

and around the White House, the organizational distinctions often matter very little, and who works where is not entirely clear. Distinct offices on an organization chart can be quite blurry in day-to-day operations.

The EOP also includes the Office of Management and Budget (formerly the Bureau of the Budget), which was one of the original agencies included in the EOP in 1939. Notably, the EOP also includes the Council of Economic Advisers (1946), National Security Council (1947), Office of the United States Trade Representative (1963), Council on Environmental Quality (1970), Office of Science and Technology Policy (1976), Office of Administration (1977), and Office of National Drug Control Policy (1988). These agencies were added for a number of reasons. In some cases, agencies were added to provide presidents advice and assistance in carrying out constitutional and statutory responsibilities (e.g., National Security Council—national security policy, Council of Economic Advisers—economic policy responsibilities from the Employment Act of 1946). Congress also added some partly as symbolic responses to national policy issues requiring presidential attention (e.g., Council on Environmental Quality).[74] Others were added to help presidents control centralized administrative processes such as budgets and legislative clearance (e.g., Office of Management and Budget).[75] In addition, presidents employ EOP agencies and staff to coordinate federal policies in areas where responsibilities are divided among multiple agencies (e.g., Office of National Drug Control Policy).

2. Controversies—Growth and "Czars"

Critics of the growth in the EOP charge that bloated White House staffs create management challenges of their own for the

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authority to take any authoritative action. Third, they are protected clearly by executive privilege. Fourth, their papers are subject to the Presidential Records Act, but they are not subject to the Freedom of Information Act. Patterson, *supra note* 65.

74 .In a few cases, Congress has placed in the EOP agencies that were not primarily presidential staff agencies such as the Office of Economic Opportunity, the Council on Marine Resources and Engineering Development, and the Council on Environmental Quality. Seidman, *supra* note 6, at 178.

75. Moe Report, *supra* note 1, at 24.

President and that the centralization of power in the White House is bad for governance. The former controversy is illustrated in coverage of the Watergate and Iran-Contra scandals, which engendered public pledges to cut White House staff and scholarly analyses noting the management challenges of the burgeoning presidential staff.[76] For example, the first recommendation of a report of the National Academy of Public Administration in 1980 was that "The trend toward enlargement of the immediate White House staff should be reversed. Rigorous efforts should be made to keep this staff small."[77]

White House observers also note an increasing presidential tendency to centralize authority in the White House, often by appointing White House or administration officials as policy coordinators.[78] The officials assuming these roles are often referred to pejoratively as "czars." The term is shorthand for their position and a comment on the centralization of power in the White House.[79] The title "czar" has been attached to administration officials at least since the Franklin Delano Roosevelt Administration in connection with officials in charge of prices, production, and ships.[80] Republican and Democratic presidents have designated key officials to direct policymaking in important areas that required substantial time and effort to direct effectively. These policy areas are often substantively and politically complicated, involve administration officials from many different departments, and have political or electoral relevance. Presidents designate single officials to "knock heads" or "cut through the red tape" or "ensure coordinated effort."[81]

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76. *Id.* at 195.
77. *Id.* at 197 (quoting National Academy of Public Administration, A Presidency for the 1980s 17 (1980)).
78. Other Senate-confirmed officials are also given the same charge by the President, but their status as Senate-confirmed appointees eliminates the concerns about testifying before Congress. José D. Villalobos and Justin S. Vaughn, *Revolt Against the Czars: Why Barack Obama's Staffing Critics Are (Mostly) Wrong*, 32 Presidency Res. Group Rep. 8 (2010).
79. Barbara L. Schwemle, et al., Cong. Research Serv., R40856, The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight (2011).
80. *Id.* at 4.
81. *Id.* at 6.

It is hard to imagine a modern President being able to coordinate policymaking in different areas without designating key officials to stand in for the President in those roles at least part of the time.

The use of administration officials to stand in the place of the President to coordinate policy has been controversial since the FDR administration, however, when administration officials were lampooned in a cartoon in the *Evening Star* wearing crowns and robes. Critics charge that such officials unduly centralize authority in the White House, lack accountability and generate management difficulties. Criticisms of these officials can follow partisan patterns. Democrats and Republicans often find such officials objectionable when the President is from the opposite party. For example, Democrats were heavily critical of Tom Ridge when he was a White House official in charge of coordinating homeland security efforts. Critics complained that Ridge was influencing policy but not accountable to Congress in the same way that a Secretary of Homeland Security would be. Congress ultimately enacted legislation to create a new executive department.[82] In the early years of Barack Obama's presidency, controversy erupted in the form of criticism of the number and power of such officials named to coordinate policy in different areas.

One objection to persons being named to these roles is that they lack democratic accountability, since those in the White House are not officers of the United States.[83] While some officials named to coordinate policy on the President's behalf are Senate-confirmed political appointees, a number are White House aides. As White House aides, presidential assistants are not subject to Senate confirmation and historically have not had to testify before Congress, being shielded by the President's executive privilege. If, however, so-called "czars" exercise substantial policymaking authority, they

82. Elizabeth Becker, *Senator Insists Ridge Testify Before Congress*, N.Y. Times, April 5, 2002, *available at* http://www.nytimes.com/2002/04/05/us/senator-insists-ridge-testify-before-congress.html (accessed July 29, 2012). Ridge was also criticized for poor performance. Harold C. Relyea, *Organizing for Homeland Security*, 33 Pres. Stud. Quarterly (2003).
83. James P. Pfiffner, *President Obama's White House Czars*, 32 Presidency Res. Group Rep. 5 (2010); Villalobos & Vaughn, *supra* note 78.

plausibly should be nominated and confirmed, and critics worry that the naming of White House officials in visible policy coordinating roles is a means of bypassing the Senate confirmation process.

Beyond concerns about accountability and transparency, some observers worry about the effectiveness of these officials. They lack formal authority over policy, budgets or personnel, and must rely on other Senate-confirmed officials in the departments and agencies to act on their behalf. The authority of appointees selected to coordinate policy on behalf of the President derives from their proximity to the President and the extent to which they can credibly claim to speak for the President. Senior presidential appointees legally preside over thousands of employees and billion dollar budgets, and these political appointees rarely have to listen to anyone other than the President or key members of Congress.[84] Many departmental secretaries complain of a lack of access to the President, and even inside the White House, access to the President, can be limited.[85] If these officials have uncertain authority, their intervention in federal administration arguably only confuses lines of accountability.

The growth in the White House staff and the increasing use of policy coordinators increases the chances that staff interpose themselves between the President and key officials. In such cases, departmental secretaries and agency heads, in effect, become middle managers.[86] It becomes harder for presidents to recruit the best talent from the private sector, including academia, if agency heads are repeatedly overruled by a White House aide. The captains of industry, academia, and government are less likely to leave their existing work or stay in government service to work for a member of the President's staff. In addition, confusion emerges about who is in charge and what the President prefers.

In summary, the EOP has developed into a collection of agencies and specialized staff that aid the President. The growth of

84. Pfiffner, *supra* note 83, at 5.
85. According to some accounts, even the highest-level officials in the White House speak to the President substantively barely once a month. Donald F. Kettl, The Politics of the Administrative Process, 147 (5th Ed. 2011).
86. Pfiffner, *supra* note 83, at 5-7.

the EOP is a relatively recent phenomenon and reflects an attempt by Congress and the President to provide the President with assistance in carrying out his constitutional and statutory responsibilities. Presidents have had a significant amount of freedom in the structure and management of the EOP, but management problems resulting from the size of the EOP and presidential decisions to centralize policy raise questions about transparency and accountability in White House policymaking.

B. Executive Departments

While the EOP primarily advises the President, the overwhelming majority of national administration is conducted by federal employees working in the 15 executive or "Cabinet" departments.[87] The number of executive departments has varied over time with the creation of new departments and reorganization of old departments into new configurations. The first Congress created the first executive departments, Treasury, State, and War, in 1789.[88] These departments performed the essential government functions of managing finances, internal affairs (e.g., patents), foreign relations, and national defense. When Congress created new programs and tasks through statute, Congress usually delegated these responsibilities to existing departments, although some of the tasks delegated did not fit neatly with the primary missions of these departments.[89]

In 1849 Congress created the Department of the Interior, colloquially known then as the "Department of Everything Else," to

87. More than 91% of federal employees tracked by the Office of Personnel Management work in an executive department. Copeland, *supra* note 28.
88. Harold Seidman, *A Typology of Government Agencies*, in Federal Reorganization: What Have We Learned?, 34 (Peter Szanton ed., 1981) [hereinafter Seidman, *A Typology*]. It is interesting to note that Congress considered, but ultimately rejected, a proposal to create a fourth executive department—a home department. Instead, they took the programs and responsibilities that would have resided in the home department, and placed them in the other departments.
89. There were a few exceptions to this early pattern. Specifically, Congress created four agencies outside the executive departments prior to the Civil War—the Library of Congress, Botanic Garden, Smithsonian, and Government Printing Office. *Id.* at 35. Three of these are located in the legislative branch.

assume many of these oddly fitting functions.[90] In the period from 1860 to 1950, Congress created the clientele-based departments of Agriculture (1889), Commerce (1903), and Labor (1913), as well as numerous agencies outside the executive departments, to manage new government programs.[91] Congress added the departments of Health, Education, and Welfare (1953), Housing and Urban Development (1965), Transportation (1966), and Energy (1977), in response to large national problems. The departments of Education (1980), Veterans Affairs (1989), and Homeland Security (2002) joined the Cabinet between 1980 and 2002. Table 2 includes a list of departments, their creation dates, and key bureaus. The Table also includes details about the number of employees and appointees in 2012 and 1960 (or later if the department was created after 1960), for reference.

These departments were not created out of whole cloth.[92] Rather, in creating new departments Congress combined existing agencies, personnel, programs, and appropriations, along with new responsibilities, into new organizational forms. Many of the central functions of government (finance, foreign affairs, national defense) are embodied in executive departments, but so are some less obvious functions (agriculture, energy, urban policy). The earliest departments developed out of existing administrative structures carrying over from the government under the Articles of Confederation.[93] Congress created the Department of the Interior out of programs and personnel from the other existing departments.

90. Lloyd M. Short, The Development of National Administrative Organization in the United States 472 (1923) [hereinafter Short, Nat'l Admin. Org.]; John A. Fairlie, The National Administration of the United States of America (1922); Richard F. Fenno, The President's Cabinet: An Analysis in the Period from Wilson to Eisenhower 26 (1959).
91. *See* Short, nat'l admin. org., *supra* note 90, at 418 (providing a description of the clientele-based departments and agencies created during this period). For example, Short reports that Congress created the Department of Agriculture in 1862 in response to pressure from the United States Agricultural Society, the Department of Education in 1867 in response to pressure from the National Association of School Superintendents, and the Department of Labor in 1888 in response to the Knights of Labor. *Id.* Congress also created other smaller agencies and proto departments during this period in response to public pressure from clients. *Id.*; *see also* Fenno, *supra* note 90, at 24.
92. Fenno, *supra* note 90, at 22.
93. *See* Short, nat'l admin. org., *supra* note 90, at 35.

The Department of Agriculture emerged from an existing independent agriculture agency created more than twenty years earlier. In the twentieth century, the pattern remains the same. The Department of Labor is the successor to the Bureau of Labor (1888). The Department of Defense is the successor to the Department of War. The National Security Act of 1947 combined the Departments of the Navy and War and created a new Department of the Air Force separate from the U. S. Army Air Forces. The Department of Health, Education and Welfare (1953, now the Department of Health and Human Services) was created from the Federal Security Agency. The Department of Veterans Affairs Act of 1988 elevated the Veterans Administration to department status in the form of the Department of Veterans Affairs.[94] Most recently, the Department of Homeland Security was created by combining 22 separate federal agencies, including the Coast Guard, Federal Emergency Management Agency, and Immigration and Naturalization Service, into one new department.[95]

There is no fundamental constitutional or management principle guiding which agencies are departments and which agencies are sub-department bureaus or independent agencies. The status and location of agencies is the subject of political determination. Despite persistent efforts, it is impossible to organize all federal programs and agencies into departments neatly organized by function, primarily because the functions themselves defy compartmentalization. Federal involvement in transportation provides a useful illustrative example. Prior to 1966, federal transportation programs were fragmented, distributed throughout different departments and agencies. Presidents since at least the Truman Administration complained about how this fragmentation of transportation-related responsibilities hindered effective and holistic planning to improve this sector.[96] In 1966 Congress enacted legislation creating a new department that was intended to address transportation problems by consolidating existing programs and

94. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).
95. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).
96. The first bill proposing the creation of a federal Department of Transportation was introduced in 1890. Seidman, *supra* note 6, at 174.

agencies into one department. Congressional efforts were only partly successful since some transportation programs were not integrated into the new department, and others that were included arguably should not have been. For example, do federal programs dealing with urban mass transit belong in the Department of Transportation or the department dealing with urban issues, the Department of Housing and Urban Development? More recently, the Transportation Security Administration, responsible for providing airport security, was integrated into the Department of Homeland Security rather than the Department of Transportation. Concerns for domestic security trumped transportation. The effort to organize domestic security functions into one department meant that transportation functions could not be organized into one department. Choices about which functions get grouped together in one department or agency are a reflection of national priorities at the time they were created. In the early 1990s, Congress and the President deliberated about elevating the Environmental Protection Agency to an executive department but ultimately could not come to agreement on structural details.[97] More recently, President Obama proposed merging the Small Business Administration, Trade and Development Administration, Export-Import Bank, Overseas Private Investment Corporation, and Office of the United States Trade Representative (EOP) with the Department of Commerce's core business and trade functions into one large department.[98]

97. Lewis, Agency Design, *supra* note 6.
98. Press Release, White House Office of the Press Secretary, President Obama Announces Proposal to Reform, Reorganize and Consolidate Government (January 13, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov (accessed August 6, 2012).

Table 2.Executive Departments in the United States

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			Emp. % App.	PAS	PA	NA	SC	Total	Total App. Emp. % App.
1789	STAT	Arms Control & International Security; Civilian Security, Democracy, and Human Rights; Consular Affairs; Diplomatic Security; Economic Growth, Energy & the Environment; Embassies, Consulates & Missions; Bureau of Intelligence & Research; Bureau of International Narcotics & Law Enforcement Affairs; Policy Planning Staff; Political Affairs; Public Diplomacy & Public Affairs; Regional Bureaus	30,000 0.01%	219	6	29	101	355	274 37,972 0.01%
1789	DTRS	Alcohol, Tobacco Ta□ & Trade Bureau; Bureau of Engraving & Printing; Bureau of the Public Debt; □inancial Crimes Enforcement Networ□; □inancial Managemen Service; Internal Revenue Service; Internal Revenue Service □versight Board; □ffice of the Comptroller of the Currency; □ffice of Thrift Supervision; □.S. Mint	106,403 0.001%	28	5	28	44	105	96 77,318 0.001%
1789, 1947	D□D	Air □orce; Army; Defense Advanced Research Pro□ects Agency; Defense Commissary Agency; Defense Contract Audit Agency; Defense Contract Management Agency; Defense □inance & Accounting Service; Defense Information Systems Agency; Defense Intelligence Agency; Defense Logistics Agency; Defense Security Service; Defense Technical Information Center; Defense Threat Reduction Agency; Defense Education Activity; □oint Chiefs of Staff; Missile Defense Agency; National Geospatial□Intelligence Agency; National Guard Bureau; National Reconnaissance □ffice; National Security Agency; Navy; Regional Commands; Tricare Mgmt. Agency	774,244 0.0003%	49	4	69	96	218	159 1,036,754 0.0002%
1870	D□□	Bureau of Alcohol, Tobacco, □irearms & E□plosives; Bureau of Prisons; Drug Enforcement Administration; E□ecutive □ffice for Immigration Review; E□ecutive □ffice for □.S. Attorneys; □ederal Bureau of Investigation; □oreign Claims Settlement Commission; □ffice of □ustice Programs; □.S. Marshals Service; □.S. Parole Commission	115,134 0.003%	217	6	52	68	343	331 31,035 0.01%
1849	INT	Bureau of Indian Affairs; Bureau of □cean Energy Management, Regulation & Enforcement; Bureau of Land Management; Bureau of Reclamation; Bureau of Safety & Environmental Enforcement; National Indian Gaming Commission; National Par□ Service; □ffice of Surface Reclamation & Enforcement; □.S. □ish & □ildlife Service; □.S. Geological Survey	77,225 0.001%	17	0	41	42	100	111 53,257 0.002%
1862, 1889	□SDA	Agricultural Mar□eting Service; Agricultural Research Service; Animal & Plant Health Inspection Service; Economic Research Service; □arm Service Agency; □ood & Nutrition Service; □ood Safety & Inspection Service; □oreign Agricultural Service; □orest Service; Grain Inspection, Pac□ers & Stoc□yards Administration; National Agricultural Statistics Service; National Institute of □ood & Agriculture; Natural Resources Conservation Service; Ris□ Management Agency; Rural Housing Service; Rural □tilities Service	105,126 0.002%	13	10	43	160	219	96 94,904 0.001%

Table 2.Executive Departments in the United States, continued

Date	Dept.	Prominent Bureaus		Political Appointees					1960
			Emp. % App.	PAS	PA	NA	SC	Total	Total App. Emp. % App.
1903, 1913	COM	Bureau of Economic Analysis; Bureau of Industry & Security; Economic Development Administration; Economic & Statistics Administration; International Trade Administration; Minority Business Development Agency; National Oceanic & Atmospheric Administration; National Telecommunications & Information Administration; National Institute of Standards & Technology; National Technical information Service Administration; U.S. Census Bureau; U.S. Patent & Trademark Office	47,626 0.003%	21	4	35	77	137	116 33,070 0.004%
1913	DO□	Bureau of International □a□or Affairs; Bureau of □a□or Statistics; Employee Benefits Security Administration; Employment & Training Administration; Mine Safety & □ealth Administration; Occupational Safety & □ealth Administration; Office of □ederal Contracts Compliance Programs; Office of □a□or□Management Standards; □eterans Employment & Training Services; □age & □our Division; □omen□s Bureau	16,29□ 0.01%	15	4	24	77	120	46 7,26□ 0.01%
1965	□UD	□ederal □ousing Administration; □overnment National Mortgage Corporation; Office of □ederal □ousing Enterprise Oversight; Office of □ealthy □omes & □ead □a□ard Control; Office of □ousing; Office of Pu□lic & Indian □ousing	9,75□ 0.01%	13	2	16	47	7□	95 14,940 0.01%
1966	DOT	□ederal Aviation Administration; □ederal □igh□ay Administration; □ederal □ailroad Administration; National □igh□ay Traffic Safety Administration; □ederal Transit Administration; Maritime Administration; St. □a□rence Sea□ay Development Corporation; Pipeline & □a□ardous Materials Safety Administration; □esearch & Innovative Technology Administration; □ederal Motor Carrier Safety Administration; Surface Transportation Board	56,96□ 0.001%	20	3	27	33	□3	63 59,□03 0.001%

Table 2.Executive Departments in the United States, continued

Date	Dept.	Prominent Bureaus		Political Appointees					1960
			Emp. % App.	PAS	PA	NA	SC	Total	Total App. Emp. % App.
1977	DOE	Energy Information Administration; Federal Energy Regulatory Commission; National Nuclear Security Administration; Office of Electricity Delivery & Energy Reliability; Office of Energy Efficiency & Renewable Energy; Office of Environmental Management; Office of Fossil Energy; Office of Indian Energy Policy & Programs; Office of Legacy Management; Office of Nuclear Energy; Office of Science; Power Marketing Admin.	16,381 0.01%	21	1	23	72	117	150 21,557 0.01%
1979	DOED	Federal Student Aid; Institute of Education Sciences; Office of Special Education & Rehabilitative Services; Office of Elementary & Secondary Education; Office of Postsecondary Education;	4,620 0.03%	13	5	14	115	147	92 7,364 0.01%
1953, 1980	HHS	Administration on Aging; Administration for Children & Families; Agency for Healthcare Research & Quality; Agency for Toxic Substances Disease Registry; Centers for Disease Control & Prevention; Centers for Medicare & Medicaid Services; Food & Drug Administration; Health Resources & Services Administration; Indian Health Service; Nat. Inst. of Health; Substance Abuse & Mental Health Serv. Admin.	85,642 0.002%	16	5	60	68	149	196 155,662 0.001%
1988	DVA	Board of Veterans Appeals; National Cemetery Administration; Veterans Benefits Administration; Veterans Health Administration	316,480 0.0001%	10	5	10	12	37	32 259,406 0.0001%
2002	DHS	Citizenship & Immigration Services; Customs & Border Protection; Federal Emergency Management Agency; Immigration & Customs Enforcement; Transportation Security Administration; U.S. Coast Guard; U.S. Secret Service	198,242 0.001%	16	5	54	89	164	200 152845 0.001%

Note: Office of Personnel Management, Central Data Personnel Data File, *supra* note 27 (providing employment data for non-career SES (NA) and Schedule C (SC) appointees); 2008 *Plum Book*, *supra* note 12 (providing data on Senate confirmed political appointees (PAS) and other presidential appointments not requiring Senate confirmation (PA)). This data was updated to account for passage of the Presidential Appointment Efficiency and Streamlining Act of 2011, which reduced the number of PAS positions requiring Senate confirmation and made them PA positions. See Pub. L. No. 112-166, 126 Stat. 1283 (2012). The final column includes data on the total number of appointees, employees, and percentage appointed in 1960, unless the department was created after 1960, in which case the data come from the next *Plum Book* published after their creation (i.e., 1968 for HUD and DOT; 1980 for DOE, DOED, and HHS; 1992 for DVA; and 2004 for DHS). Employment data from earlier period came from U.S. Civil Service Commission/Office of Personnel Management, Employment and Trends, various years. *See* Appendix A (providing list of agency abbreviations).

1. Executive Departments and Other Executive Agencies Compared

The primary difference between an executive department and an independent administration is symbolic. Department status is conferred to confirm the importance of certain constituencies (farmers, business, labor, veterans) or publicly recognize the priority of dealing with certain key policy problems (cities, transportation, energy, homeland security). Secretaries of the executive departments are traditionally members of the Cabinet. Groups press for Cabinet recognition to receive a symbolic national affirmation that they or their issues are centrally important. Membership in the Cabinet itself, however, is discretionary. The President may designate other executive officials as having Cabinet rank. Recent presidents have made heads of agencies such as the Environmental Protection Agency and Small Business Administration members of the Cabinet. The Cabinet itself is not generally a decisionmaking body. Inclusion in the Cabinet has little direct influence on presidential decisionmaking.[99]

The main structural difference between executive departments and other agencies, where such differences exist, is in placement of political appointees. First, the titles and pay levels for political appointees in executive departments often differ from political appointees in other agencies. For example, while the structure of an agency such as the Environmental Protection Agency is very similar to that of an executive department, equivalent officials have different titles and pay levels. A departmental secretary is paid at executive level I (EX I) and the EPA administrator is paid at executive level II (EX II).[100] Second, executive departments tend to have more political appointees than other agencies, even though many executive departments are significantly smaller than some independent agencies. Two of the smaller executive departments

99. Fenno, supra at 90; Moe Report, *supra* note 1.
100. The pay levels of agency heads are hard to characterize generally. For example, the Commissioner of the Social Security Administration is paid at Executive Level I despite not heading an executive department. While most chairs of independent commissions are paid at Executive Level III, the chairs of the Board of Governors of the Federal Reserve and the Nuclear Regulatory Commission are paid at Executive Level II. The Chairman of the Administrative Conference of the United States is to be paid "at the highest rate established by statute for the chairman of an independent regulatory board or commission." 5 U.S.C. § 593 (2012).

are Education (DOED) and Housing and Urban Development. They employ about 4,500 and 9,900 employees, respectively. Two of the larger agencies that are not part of an executive department, the EPA and the National Aeronautics and Space Administration (NASA), each has over 18,000 employees, and the Social Security Administration (SSA) has over 67,000 employees. Despite having only 4,500 employees, DOED has close to 150 political appointees, compared to 66, 18, and 14 for EPA, NASA, and SSA, respectively. The categorization of an agency as a department provides political justification for a department-like management structure in terms of the number of bureaus, assistant, under, and deputy secretaries and other officials common in other executive departments, even if the bureaus are significantly smaller. For example, once the Department of Defense added a deputy secretary for the first time in 1949, other departments followed suit soon thereafter.[101] When presidents name other officials as members of the Cabinet, this does not change agency features. It only provides invitations to Cabinet meetings.

2. The Structure of Executive Departments

From the start, a single person has been nominated by the President and confirmed by the Senate to head each of the executive departments. This appears to have been the clear intention of the Founders after their experience with boards during the pre-Constitution period.[102] Today, a team of presidential appointees requiring Senate confirmation, and their staffs, manage the departments. Modern department leadership currently includes from 15 to 53 Senate-confirmed positions,[103] including the secretary, a deputy secretary, and a number of under and assistant secretaries. Under these officials are chiefs of staffs and special advisors, but

101. Paul C. Light, Thickening Government: Federal Hierarchy and the Diffusion of Accountability 105 (1995) [hereinafter Light, Thickening].
102. *See* Short, *supra* note 90, at 35-77, 93, 111 (providing a useful administrative history of this period which describes the national transition from legislatively led boards to single-headed ministries or departments).
103. There are a high number of Senate-confirmed appointees in the State Department due to the requirement that all ambassadors be confirmed by the Senate. The high number in Senate-confirmed appointees in the Department of Justice is due to the requirement that all U.S. Attorneys, as well as U.S. Marshals, must be confirmed by the Senate.

also deputies who are a mix of other political appointees and career professionals. The hierarchy of the departments defies overly simple characterization because of the proliferation in the number of titles over the last 40 years.[104]

These members of the administration preside over distinct sub-department agencies. The modern executive departments are comprised of anywhere from 3 to 40 organizationally distinct bureaus, with most housing 10-15.[105] "Bureau" is a general term that refers to many different sub-units within larger departments that have different names such as the Federal Bureau of Investigation, Internal Revenue Service, or National Highway Traffic Safety Administration. Like departments, bureaus vary in size and significance. In many departments the sub-department bureaus have significant autonomy and authority; many departments are better characterized as holding companies of a number of distinct agencies rather than one large agency.[106] The autonomy of sub-department agencies derives from a number of sources. Most have legal authority delegated to the bureau chief directly by legislation, rather than to the department secretary or the President.[107] Large bureaus are also generally headed

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104. Light, Thickening *supra* note 101.

105. The Department of Defense is the outlier with 40 distinct sub-department agencies, dramatically more than any other department. These agencies include: the distinct military services (Air Force, Army, Marines, Navy); the joint commands (e.g., Joint Chiefs of Staff, U.S. Northern Command); the civilian agencies inside the department, such as the Defense Advanced Research Projects Agency (DARPA); the Defense Contract Management Agency; and, the various military educational institutions (e.g., Joint Forces Staff College, National Defense University, National War College). There is no uniform standard as to how one defines a distinct bureau within a larger department or agency. To a large extent, federal data collection agencies rely on agency self-determinations when reporting the number of bureaus. The estimates in the text derive from a count of the number of sub-department agencies listed in the *Government Manual*, which is significantly different from a count based on the list of USA.gov or FOIA.gov. *See, e.g.*, NARA, Gov't Manual, *supra* note 10.

106. Departments referred to as "holding company" departments include Interior, Defense, Commerce, Health and Human Services, and Transportation. *See* Seidman, *A Typology*, *supra* note 88, at 38; Fenno, *supra* note 90, at 228-29; Moe Report, *supra* note 1, at 11; J. Leiper Freeman, The Political Process—Legislative Committee Relations (1958).

107. John Preston Comer, Legislative Functions of National Administrative Authorities (1927); Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 27 (2006); Fenno, *supra* note 90, at 228-29. Moe Report, *supra* note 1, at 29.

by Senate-confirmed political appointees, making bureau chiefs accountable to congressional committees directly rather than through higher departmental officials.[108] Some, though a minority, are headed by political appointees who serve for fixed terms of varying lengths (Table 3). Accompanying fixed terms are explicit or implicit guarantees that political appointees cannot be removed except "for cause." This has been interpreted to mean that removals cannot happen simply because of policy disagreements between the President and political appointees.[109] Of course, political appointees serving fixed terms may leave in any case, but fixed terms can be an important source of independence.

Older bureaus like the Department of the Navy, the Federal Aviation Administration, and the Food and Drug Administration have some measure of independence, power, and prestige because they have existed longer than the departments that house them. For example, the Census Bureau traces its history to the constitutional requirement for a decennial census.[110] The Public Health Service (in the Department of Health and Human Services) was created in 1798 when Congress provided for the care of merchant seamen.[111] These long histories facilitate the development of networks of political support among clients, groups, and congressional committees. Relationships between bureau officials and Senate and House committees and staffs established through regular interaction over long periods of time facilitate bureau independence from administration political appointees and other members of Congress.[112]

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108. Freeman, *supra* note 106.

109 *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); *see also infra* Part IV. C.1 (discussing protections against removal). Similarly, because the Librarian of Congress is appointed by the President with the advice and consent of the Senate, the President also has the authority to remove the Librarian at will. *See* Live365, Inc. v. Copyright Royalty Bd., 698 F.Supp.2d 25, 42-43 (D.D.C. 2010); Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 684 F.3d 1332, 1342 (D.C. Cir.), *reh'g en banc denied*, 2012 U.S. App. LEXIS 18230 (D.C. Cir. 2012).

110. U.S. Const. art. I, § 2.

111. *See* U.S. Dep't of Health and Human Serv., U.S. Public Health Service Commissioned Corps, *Public Health Service History at USPHS Commissioned Corps*, *available at* http://www.usphs.gov/aboutus/history.aspx (accessed August 22, 2012).

112. *See* Freeman, *supra* note 106; Schick, *supra* note 22, at 522; Herbert Kaufman, The Administrative Behavior of Federal Bureau Chiefs 170 (1981).

Table 3. Bureaus in Executive Departments With Fixed Terms for Presidentially Appointed Bureau Chiefs

Department	Bureau	Term Length	For Cause
Department of Commerce	Director, Bureau of the Census	5	
Department of Defense	**Joint Chiefs of Staff:** Chair Vice chair Chief of Staff of the Air Force Chief of Staff of the Army Chief of Naval Operations Commandant of the Marine Corps	 2 2 4 4 4 4	
Department of Education	Director, Institute of Education Sciences Commissioner of Education Statistics	6 6	
Department of Energy	**Federal Energy Regulatory Commission**	5	√
Department of Health and Human Services	Director, Indian Health Service Surgeon General	4 4	
Dept. of Housing and Urban Development	Director, Office of Federal Housing Enterprise Oversight	5	
Department of Interior	**National Indian Gaming Commission**	3	√
Department of Justice	Director, Community Relations Service Director, Federal Bureau of Investigation **Foreign Claims Settlement Commission** United States Attorneys United States Marshals **United States Parole Commission**	4 10 3 4 4 6	 √
Department of the Treasury	Comptroller of the Currency Director of the Mint Commissioner, Internal Revenue Service **Internal Revenue Service Oversight Board**	5 5 5 5	
Department of Transportation	Administrator, Federal Aviation Administration Administrator, St. Lawrence Seaway Development Corporation **Surface Transportation Board**	5 7 5	 √
Department of Veterans Affairs	**Board of Veterans Appeals** Under Secretary for Benefits Under Secretary for Health	6 4 4	√

Note: Agencies in **bold** are multi-member bodies. Provisions for a fixed term for the Director of the Census Bureau were included in the Presidential Appointment Efficiency and Streamlining Act of 2011. *See* Pub. L. No. 112-166, 126 Stat. 1283 (2012). This list excludes bureaus whose personnel are named by the agency head and have fixed terms. Henry B. Hogue et al., Cong. Research Serv., RL30959, Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations (2008). √ indicates that agency statutes include explicit "for cause" protections against removal.

When deciding to create new departments or agencies Congress can specify a few or many of the details of internal agency organization.[113] In some cases, Congress leaves it up to the agency head to create the internal offices and divisions of an agency and empowers the secretary to reorganize older bureaus moving into the new agency or department.[114] In other cases, Congress specifies in great detail the internal organization of an agency and preserves the integrity of freestanding units being moved into a new department.[115] This has been true from the earliest days of the Republic when Congress laid out the structure of the Department of the Treasury in great detail but not the departments of State or War.[116] Congress is now specifying the internal organization of federal agencies in greater detail than in the past.[117]

Statutorily provided details about internal department and agency structures come from both the organic act creating the agency and subsequent legislative action. Congress regularly creates new agencies and bureaus and adds them to existing departments or agencies. For example, the Consumer Financial Protection Bureau (2010) was created by the Dodd-Frank legislation and added to the Federal Reserve (1913).[118] Congress also, from time to time, mandates the creation of offices with a particular mission in all agencies government-wide. A notable example is when Congress mandated the creation of offices of inspector general in all executive departments in the Inspector General Act of 1978.[119] Other

113. Moe Report, *supra* note 1.
114. *Compare* 6 U.S.C. §§ 101-63 (2012) (referencing 37 bureaus, offices, and agencies to be moved or created within the Department of Homeland Security) *with* 42 U.S.C. §§ 3501-15d (2012) (referencing only 5 bureaus, offices, and agencies within the Department of Health and Human Services).
115. *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.
116. Short, *supra* note 90.
117. Moe Report, *supra* note 1.
118. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010). Almost all large bureaus in the executive departments have been formally authorized in legislation. Sometimes formal legislative authorization comes after an agency has been created by executive action.
119. According to the Council of Inspectors General on Integrity and Efficiency, there are now 73 statutory inspectors general with the additions mandated in amendments to the initial act, notably in 1988, when independent agencies were added. *See* Council of the Inspectors General on Integrity and Efficiency, *available at* http://www.ignet.gov/ (accessed July 17, 2012).

government-wide mandates can have a similar effect. Congress has mandated the creation of four "chief officer" positions (financial, information, human capital, acquisition) in major agencies, and this can lead to the creation of new and similar offices in different agencies across the executive establishment.[120] Other government-wide managerial mandates such as the Freedom of Information Act, faith-based and community initiatives, and laws and regulations relating to discrimination in federal employment lead to the common offices across departments and agencies (e.g., FOIA offices, faith-based initiatives offices, and equal employment opportunity or civil rights offices).[121] Common agency tasks and requirements such as the need for legal advice and review, congressional and public relations, budget, and program evaluation also lead departments and agencies to have common features (e.g., general counsel, office of legislative affairs, office of public affairs, budget office).[122]

3. Variation in the Number of Employees and Political Appointees

In addition to differences in history, mission, and structure, executive departments differ in size and the depth and penetration of political appointees. By far the largest department is the Department of Defense (DOD), which employs over 650,000 federal civilians and oversees more than one million uniformed military personnel and unknown thousands of intelligence personnel and private contractors. The Department includes the military services (Air Force, Army, Navy), which are as large as many departments in their own right, each with over 150,000 civilian employees. The Department of Veterans Affairs and the Department of Homeland Security are also large employers, particularly in comparison to the smaller departments such as Education, Energy, and Housing and Urban Development. The number of political appointees does not correspond to differences in size. Education and Labor have close to 150 political appointees, while Energy has closer to 110. The

120. Clinton T. Brass, Cong. Research Serv., RL32388, General Management Laws: Major Themes and Management Policy Options (2004) [hereinafter Brass, Gen. Mgmt. Laws].
121. *See id.* (for a compendium of government-wide managerial mandates).
122. Moe Report, *supra* note 1, at 28.

Department of Defense and Department of Homeland Security have over 200 each, but Interior, Transportation, Treasury, and Veterans Affairs have fewer than 100 each. As a percentage of agency employees, Education, HUD, and Labor have the most political appointees.[123] These differences in political appointee numbers influence agency behavior and reputation. Political appointees aid the President in communicating administration priorities, but they also provide an important source of patronage (i.e., jobs to be allocated as a reward for political support) and have an influence on the quality of management inside agencies, as will be discussed below.[124]

C. Independent Agencies

From the first Congress, the legislature operated under the assumption that the proper form of administration was a permanent executive department headed by a single secretary.[125] Starting in the 1880s with the creation of the Interstate Commerce Commission (ICC), Congress began creating permanent agencies as commissions, often outside of the existing executive departments. Up to this point, Congress had episodically created new agencies outside of existing departments. It would do so because these agencies did not fit neatly inside existing departments. Some examples include the precursors to the departments of Agriculture and Labor. Generally, however, these agencies would have similar structures as executive

123. David E. Lewis, The Politics of Presidential Appointments: Political Control and Bureaucratic Performance 82 (2008) [hereinafter Lewis, Presidential Appt].

124. Domonic A. Bearfield, *What Is Patronage? A Critical Reexamination*, 69 Pub. Admin. Rev. 64 (2009); G. Calvin Mackenzie, The Politics of Presidential Appointments (1981); Martin Tolchin and Susan Tolchin, To the Victor: Political Patronage from the Clubhouse to the White House (1971) [hereinafter Tolchin and Tolchin, To the Victor]; Martin Tolchin and Susan Tolchin, Pinstripe Patronage: Political Favoritism from the Clubhouse to the White House and Beyond (2010) [hereinafter Tolchin and Tolchin, Pinstripe Patronage].

125. The nation had employed boards and commissions for executive functions during the struggle for independence and under the Articles of Confederation. A number of the Founders and early members of Congress determined from that experience that permanent agencies with single heads were more efficient and more accountable than boards. *See* Short, *supra* note 90, at 35-77, 93, 111 (providing a useful administrative history of this period which describes the national transition from legislatively led boards to single-headed ministries or departments).

departments, and they often would be consolidated into new or existing executive departments after a period of time. The creation of the ICC was of a different character.[126] Congress sought to create a form of administration that would be expert and insulated from politics, so that the powers of the agency would not be used in a partisan way.

Since the ICC exercised significant legislative and adjudicative power that would impact the larger economy and key interests, Congress sought to fashion an agency that was bipartisan and expertise-focused. In practice, this meant designing the agency in such a way that the President's appointment and removal powers would be limited. Congress created the ICC as a 5-member commission with 6-year fixed and staggered terms, and provided that the President could remove commissioners for "inefficiency, neglect of duty, or malfeasance in office."[127] The act stipulated that no more than 3 commissioners could be appointed from the same political party.

After the creation of the ICC, Congress created scores of both minor and major agencies outside the executive departments, including multi-member commissions modeled after the ICC, such as the Federal Reserve (1913) and Federal Trade Commission

126. The ICC was originally within the executive department structure since the original act gave the Secretary of Interior authority to receive reports and approve the number and remuneration of ICC employees. Congress granted the agency full independence from the Interior Department in 1889. The Civil Service Commission, created in 1883, was a bipartisan commission like the ICC. It operated independently, but was also located for administrative purposes inside the Department of the Interior. It would reside there until 1925. Seidman, *supra* note 6, at 163. Paul P. Van Riper, History of the United States Civil Service 103-04 (1958).

127. Interstate Commerce Act of 1887, Pub. L. No. 49-41 (1887). The phrase "inefficiency, neglect of duty, or malfeasance in office" is generally interpreted as protecting commissioners from presidential removal except "for cause." In the context when it was enacted, however, the Tenure of Office Act was still in effect, which limited the President's power of removal by requiring Senate assent to a presidential removal. This provision can be read as providing the President greater power than he might otherwise have had in removal.

(1914).[128] The creation of independent regulatory commissions continued well into the twentieth century with the New Deal and early 1970s being notable for the addition of new commissions. Congress added the Federal Communications Commission, Securities and Exchange Commission, and National Labor Relations Board in the 1930s and Consumer Product Safety Commission, Federal Election Commission, and Commodity Futures Trading Commission in the early 1970s. Once created, these agencies have proven quite durable relative to agencies in the Executive Office of the President or executive departments.[129]

1. What is an Independent Agency?

To ask this begs the question of what defines agency independence. There is no general, widely accepted definition of an independent agency, but this label or definition is consequential for both law and politics.[130] For some scholars, any agency created outside the EOP or executive departments is an independent agency.[131] This report has implicitly operated with this definition. What defines agency independence under this definition is the lack of a general requirement to report to any higher official in the executive branch such as a department secretary. There is no layer of organization between the agency and the President. Thus, the class of independent agencies would include all administrations, commissions, and corporations outside the EOP and executive departments, such

128. As before, some agencies were created outside the executive departments because their functions did not fit neatly with the functions of existing departments. In other cases, however, Congress—influenced by the Progressive belief in science and technical expertise—sought to create court-like agencies of experts to scientifically manage specific policy areas. Breger and Edles, *supra* note 9, at 1130-33.

129. David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 Brit. J. Pol. Sci. 377 (2003) [hereinafter Lewis, *Adverse Consequences*].

130. Breger and Edles, *supra* note 9; Datla and Revesz, *Deconstructing Independent Agencies*, *supra* note 9; Jacob E. Gersen, *Designing Agencies*, *in* Research Handbook on Public Choice and Public Law 347 (Daniel A. Farber and Anne Joseph O'Connell eds., 2010); Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L. J. 468 (1994).

131. Seidman, *supra* note 6; Lewis, Agency Design, *supra* note 6; David Epstein and Sharyn O'Halloran, Delegating Powers (1999).

as the Environmental Protection Agency and Federal Deposit Insurance Corporation. It would not, however, include multi-member bodies inside an executive department such as the Federal Energy Regulatory Commission (within the Department of Energy) or bureaus whose heads have fixed terms and for cause protections such as the Federal Aviation Administration or Commissioner of the Internal Revenue Service.[132]

For other scholars, however, independence is defined not by location inside or outside an executive department but by structural features, particularly for cause removal protections (i.e., political appointees cannot be removed except "for cause," "inefficiency, neglect of duty, or malfeasance in office," or similar language) for agency leaders.[133] Independence in this context means independence from political interference, particularly removal by the President.[134] By this definition, the class of independent agencies would include a multitude of single-headed and multi-member agencies inside and outside the executive departments. There are at least 23 different single-headed (i.e., not multi-member boards or commissions) sub-

132. The statute creating the Federal Energy Regulatory Commission states: "There is established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission." 42 U.S.C. § 7171; *see also* 49 U.S.C. § 106(b) (the Federal Aviation Administrator has a fixed, five-year term); 26 U.S.C. § 7803(a)(1)(B) (the Commissioner of the Internal Revenue Service serves for a fixed, five-year term).

133. Most existing scholarship recognizes some clustering of design characteristics that together signify independence, but the most important characteristic appears to be protections against removal. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 Notre Dame L. Rev. 1349 (2012); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 16, 31 (2010); Lisa Schultz Bressman and Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 610 (2010); Gersen, *supra* note 130, at 347; Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2247 (2001); *see also* Note, *Independence, Congressional Weakness, and the Importance of Appointment: the Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1824 (2012) [hereinafter Note, *Budgetary Autonomy and Removal Protection*].

134. Court jurisprudence concerning independent agencies also focuses overwhelmingly on removal provisions. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (addressing the removal provisions for the Public Company Accounting Oversight Board); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (federal statutes may limit the removal of officials in certain types of agencies); Myers v. United States, 272 U.S. 52 (1926) (any statute by which the unrestricted power of removal is denied to the President is unconstitutional); Note, *Budgetary Autonomy and Removal Protection, supra* note 133, at 1822.

department bureaus whose administrators or directors are appointed by the President and serve for a fixed term, from the Director of the Federal Bureau of Investigation to the Undersecretary of Veterans Affairs for Benefits (Table 3).[135] Discussions of independent agencies, however, usually revolve around the set of multi-member boards and commissions patterned after the ICC that have for cause protections against removal and often quasi-judicial or quasi-legislative authority. For example, the Paperwork Reduction Act of 1980 lists sixteen independent regulatory agencies. Each agency listed is a commission with tenure protections. It also notes, however, that other agencies might be classified as independent by providing that the group of independent regulatory agencies includes, "any other similar agency designated by statute as a Federal independent regulatory agency or commission."[136] In addition to commission structures and fixed terms, most discussions note the importance of for cause provisions, staggered terms, and party-balancing limitations on appointments.[137]

Table 4 includes all multi-member bodies whose members have fixed terms. The table lists each such agency and whether the agency includes other features scholars generally associate with independent agencies. The table lists 66 such agencies, some in executive departments and others created outside the executive departments. The list includes classic independent regulatory commissions such as the Federal Communications Commission and Federal Trade Commission, but also a whole host of other

135. There are other agency officials named by the agency head that also serve for fixed terms. These include: National Appeals Division (USDA); Regional Marine Fishery Management Councils (USDA); Corporation for Travel Promotion (DOC); Office of Navy Reserve (DOD); Office of Marine Forces Reserve (DOD); Office of Air Force Reserve (DOD); Joint Staff of the National Guard Bureau (DOD); Board of Actuaries (DOD); Medicare-Eligible Retiree Health Care Board of Actuaries (DOD); Performance-based Organization for the Delivery of Federal Student Financial Assistance (DOED); National Advisory Council on National Health Service Corps (HHS); Office of the Chief Actuary (CMS-HHS); Office of the Coast Guard Reserve (DHS); Foreign Service Grievance Board (STAT); and Air Traffic Services Committee (DOT). *See Free Enter. Fund*, 130 S. Ct. at App. A (Breyer, J., dissenting).
136. 44 U.S.C. § 3502(5) (2012).
137. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L.J. 259 (April/June 1988); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 Cardozo L. Rev. 273 (1993) [hereinafter Devins, *Political Will*].

agencies.[138] Interestingly, some of the classic independent regulatory commissions have all of the features of the ICC such as explicit for cause protections, explicit staggering of terms, and party balancing limitations on appointments, but others do not. For example, while the Consumer Product Safety Commission has explicit "for cause" protections against removal, the Commodity Futures Trading Commission and Securities and Exchange Commission do not.[139] The statutes governing the National Labor Relations Board do not require party balancing among members.

2. Independent Administrations

Independent administrations are listed in the left column of Table 5 and look structurally most like executive departments. A comparison of the organization charts of independent administrations and executive departments can look very similar except that where executive departments have assistant, under, and deputy secretaries and secretaries, administrations have commissioners or administrators. As suggested above, lower pay is usually attached to positions in these agencies outside the executive departments, with top officials being paid at executive level II or III rather than level I for a department secretary. This can influence the pay of subordinate officials as well. If the administrator is paid at executive level III, this implies that lower-level officials will be paid at executive levels IV and V.

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138. The classic independent regulatory commissions are those that are structured like the ICC and have important economic and regulatory impacts. Most lists generally include the following commissions: Federal Reserve Board of Governors; Federal Trade Commission; Securities and Exchange Commission; Federal Communications Commission; National Labor Relations Board; Consumer Product Safety Commission; Commodity Futures Trading Commission; Federal Energy Regulatory Commission; Nuclear Regulatory Commission; and U.S. International Trade Commission. *See* Moreno, *supra* note 130, at 475-78.

139. However, courts have recognized implicit "for cause" protections. *See*, *e.g.*, Wiener v. United States, 357 U.S. 349 (1958) (even in the absence of "for cause" statutory provisions, the President cannot remove a member of an adjudicatory body like the War Claims Commission merely because he wants his own appointees to serve on such a commission); *Humphrey's Ex'r*, 272 U.S. at 2 ("for cause" provisions are constitutional in predominately quasi-legislative or quasi-judicial agencies); *Blinder*, 855 F.2d 677 (recognizing implicit "for cause" protection in the SEC because the SEC is like the FTC in that both are administrative bodies created by Congress to carry into effect legislative policies).

Table 4. Characteristics of Multi-Member Bodies with Fixed Terms

Agency	Outside Exec Dept.	Explicit "For Cause" Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
Administrative Conference of the U.S.	X				
Board of Veterans Appeals (VA)		X			
Broadcasting Board of Governors	X		X	X	X
Chemical Safety & Hazard Invest Bd	X	X			
Commodity Futures Trading Comm.	X		X	X	
Consumer Product Safety Commission	X	X	X	X	X
Corporation for Nat'l Community Service	X			X	X
Corporation for Public Broadcasting	X	X		X	
Defense Nuclear Facilities Safety Board	X		X	X	X
Equal Employment Opportunity Comm.	X			X	X
Export-Import Bank of the U.S.	X		X	X	X
Farm Credit Administration	X		X	X	X
Federal Agricultural Mortgage Corp	X			X	X
Federal Communications Commission	X			X	X
Federal Deposit Insurance Corporation	X			X	
Federal Election Commission	X		X	X	X
Federal Energy Regulatory Com (DOE)		X	X	X	
Federal Hospital Insurance Trust Fund Bd	X			X	
Federal Labor Relations Authority	X	X		X	
Federal Maritime Commission	X	X	X	X	X
Federal Mine Safety & Health Rev Com	X	X	X		X
Federal Reserve Board	X	X	X		X
Federal Retirement Thrift Investment Bd	X		X		X
Federal Supp Med Ins Trust Fund Bd	X			X	
Federal Trade Commission	X	X	X	X	
Foreign Claims Settlement Comm. (DOJ)		X	X		
Harry S Truman Scholarship Foundation	X		X	X	X
Institute of American Indian Arts	X	X	X	X	X
Inter-American Foundation	X		X		X
IRS Oversight Board (DTRS)			X		
James Madison Mem Fellowship Found	X		X	X	
Legal Services Corporation	X	X		X	

Table 4. Characteristics of Multi-Member Bodies with Fixed Terms, continued

Agency	Outside Exec Dept.	Explicit "For Cause" Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
Merit Systems Protection Board	X	X		X	
Metropolitan Washington Airport Auth.	X	X	X	X	X
Millennium Challenge Corporation	X				X
Mississippi River Commission	X				
Morris K. Udall Scholarship Foundation	X		X	X	
National Consumer Cooperative Bank	X	X			
National Council on Disability	X		X		X
National Credit Union Administration	X		X	X	X
National Indian Gaming Com (INT)		X	X	X	
National Institute of Building Sciences	X		X		
National Labor Relations Board	X	X	X		X
National Mediation Board	X	X		X	X
Nat Railroad Passenger Corp (AMTRAK)	X			X	X
National Science Foundation	X				X
National Security Education Board	X				
National Transportation Safety Board	X	X		X	X
Nuclear Regulatory Commission	X	X	X	X	X
Occupational Safety & Health Rev Com	X	X	X		X
Overseas Private Investment Corporation	X		X		X
Postal Regulatory Commission	X	X	X	X	
Privacy and Civ. Liberties Oversight Bd	X			X	X
Railroad Retirement Board	X				X
Securities Investor Protection Corporation	X		X		
Securities & Exchange Commission	X		X	X	
Social Security Advisory Board	X		X	X	X
State Justice Institute	X	X	X	X	X
Surface Transportation Board (DOT)		X	X	X	
Tennessee Valley Authority	X	X			X
U.S. African Development Foundation	X		X	X	X
U.S. Election Assistance Commission	X		X	X	X
U.S. Institute of Peace	X	X	X	X	X
U.S. International Trade Commission	X		X	X	X
U.S. Parole Commission (DOJ)					
U.S. Postal Service	X	X	X	X	X

Note: Multi-member bodies without fixed terms that have quorum rules include the Appalachian Regional Commission and the Delta Regional Authority. The EEOC, FCC, FLRA, and TVA do not have explicit provisions for staggered terms in their current statute, but previous versions of their authorizing statutes did include provisions for such staggering. *See* Pub. L. 92-261, § 8(d) (1972) (EEOC); Pub. L. 97-259, § 103(a) (1982) (FCC); Pub. L. 98-224, § 3(b) (1984) (FLRA); Pub. L. 108-447, § 604 (2004) (TVA).

Table 5. Overview of Agencies Outside the Executive Departments

Independent Administrations	Independent Commissions (regulatory)	Independent Commissions (non-regulatory)	Government Corporations/Other
Central Intelligence Agency Environmental Protection Agency Federal Housing Finance Agency Federal Mediation and Conciliation Service General Services Administration National Aeronautics and Space Administration National Archives and Records Administration National Endowment for the Arts and Humanities **Institute for Museum and Library Services** National Endowment for the Arts National Endowment for the Humanities Office of Government Ethics **Office of Navajo and Hopi Indian Relocation** Office of Personnel Management Office of Special Counsel Office of the Director of National Intelligence **Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects** Peace Corps **Selective Service System** Small Business Administration Social Security Administration U.S. Trade and Development Agency	Chemical Safety and Hazard Investigation Board Commoditiy Futures Trading Commission Consumer Product Safety Commission Defense Nuclear Facilities Safety Board Equal Employment Opportunity Commission Farm Credit Administration Federal Communications Commission Federal Deposit Insurance Corp Federal Election Commission Federal Labor Relations Authority Federal Maritime Commission Federal Mine Safety and Health Review Commission Federal Reserve Board Federal Trade Commission Merit Systems Protection Board National Credit Union Administration National Labor Relations Board National Mediation Board National Transportation Safety Board Nuclear Regulatory Commission Occupational Safety and Health Review Commission Postal Regulatory Commission Securities and Exchange Commission United States International Trade Commission	Broadcasting Board of Governors Corporation for National Community Service Corporation for Public Broadcasting Federal Hospital Insurance Trust Fund Board Federal Retirement Thrift Investment Board Federal Supplementary Medication Insurance Trust Fund Board **Institute of American Indian Arts** Inter-American Foundation Legal Services Corporation Millennium Challenge Corporation National Science Foundation National Security Education Board Railroad Retirement Board United States African Development Foundation United States Election Assistance Commission *Advisory Commissions* Administrative Conference of the United States **National Council on Disability** Social Security Advisory Board *Scholarship Agencies* Barry M. Goldwater Scholarship and Excellence in Education Program Harry S Truman Scholarship Found. James Madison Memorial Fellowship Found. Morris K. Udall Scholarship Found.	*Corporations/GSEs* Export-Import Bank of the U.S. Federal Agricultural Mortgage Corporation Federal National Mortgage Association National Railroad Passenger Corporation (AMTRAK) Overseas Private Investment Corp Tennessee Valley Authority United States Postal Service *Non-profits and Cooperatives* Nat. Consumer Cooperative Bank National Inst. of Building Sciences Securities Investor Protection Co. State Justice Institute United States Institute of Peace *Regional Agencies* Appalachian Regional Commission Delta Regional Authority Metropolitan Washington Airport Authority **Mississippi River Commission**

Note: The heads of agencies in **bold** are no longer required to be confirmed by the Senate, due to the enactment of the Presidential Appointment Efficiency and Streamlining Act of 2011. See Pub. L. No. 112-166, 126 Stat. 1283 (2012). By some definitions, the Federal Deposit Insurance Corporation is also a government corporation, in addition to being a regulatory agency. The Department of Justice's Office of Legal Counsel has determined that the EEOC is not an independent regulatory agency. See President's Authority To Promulgate a Reorganization Plan Involving the Equal Emp't Opportunity Comm'n, 1 Op. O.L.C. 248 (1977).

The larger single-headed agencies include the Social Security Administration (67,000 employees), Environmental Protection Agency (18,700 employees), and National Aeronautics and Space Administration (18,600 employees). The SSA was formerly part of the Department of Health and Human Services. Congress removed it from HHS in 1994 in order to remove it from the budgetary and managerial pressures of being inside HHS. Among the smaller independent administrations are the Office of Navajo and Hopi Indian Relocation (41 employees) and Trade and Development Agency (43 employees). While most administrations outside the executive departments look like standard hierarchically structured agencies with single heads, some include features that insulate them from political interference. For example, the heads of the Social Security Administration (six-year term) and Office of Personnel Management (four-year term) serve for fixed terms. Table 6 includes a list of single-headed agencies outside the executive departments administered by political appointees with fixed terms.

3. Independent Commissions

The majority of agencies created outside the EOP and executive departments are multi-member bodies, many with fixed and staggered terms for members. In general, these agencies tend to be smaller than other federal agencies, varying from as many as 4,200 employees to just a handful.[140] The most recognizable of these independent commissions are the independent regulatory commissions, designed with the same structural features as the ICC--outside executive departments, multi-member body, for cause protections, staggered terms, party balancing requirements, and exercising quasi-legislative and/or quasi-judicial power.[141] These agencies are involved in significant ways in regulating the economy, from antitrust to banking to labor to communications to consumer products.

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140. Among the smallest agencies are the James Madison Memorial Fellowship Foundation and Harry S Truman Scholarship Foundation with 4 and 5 employees, respectively, as of September 2011. *See* OPM, *FedScope, supra* note 27 (Employment Cube – Sept. 2011).
141. *See generally Humphrey's Ex'r*, 295 U.S. 602.

Table 6. Single-headed Administrations Outside the Executive Departments with Fixed Term Appointments

Agency	Term Length	For Cause Protection	Statute
Federal Housing Finance Agency	5	√	12 U.S.C. § 4512(b)(2)
Institute for Museum and Library Sciences	4		20 U.S.C. § 9103(a)(2)
National Endowment for the Arts	4		20 U.S.C. § 954(b)(2)
National Endowment for the Humanities	4		20 U.S.C. § 956(b)(2)
Office of Government Ethics	5		5 U.S.C. app.4 § 401(b)
Office of Navajo and Hopi Indian Relocation	2		25 U.S.C. § 640d-11(b)(2)
Office of Personnel Management	4		5 U.S.C. § 1102(a)
Office of Special Counsel	5	√	5 U.S.C. § 1211(b)
Social Security Administration	6	√	42 U.S.C. § 902(a)(3)

There are a number of reasons why the independent commission structure was and still is appealing to policymakers. Beyond the allure of bipartisan or non-partisan expertise being applied to complicated national problems, creating new agencies as independent commissions also expresses the symbolic importance of specific policy areas or problems. Independent agencies can focus on a narrow task of national importance and not have to compete with other sub-department agencies for attention, budgets, or personnel.[142] Of course, the creation of independent agencies also helps mitigate concerns with the delegation of policymaking or adjudicatory authority to executive officials who may be tempted to use this authority for partisan benefit.[143] Historically, most policymakers have agreed in principle to the idea of a unified executive establishment organized under the President, but justify the creation of specific independent agencies as a necessary exception to this general principle.[144]

142. Moe Report, *supra* note 1, at 32.
143. Moe, *Bureaucratic Structure*, *supra* note 6; Lewis, Agency Design, *supra* note 6; McCarty, *supra* note 8; McCubbins et al., *supra* note 6.
144. Moe Report, *supra* note 1, at 11; Kosar, Quasi Gov't, *supra* note 39.

Beyond the classic independent regulatory commissions, Table 5 (and Table 4) also includes many commissions with fixed terms that neither regulate nor adjudicate. They determine government media programming, give out research grants, provide foreign aid, or manage the retirement accounts of federal employees. Some of these agencies are designed simply to provide advice to federal policymakers (e.g., National Council on Disability, Social Security Advisory Board) or hand out federal scholarships. Yet, these agencies have the same structural features as independent regulatory commissions.

The list of agencies with the features of independent regulatory commissions includes independent regulatory and non-regulatory agencies, government corporations, scholarship agencies, and agencies created to facilitate regional development. This illustrates the general view of scholars about the relationship between agency structure and function: there is no direct or necessary relationship.[145] Regulatory and adjudicative authority is delegated to single-headed executive agencies *and* independent commissions. For example, the Secretary of Agriculture and the Federal Trade Commission both regulate. The Secretary of Veterans Affairs and the National Labor Relations Board both adjudicate. Government corporations are created outside the executive departments and are insulated from political interference, and they are also included in executive departments and headed by single administrators selected by the President. The choice of structure is a political one determined by forces in play at the time that Congress and the President are deliberating over the creation of new agencies.[146]

The presence of independent commissions has been controversial in the American political system. The Brownlow Committee charged that "they do violence to the basic theory of the

145. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984); Verkuil, *supra* note 137, at 263. Tables 19 and 20, *infra*, respectively list agencies with adjudicatory authority and detail federal agencies' rulemaking activities in the last fifteen years.
146. Moe, *Bureaucratic Structure*, *supra* note 6; McCubbins et al., *supra* note 6; Lewis, Agency Design *supra* note 6; Wood and Bohte, *supra* note 6; Amy Beth Zegart, Flawed by Design: The Evolution of the CIA, JCS, and NSC (1999); Howell and Lewis, *supra* note 8.

American Constitution that there should be three major branches of government and only three."[147] The Brownlow Committee also complained about commission performance, noting, "For purposes of management, boards and commissions have turned out to be failures."[148]

The Committee's concerns have been echoed throughout the twentieth century.[149] Some scholars have also argued that the commissions are easily co-opted by the groups they are supposed to regulate. Inequalities in group pressure, appointment patterns that rotate industry officials into and out of agency management, and regular interaction between the agency and the regulated industry ultimately make the agency sympathetic to, or "captured" by, the industry.[150] Many also claim that the promises of expertise and bipartisanship have not been realized, arguing that these agencies no longer attract the very best persons, and the moderate and bipartisan composition of boards has been undermined by the increasing appointment of strong partisans or ideologues.[151]

The number of commissions of different types and the limited empirical evidence across agencies makes it difficult to generalize about the effectiveness of independent commissions except to say that there are tradeoffs associated with their political independence. Agencies designed to be insulated from political interference will be autonomous in ways that are useful to policymakers in

147. President's Comm. on Admin. Mgmt., *supra* note 2, at 40.
148. *Id*. at 32.
149. Critics of the independent agencies lament the fragmentation of policy into disparate agencies. For example, President Truman's decried his own inability to formulate and implement a comprehensive transportation policy because this policy area was partly the province of the Civil Aeronautics Board, Interstate Commerce Commission and Federal Maritime Commission. *See* Lewis, Agency Design, *supra* note 6, at 21-22.
150. Marver Bernstein, Regulating Business by Independent Commission (1977); George Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 114 (1971).
151. The increasing polarization of board governance is facilitated by the consideration of batches of nominees together, worked out as bargains between the President and the parties in the Senate. Neal Devins and David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. Rev. 459 (2008); Daniel Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 Depaul L. Rev. 333 (2010).

some cases and frustrating in others. Their autonomy can be a means of helping them accomplish democratic purposes as with, for example, courts. Their autonomy, however, also shields them from direct accountability.

When agencies are involved in adjudication or making decisions with large consequences for markets and society, most would agree that agency decisions should be made importantly on the basis of evidence and expertise rather than partisan considerations. The features of agency design that limit partisan influence are precisely those that characterize independent commissions. The alternative to creating these agencies as independent commissions is allowing executive departments to make these decisions with either no particular protection from partisan influence or to limit and confine the authority of executive officials with statutory details or political oversight. In complex areas of law and policy, however, precise statutes are difficult to craft because of the complexity. Detailed statutes can be counterproductive if they limit useful flexibility and prevent agencies from using expertise they have acquired. In some cases political oversight can help limit partisan influence in agency adjudication and rulemaking, but in other cases it is the source of partisan influence.

Direct accountability to elected officials through appointments, removals, and appropriations is useful for monitoring agency behavior and correcting agency missteps. The tradeoff for Congress and the President is that the price of insulating agencies from politics is a lack of this type of direct democratic accountability. The barriers Congress and the President put in place to insulate agencies from politics also make it harder for elected officials to monitor day-to-day agency behavior. Congress and the President still govern independent commissions through oversight and can enact new legislation, but the autonomy generated by structure can have desirable and undesirable effects.

4. Government Corporations and Government-Sponsored Enterprises (GSEs)

The remaining class of agencies in Table 5 often shares many of the structural characteristics of independent commissions such as multi-member governance and fixed terms, but characterizing them by these aspects of their design would be insufficient. Congress and the President have experimented with different forms of organization that place these agencies on the frontiers of the executive establishment and raise legitimate questions as to whether they are properly designated as federal agencies. Among this class of agencies are government corporations and government-sponsored enterprises created outside the executive departments, federally empowered non-profits and cooperatives, and federally sponsored regional development agencies whose governance is shared by states.

In the twentieth century the federal government became increasingly involved in business-related enterprises such as operating a merchant fleet, building and renting houses, and lending money. Congress was often uncomfortable with executive officials letting out contracts, purchasing property, and selling goods without some form of oversight.[152] They reasonably limited executive flexibility to ensure fidelity to the public interest in these behaviors. The lost flexibility, however, made operating a business-like venture difficult. One response Congress developed was to create government corporations, which are granted both business-like flexibility and insulation from political influence. Congress struggled with how to ensure public accountability and preserve management flexibility at the same time.[153] Its answer was the Government Corporation Control Act of 1945, which tries to regularize government corporation accountability without impinging on necessary flexibilities.[154]

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152. Seidman, *supra* note 6, at 188-89; Kosar, Gov't Corp., *supra* note 9.
153. A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 560 (1995).
154. Not long after Congress enacted this statute, it began creating entities designated specifically as neither agencies nor establishments of the United States, and did not subject them to the control of the Corporation Control Act of 1945. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).

Government corporations are wholly or partially owned government instrumentalities[155] that perform business-like functions and usually do not rely on annual appropriations for funding.[156] They are chartered by acts of Congress and generally are board-governed and exempted from government-wide managerial mandates.[157] What distinguishes government corporations from other federal agencies is the grouping of function, structure, and (sometimes) ownership.[158] For example, many federal agencies that perform business-like functions are not government corporations.

155. The mixed-ownership corporations are: Central Bank for Cooperatives; Federal Deposit Insurance Corporation; Federal Home Loan Banks; Federal Intermediate Credit Banks; Federal Land Banks; National Credit Union Administration Central Liquidity Facility; Regional Banks for Cooperatives; Rural Telephone Bank (USDA); Financing Corporation; and Resolution Funding Corporation. 31 U.S.C. § 9101(2) (2012). The wholly-owned government corporations are: the Commodity Credit Corporation (USDA); Community Development Financial Institutions Fund (DTRS); Export-Import Bank of the United States; Federal Crop Insurance Corporation (USDA); Federal Prison Industries, Inc. (DOJ); Corporation for National and Community Service; Government National Mortgage Association (HUD); Overseas Private Investment Corporation; Pennsylvania Avenue Development Corporation; Pension Benefit Guaranty Corporation (DOL); Rural Telephone Bank; St. Lawrence Seaway Development Corporation (DOT); Federal Housing Administration Fund (HUD); and Tennessee Valley Authority. *Id.* § 9101(3).

156. Kosar, Gov't Corp., *supra* note 9. There are diverse definitions of government corporations, some encompassing private instrumentalities created by Congress or any agency called a corporation. This report uses the narrower definition in the text. However, agencies themselves and other government agencies employ different definitions. Froomkin, *supra* note 153, at 543; U.S. Gen. Accounting Office, GAO/GDD-96-14, Government Corporations: Profiles of Existing Government Corporations (1995) [hereinafter GAO, Existing Gov't Corps.].

157. Board governance takes different forms with some managed by full-time boards, some by part-time boards that select chief executives, and still others by boards comprised of government officials. There are two government corporations that are not governed by boards—the Government National Mortgage Association and the St. Lawrence Seaway Development Corporation. Both are located inside executive departments. Kosar, Gov't Corp., *supra* note 9, at 9.

158. The current federal corporations located inside executive departments are: Commodity Credit Corporation (Agriculture); Federal Crop Insurance Corporation (Agriculture); Federal Financing Bank (Treasury); Federal Prison Industries (Justice); Financing Corporation; Government National Mortgage Corporation (Housing and Urban Development); Pension Benefit Guaranty Corporation (Labor); Presidio Trust of San Francisco (Interior); Resolution Funding Corporation; St. Lawrence Seaway Development Corporation (Transportation); and Valle Caldera Trust (Interior). Those located outside the executive departments are: Export-Import Bank; Federal Deposit Insurance Corporation; National Railroad Passenger Corporation; Overseas Private Investment Corporation; Tennessee Valley Authority; and U.S. Postal Service. Kosar, Gov't Corp., *supra* note 9, at Appendix A.

Similarly, many federal entities have similar features to government corporations but do not perform business-like functions. Congress has also named agencies "corporations" even though they do not perform business-like functions and are not self-funding.[159] For example, the Corporation for Public Broadcasting and the Legal Services Corporation are called corporations, but do not perform business-related functions and rely on annual appropriations.[160]

Some government corporations such as the Federal Deposit Insurance Corporation (mixed ownership) and Tennessee Valley Authority (wholly owned by the federal government) are independent agencies that report directly to the President and Congress. Others, such as the St. Lawrence Seaway Development Corporation (Transportation) and the Federal Housing Administration (HUD), exist inside executive departments and report to a department secretary. Structurally, corporations have a legal personality separate from the United States and can therefore sue and be sued.[161] Corporations generally have limitations on the President's ability to nominate and remove top officials. Fiscally, these entities have tremendous flexibility to raise and spend funds. This limits the power of OMB in reviewing agency budgets and the ease of congressional oversight of corporation activities. Rather, the expectation is that agencies should be self-funding, although Congress will intervene to supplement revenues or provide resource for capital improvements or new programs.[162]

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159. See Seidman, *supra* note 6, at ch. 11 for details. Congress cannot, by designation, determine whether an instrumentality they have created is an agency or instrumentality of the United States "for the purposes of determining the constitutional rights of citizens affected by its actions." Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 375 (1995).

160. Similarly, the Millennium Challenge Corporation is a grant-giving agency that relies on annual appropriations.

161. The virtue of this feature of government corporations is that it means that private firms can take the corporation to court rather than having to go through the arduous contract dispute process. Kosar, Gov't Corp., *supra* note 9, at 7; Seidman, *supra* note 6, at 190-91.

162. Some exceptions include the Tennessee Valley Authority. In a 1995 survey, the U.S. Government Accountability Office found that most government corporations received some federal appropriations in Fiscal Year 1994. U.S. Gen. Accounting Office, *supra* note 156, at 21-22.

Government corporations have the ability to create their own personnel system outside the normal civil service system.[163]

Government-sponsored enterprises (GSEs) perform business-like functions as well but are *private* (yet still governmental entities), for-profit organizations created to make credit more available to certain sectors of the economy.[164] They are governed by a board, the majority of which is selected by private actors, either investors or borrowers.[165] There are currently five GSEs, two of which are independent agencies outside the executive departments (Federal Agricultural Mortgage Corporation and Federal National Mortgage Corporation).[166] These entities are not staffed by federal employees and do not have the power to exercise governmental powers or commit the federal government to expenditures, but the markets generally perceive that there is an implicit federal guarantee behind these entities.

The appeal of such organizations derives from expectations about efficiency of operations. Policymakers create organizations freed from government-wide management laws, budgetary review, and personnel rules, in the belief that they will more effectively accomplish federal purposes than a traditionally structured government agency. Increased flexibility will lead to lower costs, greater risk taking, and more innovation. For elected officials there is also virtue in the fact that creating such entities is not perceived as increasing the size of government.

Critics of GSEs note the significant market power of these organizations without direct accountability to the federal government. Given the perceived backing of the federal government, these firms have market advantages that can translate into significant economic and political power. For example, Fannie Mae and Freddie Mac

163. *See id.* (finding substantial variation across corporations and providing a thorough review of government corporation adherence to government-wide management laws).
164. Kevin R. Kosar, Cong. Research Serv., RS21663, Government-Sponsored Enterprises (GSEs): An Institutional Overview (2009) [hereinafter Kosar, GSEs].
165. *Id.* at 8.
166. Kosar, Gov't Corp., *supra* note 9.

grew dramatically between 1990 and 2008 and are among the biggest financial institutions in the country.[167] They came under congressional scrutiny in 2003 and 2004 because of accounting irregularities, and in 2008 they had to be placed in government conservatorship to stabilize financial markets.[168] GSEs spent heavily on congressional lobbying, and numerous journalistic accounts questioned their influence in the regulatory regime that contributed to the financial crisis.[169] Both Fannie Mae and Freddie Mac were among the top 20 lobbying spenders between 1998 and 2008.[170]

5. Other Forms of Government Agency: Non-profits and Regional Agencies

Starting in the 1960s and accelerating in the 1980s, Congress also created other organizational forms that possessed the characteristics of both government agencies and the private sector.[171] Notably, Congress has overseen the creation of non-profit organizations to help pursue public purposes. The structure and connection of these non-profits to the federal government varies. The non-profits included in Table 5 have boards that contain presidential appointments that require Senate confirmation. Non-profit organizations are also used as tools for policy implementation in many different federal agencies.[172] The non-governmental status of these non-profits helps insulate from political direction. They do not employ federal personnel or come under the jurisdiction of general executive branch management powers. For example, the Securities Investor Protection Corporation is a non-profit chartered under

167. Kosar, GSEs, *supra* note 164, at 4.
168. *Id*.
169. Lisa Lerer, *Fannie, Freddie Spent $200 M to Buy Influence*, Politico, July 16, 2008, *available at* http://www.politico.com/news/stories/0708/11781.html (accessed August 7, 2012); Tom Raum and Jim Drinkard, *Fannie Mae, Freddie Mac Spent Millions on Lobbying*, USA Today, July 17, 2008, *available at* http://www.usatoday.com/money/companies/2008-07-17-fannie-freddie-lobbying_N.htm (accessed August 7, 2012); Tim Reid, Margaret Chadbourn & Mark Hosenball, *Fannie, Freddie Tentacles Embraced Many in Washington*, Reuters, November 17, 2011, *available at* (http://www.reuters.com/article/2011/11/18/us-usa-campaign-freddie-idUSTRE7AH02A20111118 (accessed August 7, 2012).
170. Raum and Drinkard, *supra* note 169; Tim Reid et al, *supra* note 169.
171. Kosar, Gov't Corp., *supra* note 9, at 1, 4.
172. *Id*.

Washington, DC law and operates as an adjunct of the Securities and Exchange Commission. It is governed by a board whose members are selected by the Secretary of the Treasury, members of the Board of Governors of the Federal Reserve, and the President.[173] Its function is to aid persons in retrieving funds from bankrupt or troubled brokerage firms. Congress created the State Justice Institute in 1984 as a non-profit to distribute federal grants to improve the quality of state courts. The Institute is governed by an 11-member board whose members are nominated by the President and confirmed by the Senate. The United States Institute of Peace was created the same year to aid in the goal of resolving international conflict without violence, largely through research and programming. Like the State Justice Institute, it is funded through federal monies and managed by a board containing presidential appointees, but otherwise is not structured like a federal agency.

Since the 1800s, Congress has also been interested in facilitating regional development and has created a number of agencies to achieve this goal. The agencies created to accomplish this goal are distinguished by the fact that their governance is shared between the federal government and representatives of the states or regions concerned. For example, the Appalachian Regional Commission is a grant-giving agency created to foster economic development in the Appalachian Region. It is governed by a board comprised of the governors of 13 states and a federal co-chair. The Delta Regional Authority follows a similar form. Members of its board are drawn from the 8 states of the Delta region. The Metropolitan Washington Airport Authority runs the two Washington, DC airports. Its board includes 7 members appointed by the governor of Virginia, 4 by the Mayor of the District of Columbia, 3 by the Governor of Maryland, and 3 members nominated by the President and confirmed by the Senate.[174]

173. For details, see www.sipc.org. The board members nominated by the President originally required Senate confirmation. However, the requirement of Senate confirmation was removed by the Presidential Appointment Efficiency Act of 2011. *See* Pub. L. No. 112-166, 126 Stat. 1283 (2012).

174. Another regional agency is the Mississippi River Commission. The commission is comprised of three members selected from the Engineer Corps of the Army, one from the National Ocean Survey, and three civilians, two of whom have to be civil engineers.

D. Federal Personnel System

The Constitution provides scant detail about federal personnel.[175] It includes only a few references to officers, consuls, and ministers. It specifies that principal officers of the government departments are to be nominated by the President and confirmed by the Senate, and that the President may request information from them in writing.[176] The Constitution grants to Congress the power to determine the means of appointing *inferior* officers.[177] Congress has used this power in a series of statutes that provide the outlines of the personnel system. Presidents and federal agencies have further defined and augmented the system Congress created through a series of executive orders and agency rules.

1. History and Trends

The key statute that defined the federal personnel system was the Civil Service Act of 1883.[178] Prior to the enactment of this legislation, the federal government had an all-appointee personnel system. The Pendleton Act, as it was known, specified that a small portion of federal civilian jobs (about 10.5%) would be filled on the basis of merit proven through examinations. The act created for the first time a divided personnel system. F rom this point forward, some federal jobs would be filled on the basis of merit and others filled at the discretion of the President, the President's subordinates,

175. William Franklin Willoughby, An Introduction to the Study of The Government of Modern States 242 (1919); Short, nat'l admin. org., *supra* note 90, at 15, 22, 26; Fairlie, *supra* note 90, at 55; Moe Report, *supra* note 1, at 3.
176. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2.
177. The question of what counts as an inferior officer is the subject of legal debate, but includes the vast majority of federal officials.
178. Pendleton Act, 22 Stat. 403 (1883).

or other actors Congress had identified.[179] Over the next 70 years, Congress and the President expanded the coverage and scope of the system, often under duress from reformers and federal employee unions.[180] By the middle of the twentieth century, close to 90% of federal jobs were covered by civil service laws and regulations.[181] These regulations had expanded to include protections against removal without cause, the right to unionize, prohibitions against political activity, and regularized pay grades and job definitions (Figure 1).

a) Thickening Government

Since the mid-twentieth century, four trends have shaped the federal personnel system. First, there has been an increase in layers of management between top agency officials and front-line employees. There has been an increase in both top-level executives and middle-level managers and supervisors and the ratio of managers to front-line employees has increased. The number of agency executives such as deputy secretaries, under secretaries, and assistant secretaries has increased, and with them has come an increase in deputies, chiefs

179. In general terms, this is still the structure of the personnel system in every federal agency. Presidents (or their subordinates) select appointees, usually from outside the civil service, to serve at the top of the agency hierarchy. The other employees in the agency, however, are usually selected through procedures governed by civil service law and regulation.

180. Ronald N. Johnson and Gary D. Libecap, The Federal Civil Service System and the Problem of Bureaucracy (1994); Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920 (1982); Van Riper, supra note 126; U.S. Office of Pers. Mgmt, Biography of an Ideal: A History of the Federal Civil Service (2003).

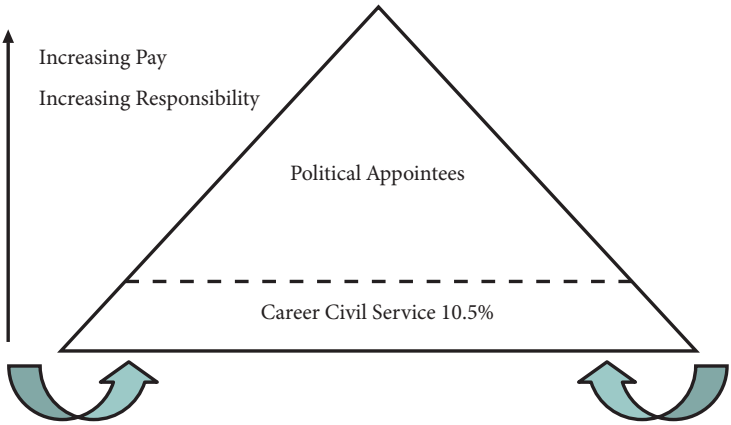
181. Protections against dismissal for partisan reasons were added in the late 1890s, and federal workers gained the right to unionize after a decade of pressure in 1912. In the 1920s, Congress added pay equity and retirement provisions to the civil service system. The Hatch Act, enacted in 1939, prohibited partisan political activity by civil servants. *See* Lewis, Presidential Appt, *supra* note 123, at 11-50; Martin West, Bargaining with Authority: The Political Origins of Public-Sector Collective Bargaining (2006) (unpublished manuscript, on file with Harvard University). This figure overestimates the number of jobs open to presidential or agency-head selection. Most of the jobs outside the traditional merit system were in agencies like the Tennessee Valley Authority with their own merit systems or were jobs overseas where political selection was unlikely. In fact, by the middle of the twentieth century, some authors were declaring the era of patronage over. Don K. Price, *A Response to Mr. Laski*, 4 Pub. Admin. Rev. 360-3 (1944); Frank J. Sorauf, *The Silent Revolution in Patronage*, 20 Pub. Admin. Rev 28-34 (1960).

of staff, assistants, and advisors.[182] Paul Light refers to these as "title riding" positions—positions whose title depends upon the status of another position. Whereas, there were 1.4 title-riding positions attached to assistant secretaries on average in 1960, in 1992 the number had increased to 5.8 positions. Whereas departments once had under and assistant secretaries, they now have deputy under secretaries and deputy assistant secretaries. They also have *principal* deputy under secretaries and *principal* deputy assistant secretaries. Each of these new titled officials also frequently have chiefs of staff, special assistants, advisors, or counselors.

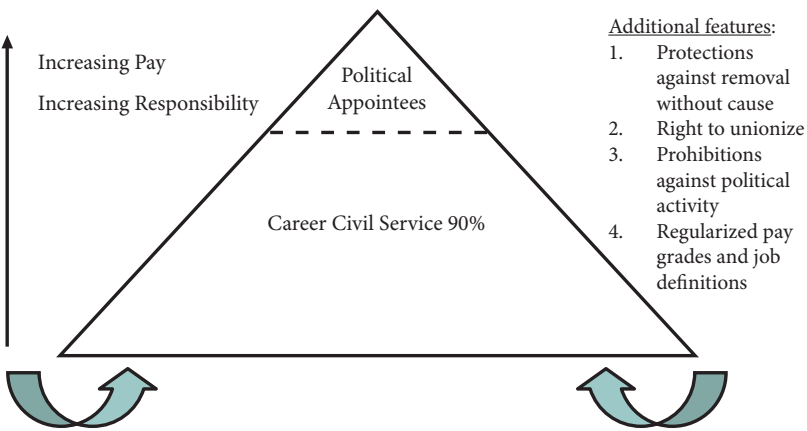
182. Light, Thickening, *supra* note 101.

Figure 1. Expansion of Federal Merit System Coverage: Percentage of Federal Jobs in Federal Merit System, 1883-1952

1883: Start of the Merit-Based Civil Service System



1953: End of the Truman Administration



A number of factors contribute to the thickening. First, promotions and titles are a tool used by agency executives to help recruit and retain executives in a competitive workplace where talented employees have viable private sector options. Since federal executives have limited flexibility to use pay to counter private sector

options, agency officials use promotions and titles as a means of securing their best talent. Second, the nature of federal work and employment is changing from mostly clerical and administrative work to professional work (e.g., law, accounting, engineering, science) and the administration of contracts and grants. Professionals enter public service at the middle to top levels of the federal hierarchy, making it thicker. The federal government has also increased the use of grants and contracts to achieve its public policy goals. This means that more federal work is done by state and local employees who receive grants and by contractors that are awarded federal contracts. This change in the nature of how the federal government does its work means that there will be more managers and fewer front-line workers. Finally, as will be discussed in more detail below, federal agencies have added management layers as a result of political efforts to secure control over federal agencies. Government work has grown in scope, volume, and complexity, and Congress and the President have responded by adding layers of political appointees to help direct federal agencies. They have also added officials that monitor agency compliance with government-wide management laws and ensure ethical behavior. The number of employees in offices of inspectors general and general counsels' offices has increased. Together, these efforts have led to a personnel system with fewer persons at the lower levels, a thicker middle, and a taller hierarchy.

b) Increase in Political Appointees

A second trend in the federal personnel system is that the number and percentage of political appointees has almost doubled since 1960 (Figure 2).[183] Part of the expansion in political appointees comes naturally from an increase in the number of federal programs and agencies.[184] Political actors have also driven the increase in political appointees in an effort to gain control over federal policymaking. Presidents, particularly, have sought to increase the number of political appointees to enhance their control over federal agencies. Congress has at times sought to increase

183. David E. Lewis, *Presidential Appointments and Personnel*, 14 Ann. Rev. Pol. Sci. 47-66 (2011) [hereinafter Lewis, *Appt and Personnel*].
184. Light, Thickening, *supra* note 101.

the number of officials subject to Senate confirmation to influence key policymaking positions, but these incidents reflect only a small fraction of the new positions created since mid-twentieth century. The benefits of increased political appointees are greater for presidents now than in the past, since presidents have asserted more control over the selection of political appointees.[185] Presidents have dramatically expanded White House capacity to vet potential nominees by building up staffs dedicated to personnel.[186] Increased presidential control over personnel, coupled with increased White House capacity, has led presidents since Ronald Reagan to assert control of appointees down to the lowest levels. The Presidential Personnel Office plays a role in the selection of all four types of appointees (PAS, NA, SC, and PA). They do so in cooperation with top-level agency officials, facilitated by an expansion in White House liaison positions in the departments and agencies.[187]

The number of political appointees has increased most after party changes in the White House and during periods when the same party has controlled the White House and Congress. In the former case, presidents feel the need to get control of agencies directed by the other party for 4, 8, or 12 years. Congress is more willing to go along with these efforts when the President is from their party, since increasing political appointees allows presidents a greater ability to get agencies to do what the President and the congressional majority both prefer. Increases in political appointees also provide patronage opportunities that benefit the majority party.

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185. Presidents have extended their control of personnel selection down to the lowest level appointees. Lewis, Presidential Appt., *supra* note 123; James P. Pfiffner, The Strategic Presidency: Hitting the Ground Running (2nd ed. 1996); Thomas J. Weko, The Politicizing Presidency: The White House Personnel Office, 1948-1994 (1995).

186. *See* Dom Bonafede, *The White House Personnel Office from Roosevelt to Reagan*, *in* The In-and-Outers: Presidential Appointments and Transient Government (G. Calvin Mackenzie ed.,1987); National Academy of Public Administration, America's Unelected Government: Appointing the President's Team 21-44 (1983); Mackenzie, *supra* note 124; Pfiffner, *supra* note 185; Weko, *supra* note 185. President Truman was the first President to have a staff person assigned full time to handle personnel issues. In the Kennedy Administration this number increased to 3 persons. There was a big jump to 30 persons in the Nixon Administration and now the personnel operation can swell to over 100 persons during the period around the transition.

187. Pfiffner, *supra* note 185; Weko, *supra* note 185.

The increase in political appointees has not been even across the executive establishment. Some positions and agencies have been targeted more than others. Most of the increase within agencies has been in policy-related positions in Washington rather than regional posts.[188] Political appointees have increased in offices that control policy, but management directorates, budget offices, and general counsels' offices have seen an increase in political appointees as well.[189] Across agencies, presidents have notably added political appointees to agencies that play a role in presidential management such as the Office of Management and Budget (budgets, regulatory review), the Office of Personnel Management (personnel), and the General Services Administration (procurement, administrative services).[190] Presidents also have targeted agencies with policy views dissimilar to their own.[191] This is particularly the case if these agencies implement a policy central to the President's political agenda.[192]

The presence of a significant number of political appointees can influence agencies differently depending upon the types of persons selected to fill positions as well as the ability of the agency itself to accommodate large numbers of political appointees. In some agencies, political appointees are chosen on the basis of competence

188. The number of appointed regional posts has actually declined. Weko, *supra* note 185, at 25.

189. Hugh Heclo, A Government of Strangers: Executive Politics in Washington (1977). Heclo describes how assistant secretaries for management shifted from career professionals to political appointees.

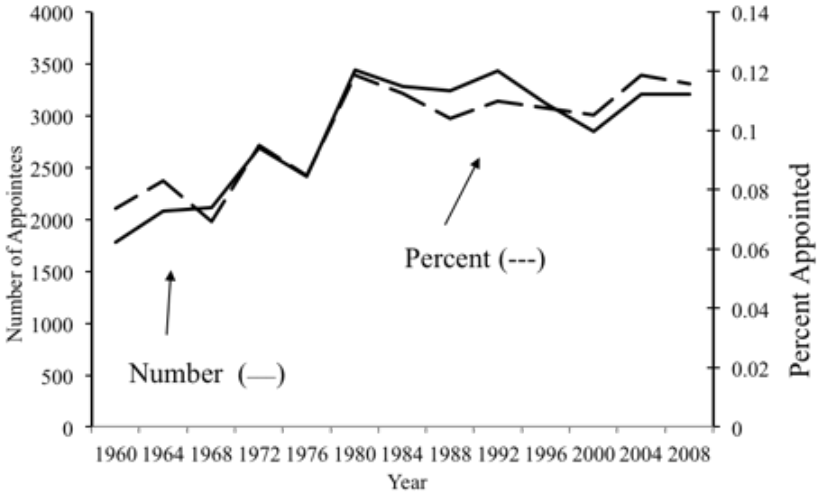
190. For details of the increase in appointees in the Bureau of the Budget/Office of Management and Budget, see Hugh Heclo, *OMB and the Presidency—The Problem of "Neutral Competence*," 38 Pub. Int. 80 (1975); Lewis, Presidential Appt., *supra* note 123. *See also* David E. Lewis and Terry M. Moe, *Struggling Over Bureaucracy: The Levers of Control*, *in* The Presidency and the Political System (Michael Nelson ed., 9th ed. 2009) (for details of the increase in the Civil Service Commission's Office of Personnel Management).

191. There is a significant amount of work that details how Republican presidents have targeted social welfare and regulatory agencies. Robert F. Durant, The Administrative Presidency Revisited: Public Lands, the BLM, and the Reagan Revolution (1992); Edie N. Goldenberg, *The Permanent Government in an Era of Retrenchment and Redirection*, *in* The Reagan Presidency and the Governing of America (Lester M. Salamon and Michael S. Lund eds.,1984); Richard P. Nathan, The Administrative Presidency (1983); Bernard Rosen, *Effective Continuity of U.S. Government Operations in Jeopardy*, 43 Pub. Admin. Rev. 383 (1983).

192. Historically, Democratic presidents have targeted more traditionally conservative agencies. Lewis, Presidential Appt., *supra* note 123.

and fidelity to the President's program in order to advance the President's agenda. In other agencies, political appointees are selected as a form of patronage to reward campaign or political supporters. Appointed positions can be distributed as a form of political capital to build support for the President's program, tie party factions together, or engender future good will. The difference in types of political appointees can be consequential for management.[193]

Figure 2. Total Number of Federal Government Appointees and Percentage Appointed, 1960-2008



Note: Includes salaried PAS, Schedule C, Noncareer SES, and NEA appointments (NEA refers to an earlier form of mid-level appointee). Excludes ambassadors, U.S. Marshals, and U.S. Attorneys. Source: 2008 Plum Book, *supra* note 12; David E. Lewis, 2010, *Modern Presidents and the Transformation of the Federal Personnel System*, 7 The Forum Article 6. Percentages of entire workforce based upon federal civilian employment data from the Office of Personnel Management. (See Note to Table 2 for an explanation of appointee abbreviations.)

A number of scholars and commissions have noted with alarm the increasing number of political appointees in the federal executive establishment and argued that having too many political

193. Bearfield, *supra* note 124; Mackenzie, *supra* note 124; Tolchin and Tolchin, To the Victor, *supra* note 124; Tolchin and Tolchin, Pinstripe Patronage, *supra* note 124.

appointees hurts federal management performance.[194] Scholars generally point to the significantly larger number of political appointees in the U.S. government relative to other developed democracies and the lack of expertise and short tenures of political appointees relative to their careerist counterparts. Observers also worry that increases in political appointees decrease morale in the civil service, since the jobs with the highest pay and greatest influence are increasingly taken by political appointees, who often know little about the agencies or their work. This makes it difficult to recruit the best and brightest to stay in government service.[195] Presidents have been among those defending the large number of political appointees as necessary to bring responsiveness and energy to the federal bureaucracy.[196]

c) Increase in Agency-Specific Personnel Systems

A second trend that characterizes the federal personnel system since the mid-twentieth century is that the nation is moving away from one central personnel system created by the Pendleton Act and defined by Title 5 of the U.S. Code, to a more diverse system defined by multiple distinct personnel systems, specific to single agencies or classes of employees. The increased reliance on government corporations explains part of the change since corporations are usually not subject to the requirements of Title 5. In other cases, Congress has explicitly excluded agencies from the

194. National Commission on the Public Service, *Leadership for America: Rebuilding the Public Service* (1989); National Commission on the Public Service, Urgent Business for America: Revitalizing the Federal Government for the 21st Century (2003); *but see* Robert Maranto, *Why the President Should Ignore Calls to Reduce the Number of Political Appointees*, *in* The Heritage Foundation Backgrounder 1413 (2001).
195. Sean Gailmard and John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 Am. J. Pol. Sci. 873 (2007); Heclo, *supra* note 189; Lewis, Presidential Appt., *supra* note 123; Ezra Suleiman, Dismantling Democratic States (2003).
196. Transcript of Interview at 11, *A Discussion with Gerald R. Ford: The American Presidency*, March 25, 1977 (American Enterprise Institute).

requirements of Title 5.[197] The largest change came in 1970 when the Postal Service (736,000 employees) was given authority to create its own personnel system. Other agencies followed, such as the Federal Deposit Insurance Corporation (1989), Office of the Comptroller of the Currency (1989), Office of Thrift Supervision (1989), Federal Aviation Administration (1996), and Internal Revenue Service (1998). Table 7 includes a list of all executive departments and independent agencies that are authorized to have their own personnel systems, as well as those where caps have been placed on the number of persons that can be hired with special hiring authorities.

197. *See*, *e.g.*, 20 U.S.C. § 5608(a)(1) (2012) (the Morris K. Udall Scholarship Foundation may appoint personnel without regard to civil service provisions of Title 5); 12 U.S.C. § 4515(a) (2012) (officers and employees of the Federal Housing Finance Agency may be paid without regard to civil service laws); 20 U.S.C. § 9105(b) (2012) (the Director of the Institute for Museum and Library Services may appoint technical and professional employees without regard to civil service laws).

Table 7. Agency-Specific Personnel Systems

Allowing Agency-Specific Personnel Authority				Restricting Agency Authority	
Agencies whose employees are excluded from the definition of "employee" for the purposes of Title 5.	Entities not considered agencies or establishments of the United States Government[a]	Agencies whose statutes permit the agency to use an agency-specific employment system[b]		Agencies w/statutory limitations on the # of employees compensated w/o regard to civil service provisions[c]	
AMTRAK CIA CNCS CPB EXIM FDIC LSC MCC OPIC SIPC TVA	FAMC NCCB NIBS SJI	ARC[d] CFTC CNCS CPB DRA EAC FCA FHFA FED IAIA MKUSF NCCB	NCUA NIGC ODNI OFCANGTP OMB SEC SIPC SSAB SJI USPS USTDA	ADF CEA CEQ DOE DHS DOJ DOT DTRS FCC FMCS	FRTIB IMLS NASA NARA NSF ONDCP OPIC SBA SSA USTR

Note: Data in column 1 comes from 5 U.S.C. § 5102 (2012). Inclusion or exclusion of agencies in the other three columns is based upon agency authorizing statutes. The table only includes information about agencies rather than classes of employees, such as Foreign Service Officers. It also excludes sub-department bureaus such as the Federal Aviation Administration, Internal Revenue Service, or the Office of the Comptroller of the Currency.

[a] Some agency statutes specify that the agency is not considered an agency or establishment of the U.S. Government. By implication, these agencies do not have to follow the civil service provisions that apply to government agencies.

[b] Typically, these provisions are characterized in the statute by language such as "members, officers, and employees of the agency are not federal employees for any purpose" or "rates of basic pay for all employees may be set and adjusted by the agency without regard to civil service provisions." Some agencies' statutes leave room for the agency to work outside of civil service provisions. For example, the Office of the Director of National Intelligence may "provide incentives for personnel . . . to serve on the staff of the Director of National Intelligence, on the staff of the national intelligence centers, on the staff of the National Counterterrorism Center, and in other positions in support of the intelligence community management functions of the Director. Incentives may include financial incentives, bonuses, and other such awards and incentives as the Director considers appropriate." Because these sort of provisions are not accompanied by limitations on the type or number of employees covered, these agencies are coded the same as those that categorically exempt all employees.

[c] While agencies have general (i.e., exists under Title 5) or agency-specific authority to take personnel actions outside the normal personnel process to account for specific agency needs or circumstances,

Table 7. Note, continued

some agencies' flexibility under such provisions is limited by specific statutory provisions. For example, some statutes place limitations on the number of employees compensated without regard to civil service provisions. Other limitations relate to specific job descriptions. For example, technical and professional employees, employees performing a specific service, or certain managerial employees may be compensated under agency-designated salaries. Often these statutes place limitations on the number of exempt (i.e., appointed outside Title 5) employees, whether those limitations are in absolute terms (e.g., "no more than 200 employees") or in percentages (e.g., "no more than 20 percent of all agency employees").

[d] For the Appalachian Regional Commission (ARC), the Federal Co-chairman, the alternate to the Federal Co-chairman, and the staff of the Federal Co-chairman, are all federal employees.

During the George W. Bush Administration, the President worked aggressively to ensure that the new Department of Homeland Security had its own personnel system.[198] The President argued that a new, more flexible personnel system was necessary for managers to fulfill the department's mission and to deliver the results elected officials and the public demanded. The administration also sought to transition the Department of Defense to a new National Security Personnel System.[199] These moves were contentious, and in 2008 the Department of Defense announced that it had scrapped plans for the new personnel system after Congress refused funding for the new system.[200] If President Bush had been successful at moving defense personnel to a new personnel system, fewer than 30 percent of federal employees would have remained under the traditional merit system, down from 90 percent at the end of the Truman Administration.

Agency executives have increasingly asked Congress for authority to create their own human resources policies to allow more flexibility in pay and management. Rigid pay restrictions can prevent federal managers from being able to recruit and retain the workers essential for program management. While there is an ongoing

198. *See* David E. Lewis, *The Presidency and the Bureaucracy: Management Imperatives in a Separation of Powers System*, *in* The Presidency and the Political System (Michael Nelson ed., 8th ed. 2005) (providing a full discussion of the politics surrounding the creation of the Department of Homeland Security).
199. Christopher Lee and Vernon Loeb, *Pentagon Assails Work Rules: Senate Panel to Hear Rumsfeld Request for Freedom from Civil Service Laws*, Wash. Post, June 4, 2003, at A25.
200. Brittany R. Ballenstedt, *Homeland Security Scraps Plans for Personnel System*, Gov't Executive, October 2, 2008, *available at* http://www.govexec.com/dailyfed/1008/100208b1.htm (last accessed December 15, 2009).

debate about pay differential generally, there is general agreement that federal pay does not keep up with private sector pay for some key occupations, particularly at the top levels.[201] Cumbersome hiring processes make it hard to attract interested employees. Rules that protect federal workers from adverse actions or job changes make it difficult for managers to nimbly restructure or reorganize. These difficulties make more flexible personnel systems attractive to federal managers.

The move away from a one-size-fits-all personnel system to a more decentralized system is one response to reasonable dissatisfaction with the modern personnel system. The proliferation of distinct personnel systems, however, also makes centralized human resource management difficult. When employees work under numerous different personnel systems and rules, it is difficult to centrally monitor employment practices to ensure fairness, fidelity to merit system principles, and equal pay for equal work. Some managers use increased flexibility to more easily accomplish agency goals. Others use the flexibility to do precisely what the rules of the Title 5 system were created to prevent. When one set of rules governed federal employment, it was easier not only to monitor agency work but also to centrally manage. If the President or Congress wants to direct agency policy in multiple agencies at the same time through changes in personnel or personnel policy, there is now no easy way for them to do this because expertise about personnel systems has devolved to the agencies themselves rather than one central human resources agency like the Office of Personnel Management. In the past there were a number of persons with sufficient expertise in civil service laws and regulations to work on behalf of the President or Congress, to tell them what was working well or working poorly and how to improve performance. Now, with multiple different systems, no single person knows enough about federal personnel policy to fill the same role. The decentralization of the federal personnel system has allowed agencies to move productively toward modern personnel systems that are more responsive to managers and market

201. U. S. Gov't Accountability Office, GAO-12-564, Federal Workers: Results of Studies on Federal Pay Varied Due to Differing Methodologies (2012).

pressures, but it has also led to confusion. Specific congressional committees and their staffs or private or not-for-profit groups may be familiar with individual systems, but few people have expertise on the entire federal personnel system.

d) Increased Role of Government Contractors

To characterize the employment needs of the federal government simply by reference to persons on the federal payroll misses another dramatic shift in the federal workforce over the last 30 years: the increasing reliance on private contract workers. While federal civilian employment has stayed relatively stable, between 2.7 and 3.0 million over the last 60 years, the number of contractors working for the federal government relative to civil servants has increased dramatically.[202] The federal government relies on contract employees to perform a variety of government jobs from janitorial and clerical work to writing regulations and providing security in Iraq. Estimates suggest that a significant proportion of the increase has come in service jobs. Although no exact count of contract employees exists,[203] recent estimates suggest that between 7.5 million and 10 million contract employees work alongside federal civilian employees, up from 4.5 million in 1999.[204] By most accounts the number of contract employees is increasing.[205]

202. Paul C. Light, A Government Ill Executed 193 (2008) [hereinafter Light, Ill Executed].

203. Two recent statutes require federal agencies to count the number of contract employees working for the agency and report such figures to the Office of Management and Budget (OMB). The Omnibus Appropriations Act of 2009 requires that agencies report to OMB the size of their workforce as of December 31, 2008, including contract employees. *See* Pub. L. No. 111-8, 123 Stat. 524 (2009). The Consolidated Appropriations Act of 2010 similarly requires that each executive agency (except DOD) provide a report to OMB that includes "the number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract." *See* Pub. L. No. 111-117, 123 Stat. 3034 (2009); Copeland, Federal Workforce, *supra* note 28, at 4.

204. Light, *New True Size of Gov't*, *supra* note 30; Copeland, Federal Workforce, *supra* note 28. The lower estimate comes from Copeland and the higher estimate was cited by Rep. Stephen Lynch (D-Mass.) in a recent hearing of the House Oversight and Government Reform Committee. *See* Alyah Khan, *Include Contract Workers in Federal Workforce Debates, Lawmakers Urged*, Fed. Computer Wk., May 26, 2011, *available at* http://fcw.com/articles/2011/05/26/house-hearing-debate-size-of-federal-workforce.aspx (accessed July 24, 2012).

205. Light, Ill Executed, *supra* note 202, at 197; U.S. Gov't Accountability

There are a number of reasons for the increased reliance on contracting. First, the virtues of privatization were consistent with the dominant managerial philosophy of the era, the New Public Management (NPM). The NPM was the basis of Vice President Gore's National Performance Review, which sought to provide "a government that works better and costs less."[206] The NPM emphasized the benefits of competition in order to provide managerial flexibility, purchase expertise, and reduce costs.[207] In practice, competition could be encouraged inside government or between government actors and the private sector. A second reason for the increase in contracting was that it allowed federal managers to work around limitations in their own agency environment. Hiring contract employees was attractive in some cases because it allowed federal managers to circumvent cumbersome hiring practices in the civil service and buy capacity and expertise that agencies lacked. This effort was supported by the general belief that the federal government should rely on the market where it could for the provision of government services.[208] The hope of proponents of contracting was that the private sector would compete for government contracts and this competition would make private sector contractors and government employees more effective and cheaper. Third, both Republican and Democratic elected officials in the last 20 years have preferred to keep federal employment small. The hiring of contract employees allows federal workforce numbers to decrease or remain steady, yet provides the necessary capacity to carry out federal programs.[209]

The federal government's increasing propensity to use contract employees is not without its critics. Critics charge that the increased role of federal contractors is due in part to the political

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Office, GAO-07-235R, Suggested Areas for Oversight in the 110th Congress 8 (2006) (report issued by Comptroller General, based on GAO work, offered three sets of recommendations to "Congressional Leadership") [hereinafter GAO, Areas for Oversight].

206. Kosar, Quasi Gov't, *supra* note 39, at 5.

207. Whether or not the use of contractors reduces costs relative to federal civilian personnel is difficult to determine, partly because there are no hard headcounts of the number of contract employees.

208. This general policy dates back to the 1950s when the Bureau of the Budget laid out this view in a series of bulletins. L. Elaine Halchin, Cong. Research Serv., R42342, Sourcing Policy: Deflected Developments and Issues (2012);

209; Light, Ill Executed, *supra* note 202, at 190, 192.

power of the firms themselves and that contract employees do not necessarily improve performance or reduce costs.[210] Supporters of the civil service system argue that the increased reliance on contract employees undermines national capacity by turning attention away from the need to recruit and retain the best and the brightest in the civil service. The Government Accountability Office has regularly named contract management as one of its high priority issues, citing no-bid contracts, understaffed contract management offices, lax oversight, poor contracting practices, and cost overruns.[211] Federal contracts can be large and complicated, and only one or a few bidders have the capacity to carry out the contract. This can lead to higher prices, poor oversight, and little accountability. Finally, some critics charge that some functions are inherently governmental and should not be delegated to private actors, particularly since contract employees operate with a profit motive rather than public service ethic.[212] This issue captured the public's attention during the war in Iraq. Contractors provided essential services including logistics, transportation, and private security. They trained Iraqi police and staffed prisons and conducted interrogations in military prisons such as Abu Ghraib.[213]

2. Modern Personnel System

Today, federal civilian jobs are primarily defined by a *pay system* and *appointment authority*. There are four main pay systems. The Federal Wage System (FWS) covers blue collar work (trade, craft, skilled, and unskilled laborers).[214] The General Schedule (GS) is the pay system for administrative, technical, clerical, and professional jobs.[215] The Senior Level and Scientific and Professional (SL/ST) system establishes pay for high-level non-executive

210. Kettl, *supra* note 85.
211. GAO, Areas For Oversight, *supra* note 205, at 8; U.S. Gov't Accountability Office, GAO-10-883, Opportunities Exist to Increase Competition and Assess Reasons When Only One Offer Is Received (2010).
212. Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It 1 (2007); James P. Pfiffner, *The Public Service Ethic in the New Public Personnel Systems*, 29 Pub. Personnel Mgmt. 54 (1999).
213. Kettl, *supra* note 85, at 421.
214 *See* 5 U.S.C. §§ 5341-44 (2012).
215. *Id*. § 5332.

positions above the highest GS pay level.[216] Senior management positions are defined in the Executive Schedule (EX) and the Senior Executive Service (ES) pay schedule.[217] The Executive Schedule is generally reserved for positions requiring presidential nomination and Senate confirmation, and the ES pay system for managers in the Senior Executive Service (SES), right below Senate-confirmed political appointees. Each pay system includes a number of distinct pay categories. For example, the GS system includes fifteen grades. The grades are attached to positions based upon the responsibility, qualifications, or experience required for the position. Each pay grade also includes sub-categories that provide additional flexibility for differentiating among employees who perform similar work but have different qualifications, experience, or performance levels. In the GS system these are called *steps*.

The pay system should not be confused with appointment authority. Appointment authority comes from the laws, executive orders, or rules that authorize a person's joining the federal service and governs the terms of their employment. Pay category and appointment authority are distinct but often correlated. Top-level positions, for example, are filled through political appointment rather than procedures governed by civil service law and regulation (appointment authority), and political appointees tend to receive the highest salaries (pay category).[218] In general terms, the federal civil service still is comprised of two types of employees, political appointees and civil servants. The former are selected by the President (directly or indirectly through agency heads), usually from outside the civil service. The President has broad authority

216. *Id.* § 3104.
217. *See id.* §§ 5311-18.
218. This is not true across the board. Some civil servants, particularly those with high private sector wages (e.g. doctors, lawyers, engineers), earn more than appointees and some positions filled by political appointment receive relatively low salaries if they are positions of a policy or confidential nature, but are staff positions (e.g., confidential assistants or chauffeurs of top officials). *Compare, e.g.*, Office of Personnel Management, *2012 Pay Tables for Executive and Senior Level Employees*, http://www.opm.gov/oca/12tables/indexSES.asp (pay tables for senior-level federal civilian employees) [hereinafter OPM, *2012 Pay Tables*] *with* 2008 Plum Book, *supra* note 12 (identifying positions in legislative and executive branches subject to noncompetitive appointment and listing applicable federal salary schedule or pay system).

to direct the activity of these officials, and in most cases they serve at the President's pleasure, with one main exception of fixed terms described above and elaborated below. The latter work under some type of merit system, and the ways that the President's or agency head's ability to hire, fire, promote, and demote these persons is restricted by law and regulation.

a) Political Appointees in the Federal Executive Establishment

There are four main types of political appointees.[219] The most visible political appointments are those nominated by the President and confirmed by the Senate. The Constitution requires that all "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States" be appointed in this manner.[220] Among the most important positions nominated by the President and confirmed by the Senate are department secretaries, agency administrators and federal commissioners. In 2012 there were approximately 1,130 positions in the federal executive establishment requiring Senate confirmation.[221] Of these, 186 are U.S. Attorneys and U.S. Marshals, about 190 are ambassadors, and hundreds are members of small boards or commissions, often serving on a part-time basis.[222] The Senate-confirmed positions in the departments include deputy, under, and assistant secretaries, as well as general counsels and an inspector

219. For a full description, see Lewis, Presidential Appt., *supra* note 123, at 22-25; Lewis, *Appt and Personnel*, *supra* note 183, at 52; 2008 Plum Book, *supra* note 12, at 197-202.
220. U.S. Const. art. II, § 2, cl. 2.
221. There are also 18 persons in the legislative branch agencies such as the Library of Congress, Government Printing Office, Architect of the Capitol, and Government Accountability Office nominated by the President and confirmed by the Senate. 2008 Plum Book, *supra* note 12. This does not include Senate-confirmed appointments to judgeships or multi-lateral agencies such as the United Nations. In 2012, Congress enacted the Presidential Appointment Efficiency and Streamlining Act of 2011, which reduced the number of positions requiring Senate confirmation by 220 positions. *See* Pub. L. No. 112-166, 126 Stat. 1283 (2012). Positions that once required Senate confirmation can now be filled by presidential appointment without Senate confirmation.
222. For example, there are 26 Senate-confirmed appointees on the board of the National Foundation on the Arts and Humanities and 16 on the National Science Board. All serve in a part-time capacity as members of the board and are paid on a per diem basis.

general.[223] As indicated above, most large sub-department bureaus are headed by Senate-confirmed political appointees. The heads of independent administrations (e.g., Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration) and the commissioners of all large commissions are positions requiring Senate confirmation.

Between Senate-confirmed political appointees at the top of federal agencies and the civil service is a middle level of management comprised of a mix of career professionals and political appointees. The Senior Executive Service (SES) is a corps of managers created by the Civil Service Reform Act of 1978.[224] The SES is comprised of about 7,000 managers distributed across the federal executive establishment.[225] Career civil servants and other eligible individuals may apply to be members of the SES. The Office of Personnel Management (OPM) allocates a fixed number of SES positions to each agency. The agency leadership determines which jobs in the agency will be filled by members of the SES.[226] The administration can fill positions designated as SES-eligible general (as opposed to career-reserved) positions, either with an existing career member of the Senior Executive Service or a political appointee selected from outside the SES.[227] No more than ten percent of the Senior

223. The Department of Defense is something of an outlier since it has 53 positions subject to Senate confirmation. Each of the military services has 7-8 Senate-confirmed positions, as well as more than 30 additional positions in other parts of the Department of Defense. 2008 Plum Book, *supra* note 12.
224. Pub. L. No. 95-454, 92. Stat. 1191 (1978) (establishing the SES in response to a perceived need to provide flexibility in recruiting and retaining qualified executives).
225. According to data from the Office of Personnel Management, as of March 2012, there were 7,146 career members of the SES, including 681 non-career (appointee) members and 122 limited term or emergency appointments. *See* Office of Personnel Management, *FedScope Employment Cubes* (March 2012), http://www.fedscope.opm.gov/employment.asp.
226. Some positions are designated by agencies as career-reserved and into these positions agency heads can only place career members of the SES. *See* 5 U.S.C. §§ 214.401-.403.
227. The SES was created partly to give presidents more control over managerial personnel. Presidents have more ability to move members of the SES as compared to other civil servants. For example, presidents can reassign career members of the SES "provided the president and the new agency head have been in office for at least 120 days and the executive has been given 15 days notice." Lewis, Presidential Appt., *supra* note 123, at 23; Lewis and Moe, *supra* note 190.

Executive Service as a whole or twenty-five percent of the allocated SES positions in an agency may be filled by political appointees.[228] Some examples of such SES positions include the Director of the Johnson Space Center, the General Counsel of the National Archives and Records Administration, the Chief of Staff at the U.S. Agency for International Development, and a number of deputy assistant secretaries in the executive departments.

The third category of political appointee is a Schedule C appointee. Schedule C positions are those with policy-determining responsibilities or positions that require a confidential relationship with a top agency official. They are usually lower-level agency positions and staff positions.[229] Schedule C appointees serve at the pleasure of the agency head, but modern presidents have become directly involved in the selection of Schedule C appointees.[230] Persons appointed to Schedule C positions are generally paid less than Senate-confirmed or SES appointees. Most are paid on the GS scale from GS 15 down, depending upon the qualifications of the job and their experience. In the spring of 2012 there were 1,443 Schedule C appointees.[231] Some examples of higher-level Schedule C positions include Director of Advance for the Administrator of the Environmental Protection Agency, the Director of the Office of Public Affairs for the Chairman of the Federal Trade Commission, and the White House Liaison in the Department of the Interior.

228. 5 U.S.C. § 3134 (2012).

229. Schedule C positions are non-permanent positions. Technically, once a person leaves a Schedule C position, the position no longer exists. In any case, when an agency wants to appoint a person under Schedule C, it must provide a justification to the Office of Personnel Management for the position, a description of its confidential and/or policy determining nature, and the pay level. As a practical matter, new presidents assume office with a map of where the appointed positions were in the previous administration (including SES and Schedule C) and start from that point. During a transition, agency heads may appoint a limited number of Schedule C appointees under authority delegated by OPM. Transitional Schedule C appointees can serve for 120 days and have their tenure extended another 120 days. The agency ultimately must approach OPM about formally converting a temporary transitional appointment to a regular Schedule C appointment. U.S. Office of Personnel Mgmt., *Presidential Transition Guide to Federal Human Resources Management* 12 (2008), *available at* http://www.chcoc.gov/Transmittals/Attachments/trans1300.pdf [hereinafter OPM, *Presidential Transition*].

230. Weko, *supra* note 185; OPM, *Presidential Transition*, *supra* note 229, at 12.

231. OPM, *FedScope*, *supra* note 27 (Employment Cube - March 2012).

The most common jobs for Schedule C appointees are as special assistants, confidential assistants, speechwriters, press secretaries, and special advisors to higher-level political appointees.

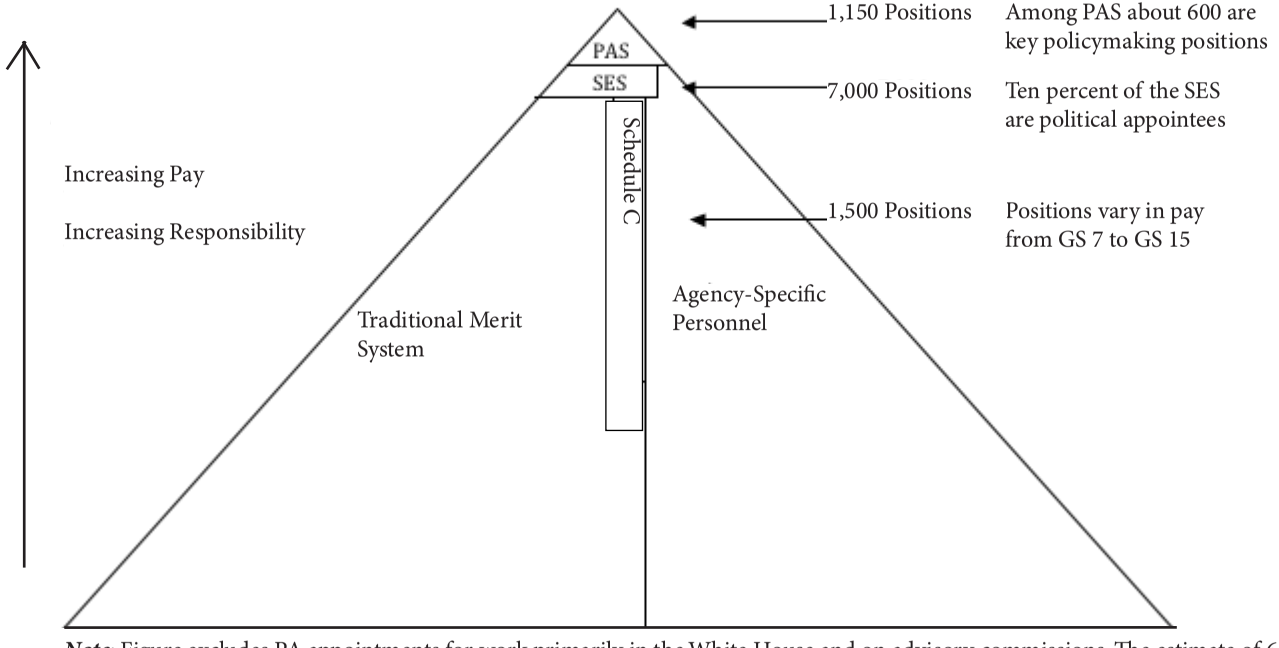
The final category of political appointees is comprised of positions that, like SES appointees and Schedule C appointees, do not require Senate confirmation. In 2008 there were 314 of these persons, the bulk of whom served either in the White House Office or on minor advisory commissions such as the Advisory Council on Historic Preservation, American Battle Monuments Commission, or the Christopher Columbus Fellowship Foundation. In 2012, however, Congress enacted the Presidential Appointment Efficiency and Streamlining Act (Pub. L. No. 112-166), which reduced the number of positions requiring Senate confirmation by 170 positions. The affected positions include a number of managerial positions such as chief financial officers and assistant secretaries for administration. The act also affects a number of appointments to minor boards and commissions. Positions that once required Senate confirmation can now be filled by presidential appointment without Senate confirmation.

The vast majority of civilian employees, however, are included in some form of merit-based civil service system.[232] Federal civilian work is defined by a series of statutes and regulations governing how persons are to be hired, fired, promoted, and demoted. The overriding principle is that a person's treatment in the civil service be governed by merit. Persons establish their merit through appropriate background qualifications or competitive examination. Employees are granted a series of rights, most notably rights to notification and appeal in cases of adverse personnel actions such as demotion or removal. While most of the attention federal agencies receive focuses on Washington, DC, where most key policymaking employees work, only about 12 percent of federal employees work in Washington, DC.

232. Congress has also granted a number of federal agencies authority to create their own personnel systems that define both pay and personnel rules. In general, while they provide executives more managerial flexibility, these personnel systems have most of the features of the Title 5-based civil service system created originally by the Civil Service Act of 1883, Pub. L. No. 16, 22 Stat. 403 (1883).

The remainder work in a network of regional and field offices, from military bases to local Social Security offices.

Figure 3. Simplified Depiction of Current Federal Civilian Personnel System



Note: Figure excludes PA appointments for work primarily in the White House and on advisory commissions. The estimate of 600 key policymaking positions excludes ambassadors, U.S. attorneys, and U.S. marshals, as well as part time, non-salaried, and advisory commission posts that require Senate confirmation.

Figure 3 provides a simplified graphical representation of the modern personnel system.[233] The triangle reflects the structure of the federal hierarchy with positions at the top higher in both pay and responsibility. At the top of the federal hierarchy are presidential appointees requiring Senate confirmation. Of the close to 1,150 of these positions, about 600 are key policymaking positions such as department secretaries, commissioners, and deputy, under, and assistant secretaries. Below this class of political appointees in most federal agencies is a middle-level of management comprised of the Senior Executive Service. Not all agencies have SES employees, particularly if they have their own personnel systems. This is why SES managers do not extend all the way across the hierarchy in the figure. In agencies with their own personnel system, managers staff these positions governed by personnel rules specific to those agencies. In agencies such as the Department of Defense or the Department of State, uniformed military personnel or foreign service officers also fill positions at this level. The vertical bar that extends down into the personnel system represents Schedule C appointees that take policy and confidential jobs from the GS 7 level to the GS 15 level.

The extent of political penetration varies across the federal executive establishment. Some agencies have many political appointees penetrating deeply into agencies, and others have few political appointees. The extent of political appointee penetration influences the "politicization" of different agencies. Agencies with more political appointees are more likely to be responsive to the White House, have their day-to-day business infused with partisan politics, and make promotion decisions in the agency on the basis of partisan or political views.[234] As a general matter, agencies in the EOP and executive departments or agencies structured like executive

233. This figure excludes some classes of excepted personnel, including appointments under other hiring authorities such as Schedules A and B relating to positions for which standard qualification requirements are impractical (e.g., chaplains, positions in isolated locations), and for positions where there are threshold qualification requirements but comparisons among applicants is impractical (e.g., new agencies, federal work-study, positions reserved for persons with specific types of disabilities).

234. David E. Lewis, *Presidential Politicization of the Executive Branch in the United States*, *in* Executive Politics in Times of Crisis (Martin Lodge and Kai Wegrich eds., 2012).

departments tend to have the highest percentage of political appointees. Among the agencies with the highest percentage of political appointees are the Office of Management and Budget (EOP, 7%), Department of Education (executive department, 3.5%), and Small Business Administration (independent, 1.35%). Independent commissions can have high percentages of political appointees since commissioners are usually political appointees and commissioners often each have a staff member. The presence of political appointees in these agencies can politicize agencies, but the additional political appointees in these agencies are not usually a conduit for White House influence since commissions have party-balancing limitations on presidential nominations.

Part IV

The Creation and Design of Federal Agencies

The number of federal agencies has changed over time because new agencies get added to the federal establishment and existing agencies get reorganized or eliminated. New agencies are usually created to carry out new or substantially reconfigured government responsibilities. Agencies are created by statute or some form of executive action—executive order, departmental order, or reorganization plan.[235] In some cases statutes delegate to agencies new tasks or responsibilities, and administration officials respond by creating bureaus, divisions, or offices to implement these new assignments. They generally do so with congressional support. However, in some cases the President or administration officials create new agencies through an executive or departmental order that takes Congress by surprise or could not have been enacted statutorially. Some prominent examples include the series of civil rights agencies created by presidents from Roosevelt to Kennedy and the Peace Corps.[236] These decisions are consequential because agencies created by executive action are significantly more likely to have features that allow presidents more influence over agency activities.[237]

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235. Agencies historically have been created by reorganization plan, executive order, and departmental order. Starting in the 1930s, Congress routinely granted reorganization authority to the President. Under such authority, the President was empowered to submit reorganization plans to Congress. These plans for reorganizing the government (i.e., creation, reorganization, and elimination of agencies) would go into effect after a certain period of time unless Congress explicitly disapproved. *See*, e.g., Peri E. Arnold, Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996 (2d ed. Revised 1998); Arnold, *supra* note 6; Lewis, Agency Design, *supra* note 6. This form of reorganization authority lapsed in the 1970s and was not renewed, partly because the Supreme Court ruled the legislative veto unconstitutional in 1983, and this was the vehicle of congressional involvement. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

236. Some other recent examples include the Council on Competitiveness and the National Biological Survey within the Department of the Interior. Hugh Davis Graham, Civil Rights and the Presidency: Race and Gender in American Politics, 1960-1972 (1992); William G. Howell, Power without Persuasion (2003); Howell and Lewis, supra note 8; Lewis, Agency Design, supra note 6.

237. Howell and Lewis, *supra* note 8.

Instances where administration officials have created agencies Congress would not have created are not the norm. The President and Congress usually must cooperate on agency creation, and the obstacles to executive agency creation are high when the President and Congress disagree. New agencies created by executive action must not contravene existing law, and their creation must be traceable to constitutional or statutory authority as the legal basis for the new agency. Of course, the meaning of constitutional provisions and statutes is not always clear, and presidents and Congress spar over what the law allows. Administration officials must secure appropriations for the new agencies after they have been created, but agencies do not have to be formally authorized or given a line of their own in the budget.[238] They can satisfy the requirement for authorization by describing the new units in budget documents.[239]

From the President's perspective, executive action can occasionally be an effective form of agency creation when presidents can secure appropriations but not authorization for an agency. Appropriations are not subject to Senate filibusters, and funds for new agencies can be buried in the large appropriations bills.

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238. Specifically, the statute provides, in relevant part:

> (a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence. (b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section.

31 U.S.C. § 1347 (2012).

239. The Comptroller General testified in hearings before the House of Representatives in 1970 that "as a practical matter, if the expenses of the groups are justified in the budget presentations, this is regarded as being adequate for this purpose. When they say specific authorization by Congress, authorization is usually meant to be approved through the appropriations process if not through the regular legislative authorization process. In other words, it does not have to be specifically authorized by separate statute." Lewis, Agency Design, *supra* note 6, at 192, n. 8 (quoting the 1970 hearings).

Presidents can also create agencies and present them to Congress as a *fait accompli*. For example, President Kennedy created the Peace Corps by executive order in 1961,[240] an action decried by Republicans in Congress. By the time Congress had a chance to pass on appropriations for the agency, however, the agency had 362 Washington employees and hundreds of volunteers working in eight different countries overseas, and the Democratic majority in Congress defeated Republican efforts to defund the agency.[241]

A. Why a New Agency Rather Than Existing Agencies?

A political decision to create a new agency begs the question of why Congress does not delegate new federal responsibilities to existing agencies. Generally, Congress creates new agencies to carry out federal responsibilities when it does not believe existing agencies will effectively implement new policies. Existing agencies may not have the expertise to carry out new policies. Or, existing agencies may resist the delegation of authority because the new policy deviates from what the agency perceives as its primary mission.[242] Of course, agencies themselves have ideological leanings on the basis of their mission, history, and the ideology of their employees. These leanings influence delegation decisions.[243] There is substantial variation across

240. Exec. Order No. 10,924, 3 C.F.R. § 85-86 (Supp. 1961).
241. *Id*. at 84; Government Agencies (Donald Robert Whitnah ed., 1983).
242. James Q.Wilson, Bureaucracy: What Government Agencies Do and Why They Do It (1989).
243. Joshua D. Clinton and David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 Pol. Analysis 3 (2008); Epstein and O'Halloran, *supra* note 131; George Krause and Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. Econ. & Org. 359 (2005).

the government in the ideology of federal employees.[244] Federal employees self-select into agencies whose missions they support. Democrats are more likely to work in the Department of Labor or the Environmental Protection Agency and Republicans are more likely to work in the Department of Defense or the Federal Bureau of Investigation.[245] This fact influences the choices of whether to delegate new authority to existing agencies or create a new agency to carry out new programs.[246] For example, President Roosevelt created scores of new agencies during the New Deal rather than delegate this responsibility to existing agencies because he feared the conservative bureaucracy he inherited from his Republican predecessors would not successfully and wholeheartedly implement his programs.[247] He was also aware of the patronage benefits of creating new agencies that he could staff.

In other cases, new agencies are the result of the larger struggle over the new policy. Proponents or opponents of new policies demand that new policies will be carried out by agencies with specific structural features in exchange for their support. The structural features they demand shape the ability of political actors to get access to agency decisionmaking. For example, some structures insulate the agency from the influence of the President or Congress. Others provide privileged access to agency decisionmaking for some groups and interests. In many cases, there would be no agency created at all unless the new agency included certain features that

244. Joshua D. Clinton, Anthony Bertelli, Christian Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States*, 56 Am. J. Pol. Sci. 341 (2012); Robert Maranto and Karen M. Hult, R*ight Turn? Political Ideology in the Higher Civil Service, 1987-1994*, 34 Am. Rev. Pub. Admin. 199 (2004); Joel D. Aberbach and Bert A. Rockman, In the Web of Politics: Three Decades of the U.S. Federal Executive (2000); Joel D. Aberbach and Bert A. Rockman, *The Political Views of U.S. Senior Federal Executives, 1970-1992*, 57 J. Pol. 838 (1995); Robert Maranto, *Still Clashing after All These Years: Ideological Conflict in the Reagan Executive*, 37 Am. J. Pol. Sci. 681 (1993); Joel D. Aberbach, Robert D. Putnam & B. A. Rockman, Bureaucrats and Politicians in Western Democracies (1981); Joel D. Aberbach and Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 Am. Pol. Sci. Rev. 456 (1976).
245. Clinton et al., *supra* note 244.
246. Epstein and O'Halloran, *supra* note 131; Clinton et al., *supra* note 244.
247. Seidman, *A Typology*, *supra* note 88, at 43.

allow broad representation and regular review by Congress.[248]

B. Agency Reorganization and Termination

Once created, federal agencies are durable but not immortal.[249] Historically, periods of national upheaval such as wars, economic crises, and public scandals have also been periods of agency reorganization and termination. National leaders restructure the administration to mobilize for war or respond to crises. When agencies are held responsible for visible blunders, agency reorganization and termination is a natural result. Both the savings and loan scandal of the late 1980s and the economic crisis of 2008 led to significant changes in the financial regulatory agencies. Political turnover also leads to agency reorganization and termination. When new administrations enter office, agency termination and reorganization are not uncommon. This can reflect a general desire to economize or restructure government. For example, President Carter ran for office pledging to reduce the number of government agencies from 1,900 to 200 agencies.[250] President Reagan sought to shrink government and proposed the abolition of several executive departments. New administrations also naturally reshuffle and reorganize existing agencies in order to accomplish their priorities. President Clinton's successful push for the creation of the Corporation for National and Community Service moved a number of existing volunteer service programs into this new unit along with the new AmeriCorps program. The creation of the new Department of Homeland Security during the Bush Administration led to the fundamental restructuring of a number of departments and agencies.

248. Moe, *Bureaucratic Structure, supra* note 6; McCubbins et al., *supra* note 6.
249. In one study of agencies created since 1946, 62 percent had been terminated or substantially reorganized by 1997. David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. Pol. 89 (2002); *see also* Daniel P. Carpenter, *Stochastic Prediction and Estimation of Nonlinear Political Durations: An Application to the Lifetime of Bureaus*, *in* Political Complexity: Nonlinear Models of Politics (Diana Richards ed., 2000); Herbert Kaufman, Are Government Organizations Immortal? (1976).
250. Moe Report, *supra* note 1, at 15.

This included the dismantling of the U.S. Customs Service and Immigration and Naturalization Service into two and three different agencies, respectively.[251]

Political turnover can also generate agency reorganization and termination when longstanding opponents of existing programs and agencies assume power and seek to eliminate the agencies and programs the opposite party previously created. For example, when Republicans gained control of the House of Representatives in 1995, the House Budget Committee listed 372 agencies, programs and authorities for termination.[252] They succeeded in eliminating the National Biological Service, the Office of Technology Assessment, and Interstate Commerce Commission. They also succeeded in shuttering the Administrative Conference of the United States, although this agency was restarted during the Obama Administration. Mitt Romney, the Republican nominee for the 2012 election, pledged to eliminate the Department of Housing and Urban Development and to shrink the Department of Education.[253] Previous efforts to eliminate large departments or agencies have been difficult, however, since agencies targeted for elimination were created because they garnered the support of majorities at one point in time and continue to receive substantial support from affected parties and often significant numbers of Congress members and/or the administration.

Among the most durable agencies are the independent agencies, those outside the executive departments, with features such as party-balancing limitations, fixed terms, and OMB-bypass authority. They seem to be able to withstand periods of upheaval and political turnover more effectively than other agencies. There are a number of reasons why this might be the case. Independent agencies may produce more moderate policies than executive

251. *See* Department of Homeland Security, *Who Jointed DHS*, *available at* http://www.dhs.gov/who-joined-dhs (accessed August 13, 2012).
252. Guy Gugliotta, *On the List: Survivors and Newcomers, At Agencies Slated for Termination, Officials Remain Hopeful but Mindful of Pressure*, Wash. Post, May 11, 1995, at A6.
253. Ryan Lizza, *Why Romney's No Reagan*, New Yorker, April 17, 2012, *available at* http://www.newyorker.com/online/blogs/newsdesk/2012/04/why-romneys-no-reagan.html (accessed August 11, 2012).

departments since the median voter on a commission hews more closely to the middle of the political spectrum. There are also fewer opportunities to eliminate these agencies since they often bypass OMB budget review, and they historically were often excluded from the President's reorganization authority.[254]

While agencies themselves as distinct entities are vulnerable, the programs and laws they implement are significantly more durable. Congress has been reluctant to give up a task or program once it has been created. For example, Congress eliminated the Interstate Commerce Commission in 1995, but its functions persisted in the Surface Transportation Board in the Department of Transportation.[255]

C. Why do Federal Agency Designs Differ?

Part of what distinguishes the agencies in the categories described above--EOP, executive departments, independent, government corporations/other--are specific structural features that determine agency responsiveness to elected officials and agency powers. The previous section of the report described general differences across agencies based upon their position in the federal executive establishment. This section examines more closely the structural features that differentiate federal agencies, focusing on features that make agencies more or less responsive to elected officials. It details features that insulate from the President, Congress, and both Congress and the President. It also includes aspects of the agencies themselves that influence their responsiveness, from their history to internal structure and rules. It is based largely upon the data collection described earlier in the report.

Since the Constitution provides few details about the departments and agencies of government, it empowers Congress and, to a lesser extent, the President to design the administrative apparatus of government. This has led to tremendous diversity in the design of government agencies. Individual choices about agency

254. Lewis, *Adverse Consequence*, *supra* note 129.
255. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

design over time are made separately, subject to the interests and politics of the moment, not by some grand notion of efficiency or effectiveness. Common, but episodic, concerns about the President or Congress having too much power have shaped agency design. So, too, have concerns about too much concentration of power, due process, and representation.

The default structure in the federal government (i.e., what is created if Congress or the President does not specify its structure in more detail) is the hierarchically organized agency located somewhere within an executive department. This type of agency is subject to the control and direction of the President and Congress. At times, Congress and the President have chosen to deviate from this design and insulate agencies from the President and/or Congress. Sometimes one or the other branch will agree to give up some influence over the agency after creation, in exchange for a concession in another part of the authorizing legislation.[256] In other cases, one branch, backed by public pressure, will more or less force the other branch to accept the creation of an agency insulated from presidential or congressional interference.[257] On occasion, both branches realize the wisdom of limiting their own influence over agencies. For example, with the creation of the Federal Reserve, the President and Congress admitted the necessity of an independent central bank that would manage monetary policy without regard to electoral or political pressures.[258] Their belief was that a central bank immune from political pressures to inflate or deflate the currency would lead to better economic policymaking in the long run.

1. Insulating Agencies from the President

Beyond the Constitution's vesting of executive power in the President, the President's primary means of influence over government agencies are through the nomination and removal of political appointees, and the President's assertion of control, via the

256. McCarty, *supra* note 8; McCubbins et al. *supra* note 6.
257. Lewis, Agency Design, *supra* note 6; Moe, *Bureaucratic Structure*, *supra* note 6.
258. *See* Federal Reserve Act, Pub. L. No. 63-43 (1913).

Office of Management and Budget, over agency budget submissions, rules, and agency legislative proposals and testimony. Presidents also have claimed control over agencies through centralized control over litigation.[259] The primary means by which agencies are insulated from presidential or congressional control is to include features in agency statutes that mitigate one or more of these means of presidential influence. Of course, presidents themselves are also constrained by their constitutional duty to see the laws faithfully executed and by the content of statutes.

a) Multi-member Bodies

Limiting presidential influence over personnel can be done in a number of ways. First, agencies can be created as commissions rather than administrations. Commissions limit the President's influence by increasing the number of actors the President (or Congress) must influence to direct agency policy. The creation of the Federal Reserve in 1913 is a good example. Congressional architects of the new agency purposefully chose a board, reasoning that it would be easier to protect a board from political pressure than a single individual.[260] Statutes provide different amounts of detail concerning the functioning of commissions with regard to quorums and dealing with ties.[261]

b) Limitations on Appointments

Congress can also provide for few or many political appointees within the agency, or can influence the types of persons the President may select. As discussed above, there is substantial variation across the executive establishment in the depth and penetration of political appointees. F eatures of the agency, such as limitations on the types

259. Presidents can also influence agencies in less direct ways such as controlling office space, procurement, civil service and personnel rules, and assistance in dealing with other agencies. Strauss, *supra* note 145, at 573; Moreno, *supra* note 130, at 500.
260. Robert Eugene Cushman, The Independent Regulatory Commissions (1972); Lewis, Agency Design, *supra* note 6.
261. Agencies whose statutes do not include quorum provisions determine such rules in by-laws or by administrative rules and practice. A list of agencies with quorum provisions is included in Table 4.

of persons eligible to serve, limit White House influence by shrinking the President's pool of potential nominees and decrease the chances that the President will be able to select exactly the person of his choice for a position. As an extreme example, consider the following language from a bill in 1916:

> Provided further, That of the vacancies created in the Judge Advocate's Department by this act, one such vacancy, not below the rank of Major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the regular or volunteer army, and shall be proficient in the Spanish language and laws.[262]

According to the *New York Times*, there was only one person that fit this description and he lived in the district of James Hay, the Chairman of the House Committee on Military Affairs, who also served on the conference committee reconciling House and Senate differences on the bill.[263] The statute more or less selects the person for the post for the President. While this example is of dubious constitutionality, it illustrates how limitations on political appointees can limit the President's power.[264] In 1976 the Supreme

262. 39 Stat. 169.
263. *Army Bill Joker Aims to Rob Wood of Honor Medal*, N.Y. Times, May 19, 1916.
264. At some point, Congress's delineation of qualifications is effectively a selection that would infringe on the President's power to nominate persons to the principal offices of government. In *Myers v. United States*, the majority opinion stated:

> It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided, of course, that the qualifications do not so limit selection and so trench upon executive choice as to be, in effect, legislative designation.

272 U.S. 52, 128 (1926). Congress and the President disagree about when congressional prescription of qualifications unduly interferes with legitimate executive choice. These disagreements have been articulated in signing statements by Presidents George H.W. Bush, Bill Clinton, and George W. Bush. Henry B.

Court invalidated a 1974 statute creating the Federal Election Commission that included a provision specifying that Congress appoint four members of the Commission.[265] The Court stipulated that the commission's "administrative functions may … be exercised only by persons who are 'Officers of the United States' " and appointed in a manner consistent with their constitutional position (i.e., nomination by the President and confirmation by the Senate).[266]

Limitations on who can be nominated or named to appointed positions come in a variety of forms. Some of the qualification requirements are quite general. For example, appointments to be the Archivist of the United States are to be made "without regard to political affiliations and solely on the basis of professional qualifications required to perform the duties and responsibilities of the office of the Archivist."[267] On the other hand, the Director of the Federal Housing Finance Agency must have extensive understanding of financial management, capital markets, mortgage securities, and housing finance and "may not … have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment."[268] The Secretary of Defense must be appointed from civilian life and be at least 7 years removed from active duty.[269] The best known limitation is the requirement for party-balancing on some multi-member bodies. Statutes creating these agencies state that "no more than x members of the commission can be from one political party."[270] Other limitations require specific backgrounds, expertise, or demographic characteristics. Table 8 includes a list of agencies

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Hogue, Cong. Research Serv., RL33886, Statutory Qualifications for Executive Branch Positions (2010).

265. Buckley v. Valeo, 424 U.S. 1 (1976).

266. *Id.* at 141.

267. 44 U.S.C. § 2103(a) (2012).

268. 12 U.S.C. §§ 4512(b)(1), (g) (2012); Hogue, *supra* note 264.

269. 10 U.S.C. § 113(a) (2012).

270. On at least one occasion, Congress has attached party-balancing requirements to non-commissions. In 1968, Congress created the Law Enforcement Assistance Administration and stipulated in the legislation that the agency would be headed by an administrator and two associate administrators, but that no more than two of these three officials could be from the same political party. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

whose authorizing statutes contain explicit provisions detailing the background or qualifications of agency heads.

Among the most binding of restrictions on appointments are cases where the statute either specifies that specific government officials serve on the board or that other actors such as a state governor may select a portion of the members. For example, the board of the Millennium Challenge Corporation (MCC) includes the Secretary of State, Secretary of the Treasury, U.S. Trade Representative, Administrator of the U.S. Agency for International Development, the CEO of the MCC, and four members selected by the President and confirmed by the Senate from lists provided by congressional leaders.[271] The Mississippi River Commission is governed by a board that includes three persons from the Army Corps of Engineers, one from the National Oceanic and Atmospheric Administration, and three other persons, two of whom must be civil engineers.[272] Mixed ownership corporations have persons selected by investors or shareholders, and presidential appointees are a minority of board members. Table 9 includes a list of agencies with these types of restrictions.

271. 22 U.S.C. § 7703(c)(3)(A) (2012)
272. 33 U.S.C. § 642 (2012)

Table 8. Statutory Limitations on the Types of Persons Who Can Be Nominated as Department or Independent Agency Heads by the President

(1) Citizen of the United States	(2) Civilian	(3) Geographic	(4) Demographic	(5) Expertise		(6) Conflict of Interest		(7) Congressional Input	(8) Party Balancing	
AMTRAK	DNFSB	AMTRAK	CNCS	ACUS	MSPB	AMTRAK	MWAA	AMTRAK	ADF	HSTSF
BBG	DOD	ARC	IAIA	ADF	MCC	ARC	NCUA	EAC	AMTRAK	IAF
CPB	MRC	CPB	NCD	AMTRAK	MRC	CFTC	NIBS	FRTIB	BBG	JMMFF
DNFSB	NASA	DRA	NSF	BBG	MKUSF	CPSC	NMB	HSTSF	CFTC	LSC
FCA	SBA	FED		CEA	NARA	DNFSB	PRC	JMMFF	CPSC	MSPB
FCC		MWAA	*NIGC**	CEQ	NCCB	DOD	RRB	MCC	CNCS	MWAA
FHFA		NIBS		CSHIB	NCD	DTRS	SEC	MKUSF	CPB	MKUSF
NRC		NSF		CFTC	NCUA	FCA	SIPC	PCLOB	DNFSB	NCUA
TVA		SIPC		CPSC	NIBS	FAMC	USPS	SSAB	EEOC	NMB
USITC		TVA		CNCS	NSF	FCC	USTR	USPS	EXIM	NTSB
				CPB	NSEB	FDIC			FCA	NRC
				DNFSB	NTSB	FHFA	*BVA**		FAMC	PCLOB
				EAC	OSHRC		*NIGC**		FCC	PRC
				EXIM	OSC		*STB**		FDIC	SEC
				FCA	ODNI				FEC	SSAB
				FDIC	OPIC				FHITFB	SJI
				FEC	PCLOB				FLRA	USIP
				FHFA	PRC				FMC	USITC
				FMSHRC	RRB				FSMITFB	USPS
				FED	SIPC				FTC	
				FRTIB	SBA					*FERC**
				HSTSF	SSAB					*NIGC**
				IMLS	SJI					*STB**
				IAIA	TVA					
				IAF	USIP					
				JMMFF	USITC					
				LSC	USPS					
				*IRSOB**	*STB**					

Note: This list includes only executive departments, not the sub-department agencies, except commissions with fixed terms inside an executive department which are indicated with an asterisk (*) and italics. (1) Statute mandates that board members or commissioners or the agency head must be citizens of the United States. (2) Statute mandates that board members or commissioners or the agency head must be civilians. (3) Statute places a geographic limitation on the nomination/selection of board members or commissioners or the agency head. (4) Statute places a demographic limitation on the nomination/selection of board members or commissioners or the agency head. For example, some statutes require the President to appoint members so that a Board will be diverse according to race, ethnicity, age, gender, or other characteristics "to the maximum extent possible," "as nearly as practicable." (5) Statute places an expertise or experience limitation on the nomination/selection of members or commissioners or the agency head. (6) Statute places a conflict of interest limitation on the nomination/selection of members. (7) Statute provides some mechanism for congressional input in the nomination process aside from confirmation. For example, a statute may require that a person be "appointed by the President after taking into consideration the recommendation made by the Speaker of the House." (8) If the agency is a commission or has a board of directors, the statute limits the number of members who may serve from the same party.

Table 9. Boards or Commissions Whose Membership the President Does Not Fully Select

Board Includes Specific Government Officials		Other Actors Get to Select Some Board Members	
ARC	Governor of each participating state	BGSEEP	Congressional selection of some members
BBG	Secretary of State	FAMC	Holders of common stock get to select some members
DRA	Governor of each state that participates	JMMFF	President selects members of Congress & judges based upon recommendations of congressional leadership & Chief Justice
FDIC	Comptroller of the Currency, Director of CFPB	MWAA	Governors of VA & MD select members as does Mayor of DC.
FHITF	Commissioner of Social Security; Secretary of the Treasury; Secretary of Labor; Secretary of Health & Human Services	MCC	President selects some members from list provided by leadership in Congress
FSMITFB	Commissioner of Social Security; Secretary of Treasury; Secretary of Labor; Secretary of Health & Human Services	RRB	President selects from lists provided by employees, employers.
HSTSF	Secretary of Education or his designee	SIPC	Sec of Treasury selects one & Fed Board selects another.

Table 9. Boards or Commissions Whose Membership the President Does Not Fully Select, continued

Board Includes Specific Government Officials		Other Actors Get to Select Some Board Members	
IAF	Three from agencies concerned with inter-American affairs, U.S. Exec Director or Alt Exec Director of the Inter-Amer Devel Bank	SSAB	Congressional selection of some members
MCC	Sec of State; Sec of Treasury; Admin of the U.S. Agency for Int Development; CEO of the Corp; U.S. Trade Representative	SJI	11 PAS members, 6 state judges & one state court admin appointed from a list submitted by the Conference of Chief Justices
MKUSF	Sec of Interior or designee; Sec of Education or designee		
MRC	7 PAS members, three from Engineer Corps of the Army, one from the National Oceanic and Atmospheric Administration		
AMTRAK	Secretary of Transportation		
OPIC	Admin of USAID, U.S. Trade Rep, one officer of DOL		
USIP	Sec of State or designate approved by the Senate; Sec of Defense or designate approved by the Senate; President or VP of the NDU		
NSEB	Sec of Defense; Sec of Education; Sec of Commerce; Sec of State; Dir of Central Intelligence; Chair of the NEH		
ADF	Two members are appointed from among officers & employees of agencies of the U.S. concerned with African affairs		

There are ways Congress and the President can circumvent such restrictions. Congress has granted waivers in law to qualifications requirements in cases where it has seen fit to do so.[273] In addition, Congress may impose any qualification requirements it prefers on nominees through the confirmation process, even if it does not write them into law. Presidents may use recess appointments to circumvent qualification requirements in cases where a nominee's qualifications have been called into question. Finally, few qualifications requirements are specific enough to limit substantially the President's discretion. For example, in the aftermath of Hurricane Katrina, Congress amended the qualifications requirements for the FEMA Administrator to read: "The Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector."[274] Even by this standard, Michael Brown, the FEMA Administrator at the helm of FEMA at the time of Katrina, arguably would have qualified. In the case of party-balancing requirements, presidents have been able to find members of the opposite party or independents who share the President's ideology to serve on commissions.

c) Protections Against Removal

Arguably the most important limitations on the President's personnel powers are limits on the President's ability to remove agency officials (Table 10).[275] As discussed above, many statutes provide agency officials with fixed-term appointments and indicate

273. For a full discussion, see Hogue, *supra* note 264, at 9-11.
274. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, §§ 503(c)(2)(A)-(B), 120 Stat. 1355, 1397 (2006) (codified at 6 U.S.C. § 313).
275. In some cases, Congress has vested authority for removal in themselves or other executive officials. For example, the statute creating the Tennessee Valley Authority provides that members of the board can be "removed from office at any time by concurrent resolution of the Senate and House of Representatives." This provision has not been challenged, but is of dubious constitutionality. Tennessee Valley Authority Act of 1933, 48 Stat. 58 (1933) (codified as amended at 16 U.S.C. § 831). Board members of the Legal Services Corporation may be removed "by a vote of seven members" for certain reasons. 42 U.S.C. § 2996c(e) (2012).

that the President cannot remove the official except "for cause."[276] The act creating the ICC, for example, prohibited removal except for "inefficiency, neglect of duty, or malfeasance in office."[277] Term lengths vary from as short as one year to as long as fourteen years for members of the Board of Governors of the Federal Reserve.[278] In some multi-member agencies, the terms of members are staggered so that positions do not all come open at once, preventing a President from dramatically changing commission policy quickly through appointment. Provisions creating staggered terms include language that fixes the original terms of board or commission members so that nominations in future years will be staggered. Often one member can be nominated for a term ending after one year, another for a term ending after two years, etc. All subsequent nominees to those positions can serve full terms.

The issue of fixed terms for political appointees and for cause protections has been highlighted in the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board,* where the Court invalidated an agency that had double "for cause" protections against removal.[279] Because the agency's principal officers had for cause protections and a commission inside the agency also had for cause protections, the Court ruled that this unconstitutionally infringed on the executive's power. Table 11 includes a list of agencies with double for cause removal protections from the decision.

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276. More generally, throughout the nation's history, Congress has attempted to reserve the right to weigh in on removals of Senate-confirmed appointees. The specific language communicating "for cause" protection varies. Some statutes prohibit removal except for "good cause" or "cause." Others prohibit removal except for cases of "inefficiency, neglect of duty, or malfeasance in office." Barnett, *supra* note 133, at 1372, 1383.
277. Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 11, 24 Stat. 379 (1887). Interestingly, some scholars argue that this provision actually made it easier for the President to remove a commissioner under the laws in place at the time the act was enacted. The Tenure of Office Act of 1867 prohibited the President from removing Senate-confirmed officials without Senate approval. *See id.*, March 2, 1867, c. 154, 14 Stat. 431 (1867). This provision allowed the President removal power without Senate involvement. Seidman, *supra* note 6, at 184.
278. The head of the Government Accountability Office, an agency in the legislative branch, serves a term of 15 years. 31 U.S.C. § 703.
279. 130 S. Ct. 3138 (2010).

Table 10. Limitations on the President's Removal Power in Independent Agencies

(1) Fixed Term (FT)		(2) Explicit Provisions for Staggered Terms (ST)	(3) Explicit "For Cause" Protections (FC)	(4) Provisions for Continuation of Service (C)	
One Year	FLRA	ADF	CHSIB	ACUS**	JMMFF
FAMC	FMC	BGSEEP	CPSC	ADF	LSC
Two Years	NLRB	BBG	CPB	AMTRAK	MSPB
ONHIR	NTSB	CFTC	FHFA	BGSEEP	MKUSF
Three Years	NRC	CPSC	FLRA	BBG	NCCB
ACUS*	OGE	DNFSB	FMC	CFTC	NCD
BBG	OSC	EAC	FMSHRC	CPSC	NCUA
LSC	RRB	EXIM	FED	CNCS	NEA
MCC	SEC	FCA	FTC	CPB	NEH
NCCB	TVA	FEC	IAIA	DNFSB	NIBS
NCD	*Six Years*	FMC	LSC	EAC	NMB
NIBS	ADF	FMSHRC	MSPB	EEOC	NTSB
NMB	BGSEEP	FED	MWAA	EXIM	ONHIR
OPIC	CPB	FRTIB	NCCB	FCA	OSC
SIPC	FCA	FTC	NLRB	FAMC	OPIC
SJI	FDIC	HSTSF	NMB	FCC	PCLOB
Four Years	FEC	IAIA	NTSB	FDIC**	PRC
EAC	FMSHRC	IAF	NRC	FEC	RRB
EXIM	HSTSF	JMMFF	OSHRC	FHITFB	SEC
FHITFB	IAIA	MWAA	OSC	FHFA	SIPC
FRTIB	IAF	MKUSF	PRC	FLRA	SSA
FSMITFB	JMMFF	NCD	SSA	FMC	SJI
IMLS	MWAA	NCUA	SJI	FED	TVA
NEA	MKUSF	NIBS	USIP	FRTIB	USIP
NEH	NCUA	NLRB	USPS	FSMITFB	USITC
NSEB	NSF	NRC		FTC	USPS
OPM	OSHRC	OSHRC		IAIA	
USIP	PCLOB	OPIC		IAF	
Five Years	PRC	PRC			
AMTRAK	SSA	SEC			
CHSIB	SSAB	SIPC			
CFTC	*Seven Years*	SSAB			
CNCS	CPSC	SJI			
DNFSB	FTC	USIP			
EEOC	MSPB	USITC			
FCC	USPS	USPS			
FHFA	*Nine+ Years*				
	FED (14)				
	MRC (9)				
	USITC (9)				

Note: (1) Statute specifies the term of members, commissioners, or agency heads. (2) Some statutes for commissions have provisions specifying the initial original term lengths so that terms will be staggered. (3) Statute states that members of the commission or board or the agency head may only be removed for "neglect of duty," "malfeasance in office," "inefficiency," or similar language. (4) If an agency member, commissioner, or agency head has a fixed term, this column indicates whether statute provides that, when such person's term has expired, he or she may serve until a successor has been appointed and qualified or some other point should no replacement be found. *The Chairman of ACUS is appointed for a 5-year term by the President, by and with the advice and consent of the Senate. Members of the Council serve three-year terms and members of the Assembly serve two-year terms. **Statutes for ACUS and FDIC explicitly provide that their respective Chairman may serve until a successor is appointed.

The following commissions have limitations on the President's removal power over commissioners, but are sub-department within executive departments and, therefore, not listed in the table above: BVA (6 years, FC, C); FERC (5 years, ST, FC, C); FCSC (3 years, ST, FC, C); IRSOB (5 years, ST); NIGC (3 years, ST, FC, C); STB (5 years, ST, FC, C); USPC (6 years, C). Of note, as well, the head of OFCANGTP may serve until one year after the pipeline is complete. NSEB members may serve up to four years, but the President determines the actual term length. Lastly, the statute for the MWAA states that members may *not* serve after the expiration of their term.

Table 11. Agencies with Explicit Double "For Cause" Protections

Traditional Double "For Cause"			"For Cause" and Career SES Employees	"For Cause" and Administrative Law Judges
Agency	*Second Level*	*Statutory Provision*		
FLRA	FSLRB	"The Chairperson [of the FLRA, who also chairs the Board] may remove any other Board member . . . for corruption, neglect of duty, malfeasance, or demonstrated incapacity to perform his or her functions . . . ." 22 U. S. C. § 4106(e)	BVA (DVA) CSHIB CPSC DOED/PBO[b] FERC (DOE) FLRA FMC FMSHRC FTC MSPB NLRB NMB NRC NTSB OSC PRC SSA STB (DOT) USCCR[c]	CFTC USDA DOED DOE FERC HHS DHS HUD DOI DOJ DOL DOT EPA FCC FLRA FMC FMSHRC FTC NLRB OSHRC SEC SSA USITC USPS
GSA	CBCA	"Members of the Civilian Board shall be subject to removal in the same manner as administrative law judges" 41 U. S. C. § 438(b)(2)[a]		
SSA	OCA	"The Chief Actuary may be removed only for cause." 42 U. S. C. § 902(c)(1)		
USPS	IG	"The Inspector General may at any time be removed upon the written concurrence of at least 7 Governors, but only for cause." 39 U. S. C. § 202(e)(3)		

Source: *Free Enter. Fund*, 130 S. Ct. at 3184-215 (Appendix A) (Breyer, J., dissenting). Agencies in the second column are Foreign Service Labor Relations Board (FSLRB), Civilian Board of Contract Appeals (CBCA), Office of the Chief Actuary (OCA), and Inspector General (IG).

[a] Since the members of the Civilian Board of Contract Appeals are to be treated as administrative law judges, their removal is governed by the Merit Systems Protection Board, whose members are protected by "for cause" provisions. Justice Breyer also included in his dissent agencies with "for cause" protections and SES career professionals and administrative law judges. *Id.*

[b] Refers to the Performance-based Organization for Student Financial Assistance, a "discrete management unit" within the Department of Education. *See* 20 U.S.C. § 1018(a).

[c] So listed in Appendix A to Justice Breyer's dissent, *see Free Enter. Fund*, 130 S. Ct. at 3184-215 (Appendix A) (Breyer, J., dissenting), though the Civil Rights Commission has no political appointees requiring Senate confirmation.

Table 12. Chair Selection and Retention Rules for Multi-Member Bodies

Selection				Retention		
(1) Chair selected by President with Senate confirmation	(2) Chair selected by President without Senate confirmation	(3) Chair elected by members	(4) Chair designated as official who serves in another position in the administration	(5) Fixed term for chair	(6) For cause protections for chair	(7) Statute explicitly states that chair serves at pleasure of President
ACUS ARC BBG CHSIB CFTC DRA EXIM FDIC FED MSPB NCUA NTSB PCLOB RRB *BVA** *FCSC** *NIGC**	ADF DNFSB EEOC CEA CEQ FCA FAMC FCC FLRA FMC FMSHRC FRTIB FTC IAF MRC NCD NLRB NRC OSHRC OPIC PRC SIPC SSAB USITC *FERC** *STB** *USPC**	AMTRAK ARC CNCS CPB DRA EAC** FEC IAIA JMMFF LSC MWAA NCCB NIBS NMB** NSF SJI TVA** USIP USPS *IRSOB**	FHITFB FSMITFB MCC NSEB	*PAS Chair* *ACUS* EXIM FDIC FED NTSB USITC *BVA** *FCSC** *NIGC** *PA Chair* SSAB USITC *Elected* CPB IAIA LSC NCCB NMB NSF SJI USIP	CSHIB *BVA** *NIGC**	CFTC EXIM FAMC NRC PRC SSAB

Note: *Agency is a commission inside an executive department rather than a commission outside the executive departments. **Agency statute uses term other than "elect." These agencies are: National Mediation Board ("designate"); Tennessee Valley Authority ("select"); and U.S. Election Assistance Commission ("select"). (1) Statute specifies that the President, with advice and consent of Senate, appoints the agency head and the agency head is not an official from another agency. The Appalachian Regional Commission and Delta Regional Authority have co-chairs, one appointed by the President and confirmed by the Senate and one elected by the state members of the board. (2) Statute specifies that President designates the agency head but does not provide for Senate advice and consent. (3) Statute provides that the head of the agency is elected from among members or commissioners of the agency. (4) Statute specifies that the head of the agency is an official who also serves in a position in the administration that is outside of the agency. For example, the Secretary of the Treasury is the Managing Trustee of the Federal Supplementary Medication Insurance Trust Fund Board. (5) Statute specifies a term of office for the chair of the agency. (6) Statute specifies that the chair may only be removed for inefficiency, neglect of duty, or malfeasance in office. (7) Statute specifies that the chair serves at the pleasure of the President, may be replaced at any time by the President, or other similar language. If a commission is not listed, its statute did not include the provisions above for the selection or removal of chairs.

Statutes specify different rules regarding the selection of commission chairs and whether fixed term political appointees may stay in their positions after their term has expired. In some agencies, the President is empowered to select the chair, either with or without Senate confirmation. In other agencies, the chair is designated by the board itself (often by election) or designated by statute to be a specific government official. Once a chair is selected, the rules for removal are the subject of some debate.[280] In some cases, the statute provides that the chair serves for a fixed term, although only one agency's statute explicitly provides for cause provisions for the chair. In a handful of other agencies, the statute explicitly provides that the chair may be removed at the President's discretion. Table 12 lists the different agencies whose statutes have different rules for chair selection and removal.

In addition to specifying fixed terms, the statutes creating many agencies provide rules concerning what to do in the case of a vacancy. In some agencies, political appointees whose terms have expired may continue to serve until a successor has been appointed and qualified.[281] For example, the statute governing the Social Security Administration states: "In any case in which a successor does not take office at the end of a Commissioner's term of office, such Commissioner may continue in office until the entry upon office of such a successor."[282] Similarly, while some statutes are silent about who assumes responsibility in the case of a vacancy, other statutes stipulate how vacancies are to be filled, either by giving discretion to the agency head or identifying a specific official to fill the position in

280. Statutory provisions governing continuation of service generally refer only to c.ommissioners or members, and most say "all" commissioners or members. This suggests that chairs are included in continuation provisions. There are two agencies—ACUS and FDIC—whose authorizing statutes explicitly provide for chairs to continue serving until a successor has been appointed. *See Table 10.*
281. See Table 10 for a list of boards and commissions with continuation provisions.
282. 42 U.S.C. § 902(a)(3) (2012). Some statutes put a more definite limit on the continuation of service. For example, one provision in the Federal Communications Commission's underlying statute states: "Commissioners shall continue until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." 47 U.S.C. § 154(c) (2012).

the event of a vacancy.[283] For example, in the Department of Labor, the deputy secretary is to "perform the duties of the secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate."[284] In the case where the statute is silent, agency vacancies are governed by general government-wide laws such as the Vacancies Act and, in some cases, agency succession rules.

d) OMB Review of Budgets, Regulations, and Communications

Another device modern presidents use to direct administrative agencies is centralized review of budgets, regulatory activity, and agency communications with Congress. Congress has delegated, and presidents have assumed, substantial control over the formation of agency budgets. The Budget and Accounting Act of 1921 first gave the President responsibility for collecting agency estimates and formulating a unified national budget.[285] Presidents use this power to control agencies through budget proposals to Congress. While Congress is responsible for enacting appropriations, the President's proposals carry weight because of presidential knowledge of agency programs and activities and the President's veto power, which can be used as leverage in negotiating over contents of appropriations bills.

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283. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913 (2008). The President has the statutory authority to designate an official to fill vacancies in the Department of Veterans Affairs, General Services Administration, and Social Security Administration. The agencies whose statutes provide explicit details about the official that assumes responsibility in the case of vacancy are: Federal Reserve Board; Administrative Conference of the United States; Appalachian Regional Commission; Corporation for National Community Service; Defense Nuclear Facilities Safety Board; Department of Education; Department of Energy; Department of Justice; Department of Labor; Department of Transportation; Department of the Treasury; Environmental Protection Agency; Federal Communications Commission; Federal Deposit Insurance Corporation; Federal Election Commission; Federal Housing Finance Agency; Merit Systems Protection Board; National Aeronautics and Space Administration; National Archives and Records Administration; National Railroad Passenger Corporation (AMTRAK); National Science Foundation; National Transportation Safety Board; Nuclear Regulatory Commission; Office of Personnel Management; Office of the Director of National Intelligence; Postal Regulatory Commission; Small Business Administration; and United States International Trade Commission.
284. 29 U.S.C. § 552 (2012).
285. Pub. L. No. 67-13, 42 Stat. 20 (1921).

In 1981 President Reagan issued Executive Order 12,291, which established centralized OMB review of proposed agency rules.[286] Agencies are required to subject proposed rules to cost-benefit analysis and submit rules to OMB for review.[287] While this executive order has been amended to limit this requirement to economically significant regulations, all subsequent presidents have maintained this requirement for review.[288] OMB Circular A-19 requires agencies to submit proposed legislation and their views on legislation to OMB for review prior to communicating these views to Congress.[289]

Table 13 lists the agencies that are able to bypass OMB review of budget submissions, regulatory actions, and communications with Congress. Budgetary bypass comes in two forms. In one form, the President must submit the agency's budget request without revision along with the President's own proposals. In the other form, the agency submits its budget request directly to Congress without OMB review. An agency's ability to bypass OMB review of budgets, regulations, and communications is determined partly by statute,

286. Exec. Order No. 12,291, 28 C.F.R. § 127 (1982).

287. In 1985, President Reagan issued Executive Order 12,498, which required each agency to submit a regulatory plan to OMB for review each year. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985).

288. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). In January 2007, President Bush issued Executive Order 13,422, which made five changes to the regulatory review process. 72 Fed. Reg. 2763 (Jan. 23, 2007). These changes imposed several requirements on agencies (i.e., identifying a market failure or problem that justifies the regulation, identifying an appointee who will serve as regulatory policy officer in the agency to control rulemaking, and providing estimates of the cumulative costs and benefits of rules they expect to promulgate in each calendar year), expanded OIRA review of guidance documents, and urged agencies to consider more formal rulemaking procedures. *See* Curtis W. Copeland, Cong. Research Serv., RL33862, Changes to the OMB Regulatory Review Process by Executive Order 13422 (Feb. 5, 2007). President Obama revoked this executive order on January 30, 2009. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

289. Office of Mgmt & Budget, Executive Office of the President, OMB Circular No. A-19 (1979); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, on Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), *available at* http://www.citizen.org/documents/OMBDocument1.pdf (accessed August 11, 2012). Presidents also possess significant residual authority to instruct agencies to fill in details omitted in statutes. This authority has existed from the earliest congresses. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure* 57 Law & Contemp. Probs. 1 (Spring 1994).

but also importantly by informal agreement, with independent agencies claiming exceptions based upon the legal status of being independent.

Table 13. Agencies Excluded from OMB Review of Budgets, Rulemaking, and Legislation

Budget				Rulemaking		Legislation and Testimony			
(1) Statute requires that *President* submit agency budget request without revision along with President's own proposals		(2) *Agency* must submit budget directly to Congress without OMB review. OMB either does not get it or receives it at the same time as Congress. OMB may then present different estimates than the agency		(3) Agency exempted from submitting proposed and final rules to OIRA		(4) Statute exempts agency from submitting its communications to OMB for coordination & clearance prior to transmittal to Congress		(5) The agency asserts "informal" legislative bypass authority without any explicit statutory authority even though OMB Circular A-19 covers the agency	
SSA USITC	USPS	CSHIB CFTC CPSC DNFCB FAMC FEC FED FRTIB	LSC MSPB NTSB RRB SEC SJI USIP	CFTC CPSC FCC FDIC FHFA FMC FED	FTC MSHRC NLRB NRC OSHRC PRC SEC USITC	CSHIB CFTC CPSC FCA FDIC FEC FHFA FED FRTIB	MSPB NCUA NTSB OSC RRB SEC SBA/OA* USITC	AMTRAK CPB FCC FMC FTC	LSC NRC SJI TVA USIP

Note: Table includes list of agencies whose statutes are generally recognized as excluding them from centralized budgetary, regulatory, and legislative review by OMB. *Exemption applies only to the Office of Advocacy within the Small Business Administration, rather than the entire agency.

OMB Budget Review: (1) Statutory law requires the President to submit the agency's budget requests to Congress without revision, together with the President's own budget proposals. (2) Statutory law requires the agency to submit its budget directly to Congress without OMB review. *See generally* Appendix of statutory provisions (on file with authors and the Administrative Conference); Office of Mgmt & Budget, Executive office of the President, OMB Circular No. A-11 (2011); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), *available at*: http://www.citizen.org/documents/OMBDocument1.pdf.

OMB Rule Review: (3) The agency is exempted from submitting all regulatory actions to the administrator of the Office of Information and Regulatory Affairs. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); 44 U.S.C. § 3502 (2012). Some sub-agency bureaus may also bypass rule review, including the Federal Energy Regulatory Commission, Consumer Financial Protection Bureau, Office of Financial Research (DTRS), and Office of the Comptroller of the Currency (DTRS).

OMB Legislation and Communications Review: (4) Statutory law exempts the agency from submitting its congressional communications to OMB for coordination and clearance prior to transmittal to Congress. The Office of Advocacy within the SBA is exempted, but other parts of the agency are not. (5) The agency asserts "informal" legislative bypass authority without any explicit authority, statutory or otherwise, even though OMB Circular A-19 does cover the agency. *See generally* Appendix of statutory provisions (on file with author and the Administrative Conference); Office of Mgmt & Budget, Circular No. A-11 (2011); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), *available at*: http://www.citizen.org/documents/OMBDocument1.pdf. Note that Breger and Edles suggest that the NRC does not acknowledge legislative clearance authority by OMB. However, because the authors do not provide a source citation, and OMB Circular No. A-11 and the OMB memo do not suggest bypass authority, the NRC was not considered for coding purposes to have an exemption from OMB legislation and communications review. *See* Breger and Edles, *supra* note 9.

Department Bureaus: Among executive departments, some bureaus or sub-department agencies may also bypass OMB budget review. These include, for column 1, the Internal Revenue Service Oversight Board (Treasury) and for column 2, the Federal Aviation Administration (Transportation) and Surface Transportation Board (Transportation). Others may bypass OMB review for legislative proposals, testimony, and communications with Congress. These include the Federal Aviation Administration (Transportation), Surface Transportation Board (Transportation), Office of the Comptroller of the Currency (Treasury), Office of Thrift Supervision (Treasury), Federal Energy Regulatory Commission (Energy), Office of Federal Housing Enterprise Oversight (Housing and Urban Development), and Office of the National Taxpayer Advocate (Treasury).

e) Control Over Agency Litigation

Another source of centralized presidential control over the executive establishment is the President's control over agency litigation.[290] Congress has vested control of federal litigation to the Department of Justice in order to promote coherence and consistency in the enforcement of federal law. The relevant statute stipulates that: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."[291] As the statute notes, however, some agencies are authorized to litigate on their own, although more are authorized to litigate independently in lower courts than in appeals, particularly before the Supreme Court.[292] For example, the statutes creating different agencies include language such as "the agency shall appoint such other attorneys as may be necessary to represent the agency in courts of law whenever appropriate"[293] or "the agency is authorized to sue and be sued, to complain and to defend in any court of competent jurisdiction, to represent or contract for representation in

290. Devins, *Political Will*, *supra* note 137; Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 Geo. Wash. L. Rev. 1080 (2009); Neal Devins and Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 J. Const. L. 558 (2003).
291. 28 U.S.C. § 516 (2012).
292. The law provides that:

> "(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Court of Federal Claims or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested. (b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

28 U.S.C. § 518(a) (2012).
293. The statute authorizing the Federal Energy Regulatory Commission states: "Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law." 42 U.S.C. § 7171(i) (2012).

all legal proceedings."[294] The Solicitor General generally conducts all litigation before the Supreme Court, even representing independent agencies. The extent of litigating authority varies not just by level of court but also by issue. Some agencies have authority to litigate on all agency issues, and some have authority to litigate on only some issues. The extent of control over specific issues and courts varies across and even within agencies. For example, some agencies control litigation on some issues before all courts and other issues before only some courts.[295] Whether or not an agency has been granted litigating authority, and how much, is an important determinant of agency independence since it determines how much influence the White House has to determine agency actions, statements, and policies and whether these are consistent with those of the President.[296]

2. Insulating Agencies from Congress

Congress exerts influence on the bureaucracy through its power to create, reorganize, and eliminate programs and agencies. Congress determines how inferior officers will be appointed and the Senate confirms nominees.[297] Article I of the Constitution provides

294. For example, the statute authorizing the Export-Import Bank of the United States empowers the Bank "to sue and to be sued, to complain and to defend in any court of competent jurisdiction; to represent itself or to contract for representation in all legal and arbitral proceedings outside the United States." 12 U.S.C. § 635(a)(1) (2012).

295. Devins, *Political Will*, *supra* note 137, at 277-78.

296. Agencies whose current authorizing statutes contain provisions concerning independent litigating authority include: Commodity Futures Trading Commission; Consumer Product Safety Commission; Corporation for National Community Service; Department of Justice; Equal Employment Opportunity Commission; Export-Import Bank; Farm Credit Administration; Federal Agricultural Mortgage Corporation; Federal Deposit Insurance Corporation; Federal Election Commission; Federal Energy Regulatory Commission (Energy); Federal Housing Finance Agency; Federal Labor Relations Authority; Federal Reserve Board; Federal Trade Commission; Institute of American Indian Arts; Inter-American Foundation; Legal Services Corporation; Merit Systems Protection Board; National Consumer Cooperative Bank; National Credit Union Administration; National Labor Relations Board; National Transportation Safety Board; Overseas Private Investment Corporation; Railroad Retirement Board; Securities and Exchange Commission; Securities Investor Protection Corporation; Small Business Administration; State Justice Institute; Surface Transportation Board (Transportation); Tennessee Valley Authority; U.S. African Development Foundation; U.S. Institute of Peace; U.S. International Trade Commission; and U.S. Postal Service.

297. Article II, sec. 2 provides that "but the Congress may by law vest the

Congress the power to give and withhold appropriations to set national priorities and compel agency action.[298] Congress has other means of agency influence as well, including hearings and oversight. The fear of public exposure and the implied threat of legislative or budgetary change behind oversight is a powerful tool that compels agencies to heed congressional directions. By virtue of these formal powers, both branches have substantial influence over federal agencies.

a) Appropriations and Agency Self-funding

Arguably, the most important vehicle by which Congress controls administrative agencies is appropriations. Article I, section 9 of the Constitution provides that: "No money shall be drawn from the Treasury, but in Consequence of appropriations made by Law..."[299] As a result, no federal agency may spend revenues or funds except if Congress has appropriated them. When agencies receive fees for services, whether an application fee or a fee to enter a national park or an assessment on a financial institution, these funds must be returned to the Treasury. Agencies cannot spend these revenues unless explicitly allowed to do so by statute. Congress uses funding levels to set priorities and as an instrument to reward and punish agencies in order to induce agencies to do what Congress wants. Congress historically has directed agency spending through earmarks, which can be communicated informally, in legislative reports accompanying appropriations bills, or in the text of bills themselves. Congress also increasingly relies on limitation riders in appropriations bills to direct agency activity.[300] These limitations take the form of "none of the funds appropriated under this act may be used to pay for action X," and provide an effective means of

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appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." U.S. Const., art. 2, § 2. *See generally* Kate Stith, *Congress's Power of the Purse*, 97 Yale L.J. 1343 (1987).

298. U.S. Const., art. I, § 9, cl. 7.

299. *Id*.

300. Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bur. eaucratic Policy Decisions*, 104 Am. Pol. Sci. Rev. 766 (Nov. 2010); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 36 Duke L.J. 456 (1987).

limiting agency discretion.[301] More generally, Congress's statutory or non-statutory instructions to agencies are made credible by an implied threat to withhold appropriations if the agency does not follow congressional wishes.

At times, Congress and the President have limited their own influence over agencies by allowing agencies to collect and spend revenues outside the appropriations process. This does not limit Congress's ability to set spending caps and few agencies are entirely self-funding, but the greater the degree of self-funding, the more independent the agency is from Congress.[302] Table 14 lists the agencies that have been authorized by Congress to collect and spend funds outside the appropriations process. These exceptions come in a variety of forms that are grouped into distinct categories. Many agencies have been authorized to receive gifts and donations. Some have been given the ability to charge reasonable fees and use the revenue for specific purposes. A smaller set of agencies may become involved in real estate transactions or banking activities. The second to last column includes agencies whose external funding represents a notable portion of their yearly outlays, and Table 15 includes a list of completely self-funded agencies and bureaus. This list is comprised mainly of financial regulatory agencies that receive fees and assessments and government corporations.[303]

301. For example, the FY 2006 appropriations bill for the Department of Health and Human Services specifies that "none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used, in whole or in part, to advocate or promote gun control." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 109-149, title II, 119 Stat. 2833, 2846 (2006).
302. Note, *Budgetary Autonomy and Removal Protection*, *supra* note 133, at 1824.
303. Table 15 breaks down the listed regulatory entities by bureaus and programs.

Table 14. Agency Statutes Providing Sources of Funding Other than Appropriations

(1) Gifts and Donations	(2) Reasonable Admin. Fees	(3) Deal in Property (lease, purchase, hold, etc.)	(4) Invest or Reinvest in Property	(5) Authorizes Working Capital Fund	(6) Business or banking activities authorized	(7) Fees & charges cover substantial portion of operating expenses	(8) Other outside funding authorized
ACUS	CEA	ADF	CIA	CFTC	ADF	AMTRAK	AMTRAK
ADF	DHS	BGSEEP	DOT	CIA	EXIM	ARC	CIA
ARC	DOC	CIA	DTRS	DOE	FAMC	CFTC	CPB
BGSEEP	DOE	DOE	FDIC	DOED	FDIC	FAMC	FAMC
CIA	DOI	DOED	FHFA	DOI	FED	FDIC	FDIC
CNCS	DOT	DOL	HTSF	DOJ	NCCB	FED	FHITFB
DHS	EEOC	FAMC	MKUSF	DOT	NCUA	FHFA	FNMA
DOE	EXIM	FCA	NCCB	DTRS	SBA	MWAA	FSMITFB
DOED	FCA	HUD	NCD	FCA		NCCB	IAIA
DOI	FTC	IAF	NCUA	FDIC		NCUA	MWAA
DOJ	GSA	NARA	OPIC	GSA		NRC	NCCB
DOL	HUD	NASA	RRB	HUD		OFCANGTP	OPIC
DOT	NARA	NCCB	USIP	MKUSF		OPIC	RRB
DTRS	NCCB	NCUA		NARA		SEC	SIPC
FHFA	NIBS	NSF		NCUA		SIPC	STAT
FHITFB	NTSB	OPIC		OPIC		USPS	TVA
GSA	RRB	RRB		PCRP			USIP
HTSF	SBA	SBA		SBA		*FERC**	USPS
HUD	SEC	SIPC		SEC		*NIGC**	
IAF	STAT	STAT		STAT		*STB**	
IAIA	USDA	TVA		USPS			
IMLS	USIP	USPS					
LSC							
MCC							
MKUSF							
NARA							
NASA							
NCD							
NCUA							
NEA							
NEH							
NSF							
NTSB							
OGE							
ONDCP							
PCRP							
RRB							
SBA							
SIPC							
SSS							
STAT							
USDA							
USITC							
USPS							
USTR							

Note: *Agency is a commission whose members serve for fixed terms inside an executive department, rather than a commission outside the executive departments. Federal statutes include a number of different types of provisions that allow agencies freedom from the requirement that their funding come directly from appropriations. This table lists the departments and agencies whose establishment provisions in the U.S. Code include language allowing them funding outside the appropriations process. (1) Statute authorizes the agency to accept, use, and dispose of gifts, donations, or property (real, personal, or mixed) in furtherance of the agency's purposes. (2) Statute authorizes the agency to charge and collect reasonable administrative fees for, among other things, products, services, and access to data. (3) Statute authorizes the agency to lease, purchase, acquire, own, hold, improve, or otherwise deal in property (real, personal, or mixed). (4) Statute authorizes the agency to invest or reinvest any property (real, personal, or mixed) or monies. (5) Statute establishes a working capital fund or other similar fund to be available to the agency without fiscal year limitation for one or more purposes. (6) Statute authorizes the agency to participate in activities generally associated with the business of banking, such as the authority to receive deposits, to insure credit risks of loss, to borrow and lend money, to purchase, sell, and guarantee securities, or other similar functions. (7) Statute authorizes agency to assess and collect fees or charges for the purpose of covering a substantial portion of the cost of operating expenses incurred by the agency. (8) Statute authorizes agency to accept a source of funding outside of appropriated monies that is not in the coding scheme.

Table 15. Agencies and Bureaus Completely Exempt from Appropriations

Farm Credit Administration
Farm Credit System Insurance Corporation
Federal Deposit Insurance Corporation
Federal Home Loan Mortgage Corporation
Federal Housing Finance Agency
Federal Reserve System
Federal Prison Industries, Inc. (DOJ)
National Credit Union Administration
Public Company Accounting Oversight Board (SEC)
Comptroller of the Currency (DTRS)
Bureau of Engraving and Printing (DTRS)

Note: Identification of agencies and bureaus in this table based on Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1824 (2012). Other bureaus not listed may have some other sources of funding, but still require appropriations.

b) Agency Reporting Relationships

The relationship between Congress and federal agencies is influenced importantly by the committee and reporting relationships of each agency. The number of committees and subcommittees actively involved in confirming agency political appointees and monitoring agencies varies from one or two committees to scores of committees. In theory, every agency is overseen by at least four committees, two authorizing committees (one in the House and one in the Senate) and two appropriations committees. Of course, the extent of active oversight varies depending upon the agenda of the committees themselves and the politics of the day. Despite the prohibitions against legislative vetoes, committees and agencies continue to operate under agreements that require agency officials to seek approval of committees prior to taking action.[304] The amount of oversight also varies depending upon the character of the work of the agency. Some agencies implement laws in a specific limited

304. For details, see Louis Fisher, Cong. Research Serv., RL33151, Committee Controls of Agency Decisions (Nov. 16, 2005).

policy area, and the work of other agencies involves numerous policy areas.

The structure of congressional oversight matters for agency behavior. In some cases, having more committees involved in active oversight is helpful since committees have expertise in different policy areas, and redundancy in oversight can ensure that agencies comply with congressional intent. In other cases, however, having too many committees hurts agency performance. In the *Final Report of the National Commission on Terrorist Attacks Upon the United States,* the 9/11 Commission urged: "Congress should create a single, principal point of oversight and review for homeland security … [We] believe that Congress does have the obligation to choose one in the House and one in the Senate, and that this committee should be a permanent standing committee with a nonpartisan staff."[305] At the time of the report there were 108 different committees and subcommittees responsible for overseeing the Department of Homeland Security.[306] The concern with too many committees is that agencies are pulled in different directions, and any efforts to direct or reform DHS must be agreed upon by scores of committees. Empirical research on the question suggests that Congress has less influence over agencies overseen by a greater number of committees relative to the President.[307]

Congress has also written into agency statutes rules and requirements that help facilitate oversight. Congress frequently asks agencies to provide regular reports to specific committees or the chambers as a whole. Congress also empowers advisory commissions to work with agencies to provide advice to agencies

305. Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9-11 Commission Report 421 (2004), *available at* http://www.911commission.gov/report/911Report.pdf.
306. *See Who Oversees Homeland Security? Um, Who Doesn't?*, Nat'l Pub. Radio, July 10, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=128642876 (accessed January 31, 2011).
307. Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, Influencing the Bureaucracy: The Irony of Congressional Oversight (2012) (working paper) (on file with the Center for the Study of Democratic Institutions, Vanderbilt University), *available at* http://www.vanderbilt.edu/csdi/research/cls_csdiwp_5_2012.pdf. For a list of committees responsible for confirming nominees to federal agencies, see Appendix B.

and help Congress monitor the agency. This can come in the form of specific mandates creating such commissions or simply authorization to create such commissions. For example, the statute authorizing the Commodity Futures Trading Commission mandates the creation of the Energy and Environmental Markets Advisory Committee.[308] On the other hand, the Secretary of Energy "is authorized to establish in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate to assist in the performance of his functions."[309] As with other aspects of design, these reporting and commission requirements vary from agency to agency, with some agencies having few such requirements and others having many.

3. Other Key Structural Features

Of course, how responsive an agency is to presidential or congressional direction also depends on adherence to government-wide mandates and features of departments and agencies themselves, including history, details of their statutes, internal organization, personnel, and rules of operation. Congress has enacted a number of government-wide management and transparency laws to facilitate political control of federal agencies, to improve performance and to root out waste, fraud, and abuse (Table 16).[310] The Chief Financial Officers Act of 1990 was intended to improve the financial management practices of federal entities.[311] It required the designation of a chief financial officer (CFO) with appropriate managerial and financial management background in all large agencies.[312] The statute specified that there shall be a CFO appointed by the President and confirmed by the Senate in larger agencies specified in statute,[313] although the requirement for CFO confirmation has been removed by the Presidential Appointment Efficiency and Streamlining Act of 2011. The statute

308. 7 U.S.C. § 2(a)(15)(A) (2012).
309. 42 U.S.C. § 7234 (2012).
310. Brass, Gen. Mgmt. Laws, *supra* note 120.
311. Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (1990).
312. 31 U.S.C. § 901(a)(3) (2012).
313. *Id.* § 901(b)(1).

also mandates that a CFO be installed in other agencies not in the first list, but in these agencies CFOs are appointed by the agency head and are career political appointees either from the competitive service or the Senior Executive Service.[314]

The Information Technology Management Reform Act, Pub. L. No. 104-106, title LI, 110 Stat. 203, 680-89 (1996) (commonly referred to as the Clinger-Cohen Act), mandated the designation of a chief information officer (CIO) in federal agencies. The CIO would be responsible for (1) providing advice to ensure that each agency acquires information technology and manages information resources effectively; (2) developing, maintaining and facilitating an information technology architecture for each agency; and (3) promoting effective and efficient design and operation of all major information resources management processes for each agency.[315] The statute's information technology requirements apply broadly to "executive agencies," as defined in 41 U.S.C. § 133: any executive department, military department, independent establishment, or wholly owned Government corporation.[316]

Finally, Congress enacted the Inspector General Act of 1978 to help root out waste, fraud, and abuse in federal management.[317] The act and its amendments mandated the creation of Offices of Inspector General in various large agencies across the executive branch.[318] Each Inspector General (IG) is appointed by the President

314. *Id.* § 901(b)(2).
315. 40 U.S.C. § 11315 (2012).
316. The statute expressly applies to those agencies requiring CFOs under the Chief Financial Officers Act of 1990. *See* 40 U.S.C. § 1425 (specifying duties and qualifications of CIOs by cross-reference to agencies with CFOs as mandated by 31 U.S.C. § 901(b)). However, there are 90 other agencies that also have Chief Information Officers and are part of the Small Agency CIO Council.
317. There are several exceptions made with respect to IG audits or investigations in agencies dealing with national security. In the Departments of Defense, Homeland Security, Justice, and Treasury, the head of the agency may prohibit the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena if such prohibition is necessary to preserve national security. Should an agency head exercise this power, he and the IG must submit a statement to appropriate congressional committees. *See* 5 U.S.C. app. 3 §§ 8 - 8F (2012). Similar provisions are made for elements of the intelligence community: Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency. *See id.* app. 3 § 8G(d).
318. Each IG is nominated by the President and confirmed by the Senate. IGs

and confirmed by the Senate solely on the basis of "integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[319] An IG may be removed from office by the President. If the President removes or transfers an IG, the President must send a written notice to both houses of Congress not later than 30 days before such removal or transfer explaining the reasons. The act adds a layer of accountability, as each IG must prepare semiannual reports summarizing the activities of his office. These reports are sent to the head of the agency, which then sends the IG report, together with the agency head's response, to the appropriate committees or subcommittees of Congress.

While the statute specifically creates an Office of Inspector General in each agency designated as an "establishment," the statute also mandates that the Director of OMB publish in the Federal Register a list of federal "entities" that fall under the jurisdiction of the Inspector General Act.[320] OMB's "designated federal entities" are required to establish Offices of Inspector General headed by an Inspector General appointed by the head of the agency. An agency that is a "federal entity" must have an audit office that conducts annual agency audits and report the results and any other investigative activities to both chambers of Congress and the director of OMB. The last list published in the Federal Register was in 2009.[321]

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may be removed from office by the President; however, the President must notify both houses of Congress not less than 30 days before any removal or transfer and explain the reasons for such action. 5 U.S.C. app. 3 § 3(b) (2012).

319. *Id*. app. 3 § 3(a).

320. *Id*. app. 3 §§ 2, 8G.

321. *See* Office of Management and Budget, 2008 and 2009 List of Designated Federal Entities and Federal Entities, 74 Fed. Reg. 3656, 3657 (Jan. 21, 2009) (providing updated list of designated federal entities and federal entities); *see also* 5 U.S.C. app. 3 § 8G(a)(2) (1978) (original statute defining "designated Federal entity" to mean 36 specified agencies).

Relatedly, in 1976, Congress enacted the Government in the Sunshine Act, which requires most multi-member bodies to conduct their business in a manner that facilitates public scrutiny and involvement.[322] Specifically, it requires that agencies provide advance notice of meetings and make those meetings accessible. Table 17 includes the list of agencies subject to the law.

322. The Sunshine Act applies to multi-member bodies that have more than half of their members nominated by the President and confirmed by the Senate. *See* 5 U.S.C. § 552b(a) (2012).

Table 16. Government-Wide Position Mandates (CFO, CIO, IG)

Chief Financial Officer		Chief Information Officer		Inspector General					
The Chief Financial Officers Act of 1990 sought to enhance the financial management practices of the federal government. One of the Act's stated purposes was to designate a Chief Financial Officer (CFO) in each executive department and major executive agency.		The Clinger-Cohen Act, designed to reform information technology management in the federal government, established agency Chief Information Officers responsible (40 U.S.C. § 11315).		The Inspector General Act of 1978 established Offices of Inspector General in various agencies across the executive branch. These offices were to provide a means for keeping the head of the agency and Congress fully informed about problems relating to the administration of agency programs and operations. (5 U.S.C. app. 3 § 3(a).					
The statute specifies that there shall be a CFO appointed by the President and confirmed by the Senate in the agencies in the first column (31 U.S.C. § 901(b)(1)). The statute specifies that a CFO be installed in the agencies in the second column, although the CFOs in these agencies are appointed by the head of the agency and are career appointees either from competitive service or the Senior Executive Service (31 U.S.C. § 901(b)(2)).		The statute's CIO requirements (44 U.S.C. § 3506(a)) apply broadly to "agencies" as defined in 44 U.S.C. § 3502(1): any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including EOP, but with certain other exclusions), or any independent regulatory agency. At a minimum, the statute lists specific duties and qualifications for those agencies that are also listed as requiring CFOs in the Chief Financial Officers Act of 1990.[a]		The agency is statutorily defined as an "establishment" under the Inspectors General Act and has an Office of Inspector General that is headed by an Inspector General who is appointed by the President by and with the advice and consent of the Senate.		The agency is statutorily defined as a "designated federal entity" and has an Office of Inspector General that is headed by an Inspector General who is appointed by the head of the agency.		The agency is defined by the Office of Management and Budget as a "federal entity" and has an audit office that conducts an annual audit of agency activities and reports that audit and any other investigative activities to each house of Congress and the Director of OMB.	
USDA DOC DOD DOED DOE HHS DHS HUD DOI DOJ DOL STAT DOT DTRS DVA EPA NASA	USAID GSA NSF NRC OPM SBA SSA	USDA DOC DOD DOED DOE HHS DHS HUD DOI DOJ DOL STAT DOT DTRS DVA EPA NASA	USAID GSA NSF NRC OPM SBA SSA	CIA CNCS COM DHS DOD DOE DOED DOJ DOL DOT DTRS DVA EPA EXIM FDIC FHFA	GSA HHS HUD INT NASA NRC ODNI OPM RRB SBA SSA STAT TVA USAID USDA	AMTRAK ARC BBG CFTC CPSC CPB EAC EEOC FCA FCC FEC FED FLRA FMC	FTC LSC NARA NCUA NEA NEH NLRB NSF PCRP PRC SEC USITC USPS	ACUS ADF CSHIB DNFSB DRA FMCS FMSHRC FRTIB HSTSF IMLS IAIA IAF JMMFF MCC	MKUSF MSPB NCD NMB NTSB OFCA ONHIR OGE OPIC OSC OSHRC SSS USIP

[a]There are 90 other agencies that also have Chief Information Officers and are part of the Small Agency CIO Council. See discussion *supra* note 316.

Table 17. Agencies Subject to the Sunshine Act

ADF	FCC	IRSOB	OSHRC
AMTRAK	FCSC	LSC	PCLOB
BBG	FDIC	MKUSF	PRC
BGSEEP	FEC	MRC	RRB
CFTC	FED	MSPB	SEC
CNCS	FERC	NCD	SIPC
CPB	FHFA	NCUA	SJI
CPSC	FLRA	NIBS	STB
CSHIB	FMC	NLRB	TVA
DNFSB	FMSHRC	NMB	USIP
EAC	FTC	NRC	USITC
EEOC	HSTSF	NSF	USPC
EXIM	IAIA	NTSB	USPS
FCA	IAF	OPIC	

Note: The Comptroller General ruled in 1979 that AMTRAK was subject to the Sunshine Act. *See* Nat'l Railroad Passenger Corp. - Applicability of Freedom of Information, Privacy and Sunshine Acts, 57 Comp. Gen. 773 (1979).

a) Internal Agency Decisions and Processes

Agencies' responsiveness can be influenced by the design of their procedures. For example, commissions can take longer to make determinations as a feature of their being commissions. So, while elected officials may want quick and decisive action, an agency may not be able to do what elected officials ask. One way Congress restricts agency freedom is to require that agencies get approval from outside bodies before taking authoritative action (Table 18).[323] For example, the National Endowment for the Arts may not make determinations on grant applications without approval from an external council, the National Council on the Arts.[324] Similarly, no grants may be made from the National Institutes of Health without the approval of a National Advisory Council attached to the agency.[325] The Chief Executive Officer of the Corporation for National Community Service cannot issue regulations establishing a selection and compensation system for the Corporation's employees without first obtaining the approval of the Director of the Office of Personnel Management.[326] Some statutes still require legislative approval despite the Supreme Court's invalidation of this tool in

323. The list of agencies in Table 18 is based on information from their respective current authorizing statutes.
324. 20 U.S.C. § 955 (2012).
325. Seidman, *supra* note 6, at 182-83.
326. 42 U.S.C. § 12651d(c)(7) (2012).

INS v. Chadha.[327] For example, the Commodity Futures Trading Commission cannot implement any plan to charge and collect fees until that plan is approved by the House Agriculture Committee and the Senate Agriculture, Nutrition, and Forestry Committee.[328]

Table 18. Agencies With Authorizing Statutes That Require Prior

327. 462 U.S. at 956-59.
328. 7 U.S.C. § 16a(a) (2012).

Approval by Other Agency or Congress for Certain Actions

Commodity Futures Trading Commission*
Corporation for National Community Service
Defense Nuclear Facilities Safety Board
Department of Education
Department of Energy*
Department of Transportation
Department of the Treasury
Export-Import Bank of the United States*
Morris K. Udall Scholarship Foundation
National Aeronautics and Space Administration*
National Archives and Records Administration
National Railroad Passenger Corporation (AMTRAK)
Office of the Director of National Intelligence*
Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects
Privacy and Civil Liberties Oversight Board
Securities Investor Protection Corporation
Small Business Administration
United States International Trade Commission
United States Postal Service

Note: This list includes executive departments, but not the sub-department agencies. *Outside approval is required by Congress in the form of a legislative veto.

The internal process of agency decisionmaking also varies. In some agencies, key decisions are made primarily through the adjudication of cases and in others through rulemaking, and this can influence agency responsiveness. A large number of agencies set policy through both. Table 19 includes a list of all agencies authorized to or engaged in adjudication. The first and second columns include lists of agencies whose authorizing statutes give the agency or a sub-part of the agency authority to conduct or hold hearings or adjudications *and* take testimony, receive evidence, employ administrative law judges, or perform other similar adjudicatory functions.[329] The final two columns list agencies that employ administrative law judges.

329 Agencies listed in Table 19 include those agencies whose authorizing statutes giv.es the agency, or a sub-part of the agency, authority to conduct hearings or adjudications, and otherwise provides evidence that the agency employs administrative law judges (ALJs).

Table 19. Agencies with Adjudicatory Authority

Agency	Main Authorizing Statute Includes Provisions Authorizing Adjudication[a]	Main Authorizing Statute Includes Reference to Adjudicatory Portion of APA (5 U.S.C. § 554)[b]	Agency Employs Administrative Law Judges (Association of Administrative Law Judges)[c]	Agency Employs Administrative Law Judges (Breyer)[d]
ARC	X			
CFTC	X		X	X
CHSIB	X			
CPSC	X	X		
USDA	X	X	X	X
DNFSB	X			
DRA	X			
DOC		X	X	
DOED		X		X
DOE	X	X	X	X
FERC			X	X
HHS		X	X	X
DHS	X	X	X	X
HUD	X		X	X
DOI		X	X	X
DOJ	X	X	X	X
DOL		X	X	X
DOT	X	X	X	X
DVA			X	
EPA		X	X	X
EEOC	X	X	X	
FCA		X		
FCC	X	X	X	X
FDIC	X	X		
FEC	X			
FED	X			
FHFA	X			
FLRA	X		X	X
FMC	X		X	X
FMSHRC	X	X	X	X
FTC	X		X	X
MSPB	X		X	
NCD	X			
NCUA	X			
NLRB	X		X	X

Table 19. Agencies with Adjudicatory Authority, continued

Agency	Main Authorizing Statute Includes Provisions Authorizing Adjudication[a]	Main Authorizing Statute Includes Reference to Adjudicatory Portion of APA (5 U.S.C. § 554)[b]	Agency Employs Administrative Law Judges (Association of Administrative Law Judges)[c]	Agency Employs Administrative Law Judges (Breyer)[d]
NSF		X		
NMB	X			
NTSB	X		X	
NRC	X	X	X	
OMB		X		
OSHRC	X	X	X	X
PRC	X			
SEC	X		X	X
SBA	X		X	
SSA	X		X	X
USEAC	X			
USITC	X		X	X
USPS	X		X	X

Note: This table does not list specific bureaus, offices, or divisions within departments or agencies authorized to adjudicate or employing administrative law judges. This information is available with statutory citation in the dataset accompanying this report. *See* Appendix of statutory provisions (on file with authors and the Administrative Conference).

[a] Agencies included in this list have authorizing statutes that give the agency or a sub-part of the agency authority to conduct or hold hearings or adjudications *and* take testimony, receive evidence, employ administrative law judges, or perform other similar adjudicatory functions. Alternatively, the statute indicates that the agency employs administrative law judges. This list relies exclusively on primary authorizing statutes. It should be noted that some agencies have adjudicatory authority granted outside of the primary authorizing statute. For example, the U.S. Patent and Trademark Office is located within the Department of Commerce and does adjudicate, but the PTO is not covered in Commerce's statute. Some examples of statutory provisions that grant adjudicatory authority include:

> *Chemical Safety and Hazard Investigation Board*: The Board, or upon the authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board may for the purpose of carrying out duties hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise attendance and testimony of such witnesses and the production of evidence. 42 U.S.C. § 7412(r)(6)(L)(i) (2012).
>
> *Department of Agriculture*: The Secretary shall have the power to subpoena the attendance and testimony of any witness, and the production of all documentary evidence relating to the enforcement of civil penalties or any matter under investigation in connection with official inspections. The attendance of any witness and the production of documentary evidence may be required from any place in the United States at any designated place of hearing. *See* 7 U.S.C. §§ 2279f(a)-(b) (2012).

[b] The list in this column was compiled by examining the United States Code Annotated's cross references for the provision of the APA relating to adjudication (5 U.S.C. § 554). This list includes the agencies with citations that directly reference the procedures as outlined in that section. Each reference was read to be certain that the provision included, rather than excluded, APA-based adjudicatory proceedings.

[c] The list in this column was created by referring to "Agencies Employing Administrative Law Judges" posted on the Association of Administrative Law Judges' website. *See* http://www.aalj.org/agencies-employing-administrative-law-judges (accessed August 29, 2012).

[d] The agency list in this column is based on Appendix C of the dissenting opinion of Justice Breyer in *Free Enterprise Fund*. 130 S. Ct. at 3213. Justice Breyer's dissent notes that he relied on data from the Office of Personnel Management to compile Appendix C. *Id.*

Table 20. Details of Federal Agencies' Rulemaking Activities

Agency has promulgated an economically significant rule in the last 15 years	Agency has promulgated a rule through a process that included a formal hearing in the last 15 years	Agency has not promulgated a rule in the last 15 years (EOP agencies, executive departments, agencies outside executive departments)
USDA	USDA	ADF
DOC	DOC	ARC
DOD	DOE	BGSEEP
DOED	HHS	BVA (DVA)
HHS	DHS	CEA
DHS	DOI	CPB
HUD	DOJ	DRA
DOI	DOL	EXIM
DOJ	EPA	FAMC
DOL	NRC	FHITFB
STAT	PRC	FSMITFB
DOT	SBA	IAIA
DTRS	USAID	IRSOB
DVA	USPS	MWAA
EPA		MRC
EEOC		NCCB
OMB		NIBS
OPM		NSEB
RRB		OA (EOP)
SBA		ONDCP (EOP)
SSA		OSTP (EOP)
		OFCANGTP
		SIPC
		SSAB
		SJI
		USIP
		USTDA

Note: This table does not list specific bureaus, offices, or divisions within departments or agencies. Data on economically significant rules does not include those from independent regulatory commissions. *See* Office of Information and Regulatory Affairs, Office of Management and Budget, *Historical Reports*, *available at* http://www.reginfo.gov/public/do/eoHistoricReport (information on economically significant rules); Federal Register, *available at* https://www.federalregister.gov (information on both formal and informal rulemaking). Among the larger departments, the specific bureaus promulgating rules through formal rulemaking include: Agricultural Marketing Service (USDA); U.S. Forest Service (USDA); National Oceanic and Atmospheric Administration (DOC); Centers for Medicare and Medicaid Services (HHS); Coast Guard (DHS); National Indian Gaming Commission (DOI); U.S. Fish and Wildlife Service (DOI); Drug Enforcement Administration (DOJ); and Office of Federal Contract Compliance (DOL).

Most agency authorizing statutes also include language that explicitly authorizes the agency to promulgate rules and/or regulations. Those agencies that may promulgate rules, however, do not necessarily do so, and those that do promulgate rules sometimes do so only for minor administrative matters rather than to regulate or set general policy. Table 20 lists the agencies engaged and *not* engaged in rulemaking of different forms. Specifically, it lists all agencies that have promulgated an economically significant rule, or a rule with over $100 million in impact, in the last 15 years. It also includes agencies that have promulgated rules that included a formal hearing (i.e., hybrid or formal rulemaking).

In total, there a number of features of different agencies that determine their responsiveness to the President, Congress, and different groups. Some features of agency design are specifically chosen to limit political influence. Other features of agency design are chosen to enhance responsiveness. Beyond these features, however, are a host of agency-specific factors that influence responsiveness but are hard to characterize generally. Agency choices are influenced by constituency groups, professional norms, and the personality and choices of agency leaders and congressional overseers. When agencies are removed from direct political oversight, they may sometimes be more amenable to influence by their clients or pressure groups. The longer the history of autonomy, the stronger the culture and more difficult readjustment can be if political actors seek to direct agencies to do something quite different from what they have done in the past.

Conclusion

The purpose of this report has been to provide a map of the federal executive establishment. It has sought to describe the history of this establishment, to explain why the establishment is organized the way it is, and to describe trends that will determine what the federal executive establishment will look like in the future. The peril of such a project is that the executive establishment constantly changes as new agencies are added and others are restructured or removed. Like the old farm described by the Brownlow Committee, the federal executive establishment's organization and structure is evolving and changing. Indeed, the period since the publication of the first report on the federal executive establishment in 1980 has been characterized by a number of important trends, some that were visible in 1980 and some that are newly emerging. These trends have important consequences for political control and agency performance.

Arguably the most dramatic change in the federal executive establishment in the last 50 years has been the change in the federal personnel system. Elected officials, unhappy with the federal civil service system, have sought ways to make the executive establishment more responsive by increasing the number of political appointees, granting agencies authority to create their own personnel systems outside of Title 5, and by increasing reliance on contract employees instead of civil servants. The increasing depth and penetration of political appointees has allowed presidents more control over a number of executive agencies, particularly those with government-wide reach such as the Office of Management and Budget, Office of Personnel Management, and General Services Administration. The increased penetration of political appointees allows more democratic accountability. Elected presidents are more easily able to redirect agency activities, to be responsive to the wishes of the public as expressed through elections. There is very little doubt that these political appointees have an influence on the policy outputs of federal agencies.

The increase in political appointees has been controversial, however, precisely because it increases presidential power, and members of Congress decry presidential politicization of federal agencies. Presidential appointees not only change agency policies to be in line with presidential ideological views (e.g., increase or decrease environmental citations, influence U.S. attorney prosecution decisions), they also provide presidents access to the distributional resources of government. Political appointees influence the distribution of federal contracts and grants in electorally consequential ways.[330] Electorally competitive states receive more federal grants, particularly during election years. A number of parties such as the National Commission on the Public Service have worried publicly about how the large number of political appointees influences agency performance. Existing empirical evidence, while limited, suggests that agencies and programs run by a higher percentage of political appointees perform worse than other agencies, either in Program Assessment Rating Tool scores or federal surveys of employee attitudes.[331]

Discussions of the federal personnel system frequently revolve around size and growth or decline in the number of federal employees. The size of the federal workforce has fluctuated between 2 and 3 million employees for some time. However, these numbers mask significant changes in the federal personnel system. While numbers have been relatively stable in the last 40 years, an increasing proportion of federal employees work under appointment authorities other than the traditional merit system, and it is not clear whether the changes have improved performance. Personnel responsibilities have been devolved to agencies and departments, and Congress has given many agencies and departments greater personnel flexibility. Yet such changes have made the federal personnel system harder to monitor and control.

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330. John Hudak, *The Politics of Federal Grants: Presidential Influence over the Distribution of Federal Funds* (Feb. 29, 2012) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with author).
331. Lewis, Presidential Appt., *supra* note 123; David E. Lewis and Nick Gallo, *The Consequences of Presidential Patronage for Agency Performance*, 22 J. Pub. Admin. Res. & Theory 219 (2012).

The stability in numbers of federal employees masks an expansion in the number of contract employees. The increased use of contract employees has been a common way of buying government capacity. If current estimates are correct, the growth in contract employees has been nothing short of astounding. The reliance on contract employees provides managers flexibility, the hope of lower costs, and the ability to buy capacity easily. However, the reliance on contract employees influences the public sector labor market and the willingness of civil servants to invest in agency-specific expertise. Federal employees are less likely to make careers in government service, often leaving government service for private contracting firms. The proliferation of federal contractors also raises issues of monitoring and control. Accurate counts of contract employees do not exist, and the Government Accountability Office has repeatedly identified federal contract management as a problem area for federal management.

The federal personnel system is in a state of profound transition. Beyond the expansions of agency-specific personnel systems and contract employment, the system is confronted with a number of serious problems, including an outdated pay system, a cumbersome hiring process, and a coming retirement wave.[332] Budget cutting proposals targeted at federal employees reflect dissatisfaction with the federal personnel system. Difficulties with the traditional merit system have led to a series of ad hoc workarounds. Growing evidence from the experience of federal and state agencies may soon be enough to provide the foundation for a fundamental reevaluation of the entirety of the federal personnel system.

A second trend that characterizes the period since 1980 is the increasing use of agency designs that insulate agencies from political control, either directly through devices like fixed terms or indirectly by creating agencies as private non-governmental entities. The federal executive establishment is increasingly characterized by agencies with features that create administrative autonomy, in some

332. Paul A. Volcker et al., The Changing Nature of Government Service: A Woodrow Wilson School Task Force Final Report (2009), *available at* http://wws.princeton.edu/gstf/Volcker-Report.pdf.

cases even calling into question whether these instrumentalities are even agencies at all. These new and innovative designs hold out the promise of effectiveness and efficiency. The ability of new federal entities to avoid government-wide managerial mandates and rules creates managerial flexibility that can be employed to better accomplish government objectives.

With greater flexibility and autonomy, however, necessarily comes a lack of political accountability. There are cases where elected officials see the wisdom in limiting their own influence over agency activities. These choices, however, come at a cost when autonomous government actors make poor decisions or become embroiled in scandal. The proliferation of exceptions has significant consequences for centralized management of key policy areas by Congress and the President, including trade, foreign aid, lending, housing, banking, and transportation. Federal agencies designed to be insulated from political control endure longer than other agencies, and the accumulation of these organizations makes centralized coordination of these policy areas more difficult. There have also been visible scandals in hierarchically organized agencies such as the Federal Emergency Management Administration, Minerals Management Service, and the General Services Administration, so the conclusion is not that one structure guarantees excellent performance. Rather, it is impossible to have autonomy and control at the same time, and the increasing fragmentation of the federal executive establishment makes holistic planning difficult. The lack of one unified source to describe the executive establishment and the differences among existing lists is evidence in itself of the difficulty in control and oversight. The purpose of this work is, in large measure, to provide the background necessary for the oversight process to be improved and reformed.

Appendix A-1: List of Agencies – By Agency Name

Administrative Conference of the U.S.	ACUS
Appalachian Regional Commission	ARC
B. Goldwater Scholarship & Excellence in Educ. Pr.	BGSEEP
Broadcasting Board of Governors	BBG
Central Intelligence Agency	CIA
Chemical Safety & Hazard Investigation Board	CSHIB
Commodity Futures Trading Commission	CFTC
Consumer Product Safety Commission	CPSC
Corporation for National Community Service	CNCS
Corporation for Public Broadcasting	CPB
Council of Economic Advisers	CEA
Council on Environmental Quality	CEQ
Defense Nuclear Facilities Safety Board	DNFSB
Delta Regional Authority	DRA
Department of Agriculture	USDA
Department of Commerce	DOC
Department of Defense	DOD
Department of Education	DOED
Department of Energy	DOE
Department of Health & Human Services	HHS
Department of Homeland Security	DHS
Department of Housing & Urban Development	HUD
Department of Justice	DOJ
Department of Labor	DOL
Department of State	STAT
Department of the Interior	DOI
Department of Transportation	DOT
Department of the Treasury	DTRS
Department of Veterans Affairs	DVA
Environmental Protection Agency	EPA
Equal Employment Opportunity Commission	EEOC
Export-Import Bank of the U.S.	EXIM
Farm Credit Administration	FCA

Appendix A-1: List of Agencies – By Agency Name, Continued

Federal Agricultural Mortgage Corporation	FAMC
Federal Communications Commission	FCC
Federal Deposit Insurance Corporation	FDIC
Federal Election Commission	FEC
Federal Hospital Insurance Trust Fund Board	FHITFB
Federal Housing Finance Agency	FHFA
Federal Labor Relations Authority	FLRA
Federal Maritime Commission	FMC
Federal Mediation & Conciliation Service	FMCS
Federal Mine Safety & Health Review Commission	FMSHRC
Federal National Mortgage Association	FNMA
Federal Reserve Board	FED
Federal Retirement Thrift Investment Board	FRTIB
Federal Supp. Medication Insurance Trust Fund Bd	FSMITFB
Federal Trade Commission	FTC
General Services Administration	GSA
Harry S Truman Scholarship Foundation	HSTSF
Institute for Museum & Library Services	IMLS
Institute of American Indian Arts	IAIA
Inter-American Foundation	IAF
James Madison Memorial Fellowship Foundation	JMMFF
Legal Services Corporation	LSC
Merit Systems Protection Board	MSPB
Metropolitan Washington Airport Authority	MWAA
Millennium Challenge Corporation	MCC
Mississippi River Commission	MRC
Morris K. Udall Scholarship Foundation	MKUSF
National Aeronautics & Space Administration	NASA
National Archives & Records Administration	NARA
National Consumer Cooperative Bank	NCCB
National Council on Disability	NCD
National Credit Union Administration	NCUA
National Endowment for the Arts	NEA

Appendix A-1: List of Agencies – By Agency Name, Continued

National Endowment for the Humanities	NEH
National Institute of Building Sciences	NIBS
National Labor Relations Board	NLRB
National Mediation Board	NMB
National Railroad Passenger Corp	AMTRAK
National Science Foundation	NSF
National Security Education Board	NSEB
National Transportation Safety Board	NTSB
Nuclear Regulatory Commission	NRC
Occupational Safety & Health Review Commission	OSHRC
Office of Administration	EOP
Office of the Director of National Intelligence	ODNI
Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects	OFCANGTP
Office of Government Ethics	OGE
Office of Management & Budget	OMB
Office of National Drug Control Policy	ONDCP
Office of Navajo & Hopi Indian Relocation	ONHIR
Office of Personnel Management	OPM
Office of Science & Technology Policy	OSTP
Office of Special Counsel	OSC
Office of the U.S. Trade Representative	USTR
Overseas Private Investment Corporation	OPIC
Peace Corps	PCRP
Postal Regulatory Commission	PRC
Privacy & Civil Liberties Oversight Board	PCLOB
Railroad Retirement Board	RRB
Securities & Exchange Commission	SEC
Securities Investor Protection Corporation	SIPC
Selective Service System	SSS
Small Business Administration	SBA
Social Security Administration	SSA
Social Security Advisory Board	SSAB

Appendix A-1: List of Agencies – By Agency Name, Continued

State Justice Institute	SJI
Tennessee Valley Authority	TVA
U.S. African Development Foundation	ADF
U.S. Agency for International Development	USAID
U.S. Election Assistance Commission	EAC
U.S. Institute of Peace	USIP
U.S. International Trade Commission	USITC
U.S. Postal Service	USPS
U.S. Trade & Development Agency	USTDA
White House Office	WHO
Sub-Department Bureaus:	
Board of Veterans Appeals (DVA)	BVA
Federal Energy Regulatory Commission (DOE)	FERC
Foreign Claims Settlement Comm of the U.S. (DOJ)	FCSC
Internal Revenue Service Oversight Board (DTRS)	IRSOB
National Indian Gaming Commission (DOI)	NIGC
Surface Transportation Board (DOT)	STB
U.S. Parole Commission (DOJ)	USPC

Appendix A-2: List of Agencies – By Abbreviation

ACUS	Administrative Conference of the U.S.
ADF	U.S. African Development Foundation
AMTRAK	National Railroad Passenger Corporation
ARC	Appalachian Regional Commission
BBG	Broadcasting Board of Governors
BGSEEP	B. Goldwater Scholarship & Excellence in Educ. Pr.
BVA	Board of Veterans Appeals (DVA)
CEA	Council of Economic Advisers
CEQ	Council on Environmental Quality
CFTC	Commodity Futures Trading Commission
CIA	Central Intelligence Agency
CNCS	Corporation for National Community Service
CPB	Corporation for Public Broadcasting
CPSC	Consumer Product Safety Commission
CSHIB	Chemical Safety & Hazard Investigation Board
DHS	Department of Homeland Security
DNFSB	Defense Nuclear Facilities Safety Board
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOED	Department of Education
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DRA	Delta Regional Authority
DTRS	Department of the Treasury
DVA	Department of Veterans Affairs
EAC	U.S. Election Assistance Commission
EEOC	Equal Employment Opportunity Commission
EOP	Office of Administration
EPA	Environmental Protection Agency
EXIM	Export-Import Bank of the U.S.

Appendix A-2: List of Agencies – By Abbreviation, Continued

FAMC	Federal Agricultural Mortgage Corporation
FCA	Farm Credit Administration
FCC	Federal Communications Commission
FCSC	Foreign Claims Settlement Comm of the U.S. (DOJ)
FDIC	Federal Deposit Insurance Corporation
FEC	Federal Election Commission
FED	Federal Reserve Board
FERC	Federal Energy Regulatory Commission (DOE)
FHFA	Federal Housing Finance Agency
FHITFB	Federal Hospital Insurance Trust Fund Board
FLRA	Federal Labor Relations Authority
FMC	Federal Maritime Commission
FMCS	Federal Mediation & Conciliation Service
FMSHRC	Federal Mine Safety & Health Review Commission
FNMA	Federal National Mortgage Association
FRTIB	Federal Retirement Thrift Investment Board
FSMITFB	Federal Supp. Medication Insurance Trust Fund Bd
FTC	Federal Trade Commission
GSA	General Services Administration
HHS	Department of Health & Human Services
HSTSF	Harry S Truman Scholarship Foundation
HUD	Department of Housing & Urban Development
IAF	Inter-American Foundation
IAIA	Institute of American Indian Arts
IMLS	Institute for Museum & Library Services
IRSOB	Internal Revenue Service Oversight Board (DTRS)
JMMFF	James Madison Memorial Fellowship Foundation
LSC	Legal Services Corporation
MCC	Millennium Challenge Corporation
MKUSF	Morris K. Udall Scholarship Foundation
MRC	Mississippi River Commission
MSPB	Merit Systems Protection Board
MWAA	Metropolitan Washington Airport Authority

Appendix A-2: List of Agencies – By Abbreviation, Continued

NARA	National Archives & Records Administration
NASA	National Aeronautics & Space Administration
NCCB	National Consumer Cooperative Bank
NCD	National Council on Disability
NCUA	National Credit Union Administration
NEA	National Endowment for the Arts
NEH	National Endowment for the Humanities
NIBS	National Institute of Building Sciences
NIGC	National Indian Gaming Commission (DOI)
NLRB	National Labor Relations Board
NMB	National Mediation Board
NRC	Nuclear Regulatory Commission
NSEB	National Security Education Board
NSF	National Science Foundation
NTSB	National Transportation Safety Board
ODNI	Office of the Director of National Intelligence
OFCANGTP	Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects
OGE	Office of Government Ethics
OMB	Office of Management & Budget
ONDCP	Office of National Drug Control Policy
ONHIR	Office of Navajo & Hopi Indian Relocation
OPIC	Overseas Private Investment Corporation
OPM	Office of Personnel Management
OSC	Office of Special Counsel
OSHRC	Occupational Safety & Health Review Commission
OSTP	Office of Science & Technology Policy
PCLOB	Privacy & Civil Liberties Oversight Board
PCRP	Peace Corps
PRC	Postal Regulatory Commission
RRB	Railroad Retirement Board
SBA	Small Business Administration
SEC	Securities & Exchange Commission

Appendix A-2: List of Agencies – By Abbreviation, Continued

SIPC	Securities Investor Protection Corporation
SJI	State Justice Institute
SSA	Social Security Administration
SSAB	Social Security Advisory Board
SSS	Selective Service System
STAT	Department of State
STB	Surface Transportation Board (DOT)
TVA	Tennessee Valley Authority
USAID	U.S. Agency for International Development
USDA	Department of Agriculture
USIP	U.S. Institute of Peace
USITC	U.S. International Trade Commission
USPC	U.S. Parole Commission (DOJ)
USPS	U.S. Postal Service
USTDA	U.S. Trade & Development Agency
USTR	Office of the U.S. Trade Representative
WHO	White House Office

Appendix B. Senate Committees Confirming Agency Nominees

Agency	Number of Committees	Committees
ACUS	1	Judiciary
ADF	1	Foreign Relations
AMTRAK	1	Commerce, Science, & Transportation
ARC	1	Environment & Public Works
BGSEEP	1	Health, Education, Labor, & Pensions
BBG	1	Foreign Relations
CIA	1	Intelligence
CSHIB	1	Environment & Public Works
CFTC	1	Agriculture, Nutrition, & Forestry
CPSC	1	Commerce, Science, & Transportation
CNCS	2	Health, Education, Labor, & Pensions; Homeland Security & Governmental Affairs
CPB	1	Commerce, Science, & Transportation
DNFSB	1	Armed Services
DRA	1	Environment & Public Works
USDA	2	Agriculture, Nutrition, & Forestry; Homeland Security & Governmental Affairs
DOC	6	Banking, Housing, & Urban Affairs; Commerce, Science, & Transportation; Environ & Public Works; Finance; Homeland Security & Governmental Affairs; Judiciary
DOD	3	Armed Services; Environment & Public Works; Homeland Security & Govt. Affairs
DOED	2	Health, Education, Labor, & Pensions; Homeland Security & Govt. Affairs
DOE	3	Armed Services; Energy & Natural Resources; Homeland Security & Govt. Affairs
HHS	4	Finance; Health, Education, Labor, & Pensions; Homeland Security & Govt. Affairs; Indian Affairs

Appendix B. Senate Committees Confirming Agency Nominees, Continued

DHS	4	Commerce, Science, & Transport; Finance; Homeland Security & Govt. Affairs; Judiciary
HUD	2	Banking, Housing, & Urban Affairs; Homeland Security & Govt. Affairs
DOJ	3	Judiciary; Homeland Security & Governmental Affairs; Intelligence
DOL	3	Health, Education, Labor, & Pensions; Homeland Security & Governmental Affairs; Veterans Affairs
STAT	3	Foreign Relations; Homeland Security & Governmental Affairs; Intelligence
DOI	4	Energy & Natural Resources; Environment & Public Works; Homeland Security & Governmental Affairs; Indian Affairs
DOT	4	Banking, Housing, Urban Affairs; Commerce, Science, & Transportation; Environment & Public Works; Homeland Security & Govt. Affairs
DTRS	4	Banking, Housing, & Urban Affairs; Finance; Homeland Security & Governmental Affairs; Intelligence
DVA	2	Veterans Affairs; Homeland Security & Govt. Affairs
EAC	1	Rules & Administration
EPA	2	Environment & Public Works; Homeland Security & Govt. Affairs
EEOC	1	Health, Education, Labor, & Pensions
EXIM	2	Banking, Housing, & Urban Affairs; Homeland Security & Govt. Affairs
FCA	1	Agriculture, Nutrition, & Forestry
FAMC	1	Agriculture, Nutrition, & Forestry
FCC	1	Commerce, Science, & Transportation
FDIC	2	Banking, Housing, & Urban Affairs; Homeland Security & Govt. Affairs
FEC	1	Rules & Administration

Appendix B. Senate Committees Confirming Agency Nominees, Continued

FHITFB	1	Finance
FHFA	1	Banking, Housing, & Urban Affairs
FLRA	1	Homeland Security & Governmental Affairs
FMC	1	Commerce, Science, & Transportation
FMCS	1	Health, Education, Labor, & Pensions
FMSHRC	1	Health, Education, Labor, & Pensions
FED	1	Banking, Housing, & Urban Affairs
FRTIB	1	Homeland Security & Governmental Affairs
FSMITFB	1	Finance
FTC	1	Commerce, Science, & Transportation
GSA	1	Homeland Security & Governmental Affairs
HSTSF	1	Health, Education, Labor, & Pensions
IMLS	1	Health, Education, Labor, & Pensions
IAIA	1	Indian Affairs
IAF	1	Foreign Relations
JMMFF	1	Health, Education, Labor, & Pensions
LSC	1	Health, Education, Labor, & Pensions
MSPB	1	Homeland Security & Governmental Affairs
MWAA	1	Commerce, Science, & Transportation
MCC	1	Foreign Relations
MRC	1	Environment & Public Works
MKUSF	1	Environment & Public Works
NASA	2	Commerce, Science, & Transportation; Homeland Security & Govt. Affairs
NARA	1	Homeland Security & Governmental Affairs
NCCB	1	Banking, Housing, & Urban Affairs
NCD	1	Health, Education, Labor, & Pensions
NCUA	1	Banking, Housing, & Urban Affairs
NEA	1	Health, Education, Labor, & Pensions
NEH	1	Health, Education, Labor, & Pensions
NIBS	1	Banking, Housing, & Urban Affairs
NLRB	1	Health, Education, Labor, & Pensions
NMB	1	Health, Education, Labor, & Pensions
NSF	1	Health, Education, Labor, & Pensions

Appendix B. Senate Committees Confirming Agency Nominees, Continued

NSEB	1	Armed Services
NTSB	1	Commerce, Science, & Transportation
NRC	2	Environment & Public Works; Homeland Security & Govt. Affairs
OSHRC	1	Health, Education, Labor, & Pensions
OGE	1	Homeland Security & Governmental Affairs
ONHIR	1	Indian Affairs
OPM	1	Homeland Security & Governmental Affairs
OSC	1	Homeland Security & Governmental Affairs
ODNI	1	Intelligence
OFCANGTP	1	Energy & Natural Resources
OPIC	1	Foreign Relations
PCRP	1	Foreign Relations
PRC	1	Homeland Security & Governmental Affairs
PCLOB	1	Judiciary
RRB	2	Health, Education, Labor, & Pensions; Homeland Security & Govt. Affairs
SEC	1	Banking, Housing, & Urban Affairs
SIPC	1	Banking, Housing, & Urban Affairs
SSS	1	Armed Services
SBA	2	Small Business & Entrepreneurship; Homeland Security & Govt. Affairs
SSA	2	Finance; Homeland Security & Govt. Affairs
SSAB	1	Finance
SJI	1	Judiciary
TVA	2	Environment & Public Works; Homeland Security & Govt. Affairs
USAID	2	Foreign Relations; Homeland Security & Governmental Affairs
USIP	1	Health, Education, Labor, & Pensions
USITC	1	Finance
USPS	1	Homeland Security & Governmental Affairs
USTDA	1	Foreign Relations

Note: Many agencies that have Homeland Security & Govt. Affairs in addition to other committees have this committee listed because of its role in confirming inspectors general.

Appendix C. Agency Structure Codebook

This codebook describes the data collected for *The Federal Executive Establishment*, a report prepared for the Administrative Conference of the United States. The dataset described in this codebook has three components: (1) the codebook describing the variables and their coding, (2) the statutory provisions justifying the coding, and (3) a Microsoft Excel spreadsheet containing the data. This document comprises the first component of the dataset.

Data Collection

A team of researchers under the direction of a team lead collected data on all federal agencies in the summer of 2012. For the purposes of this report, researchers followed the Administrative Procedure Act (APA) and defined all federal entities outside the legislative and judicial branches as federal agencies for the purposes of data collection. Among the set of federal entities, researchers examined only those that included Senate-confirmed political appointees. The data collection focuses on the top leadership and activities of agencies in the Executive Office of the President, the executive departments, and independent agencies, rather than their component bureaus, divisions, and committees. Agency statutes are the primary source of data for each agency. The choice to rely on statutory law was made for the sake of consistent coding across all agencies and to capture the agreed-upon structural deal made between Congress and the President. For a few variables, notably those relating to OMB review of budgets, legislative proposals, testimony, and regulations, researchers referenced OMB publications to U.S. Code agencies. Researchers also relied on outside information in coding for adjudicatory authority and congressional committee confirmation and oversight information.

Method

Data collection proceeded in three phases. In the first phase, each researcher on the team researched approximately 15 agencies. Each researcher found the original public law that established the agency and that law's corresponding updated section in the U.S. Code.

Unless otherwise specified, all information referring to "statute" in the codebook comes from this updated section of the U.S. Code.[333] Next, each researcher read that section of the Code and extracted information about the agency's structure. Researchers noted statutory features of each agency along with a statutory reference for each feature. A total of 55 statutory characteristics of agencies were tracked for the 9 components of the Executive Office of the President (EOP), the 15 executive departments, and 81 independent agencies.[334] Researchers noted the location of each agency (e.g., EOP, executive departments, independent agency, etc.), features of agency governance (e.g., commission, fixed terms, number of political appointees), agency powers (e.g., power to raise funds, independent litigating authority), and aspects of agency political oversight (e.g., OMB and congressional reporting requirements, congressional committee jurisdiction).

In the second phase of the research, the researchers' work was double checked against the work of the team lead. Once each researcher completed coding each agency's statute, he or she sent it to the team lead. The team lead also coded the statutes for each of the agencies. After the team lead received the completed coding from the team, she compared the two coded versions of the data for each agency and resolved any discrepancies in the coding. She then placed the final data in the Master Agency Structure Spreadsheet.

In the final phase, coding of the data was validated using a variety of different sources, depending upon the type of agency

333. All statutory provisions cited in this Codebook are current as of July 1, 2012.
334. What constitutes a federal agency is a matter of some dispute since such designation opens up an organization to laws such as the Freedom of Information Act (5 U.S.C. § 552) and the Government in the Sunshine Act (5 U.S.C. § 552b). By focusing only on entities with Senate-confirmed appointees, there are hundreds of federal advisory commissions, ceremonial bodies with heads appointed by Congress and other actors, and multi-lateral organizations where the entity is jointly run between the United States and another nation. Kosar, Quasi Gov't, *supra* note 39.

and characteristic.[335] Where discrepancies emerged,[336] statutes were reread and a judgment was made about what source was correct. Any discrepancies between the team's coding and existing research are noted in footnotes in the portion of the dataset listing the statutory provisions justifying the coding for each agency.

Variables and Coding

Basic Agency Characteristics

Agency Name: Name of Agency

Date of Creation: Date the establishing statute for the agency became law. In most cases the date of creation is clear. In some cases, however, there is some uncertainty. For example, the Department of Labor was created as an independent agency in 1888, became part of the Department of Labor and Commerce in 1903, and was named an executive department in 1913. Where there was uncertainty, the researchers relied on agency self-interpretation. *Source*: Agency statute

335. Sources include: Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000); Datla and Revesz, *Deconstructing Independent Agencies*, *supra* note 9; *Free Enterprise Fund*, 130 S. Ct. 3138 (Breyer, J., dissenting).

336. If discrepancies exist, they are often the result of the team using the provisions of the statutory law described above to code the structural features of the agency. By relying on the portions of the U.S. Code related to agency structure, it is possible that other statutory provisions outside of the establishing statute impose additional requirements on the agency or specify additional structural features of the agency. In addition, not all structural features are detailed in statute. Many are determined by agency action. Agencies promulgate regulations to implement law and clarify areas where statutory law is unclear. For example, many commission statutes are silent on the question of what constitutes a quorum in an agency, yet such rules are necessary for the functioning of the agency. Agencies subsequently clarify this uncertainty in regulation or bylaws. Finally, in some cases, administrative common law gives agencies features that differ from what is in statute. For example, the statute authorizing the Securities and Exchange Commission does not include "for cause" protection for the removal of commissioners. Nonetheless, federal courts recognize the existence of "for cause" protection for SEC Commissioners despite absence of explicit reference to such protection in the underlying statute. *See, e.g., Blinder*, 855 F.2d 677.

and agency-issued statements about agency history (usually from the agency's website).

Statute: Sections of the U.S. Code that establish the agency.

Sub-agency Bureaus: The number of distinct bureaus or offices within the agency mentioned in the statute. Given the irregularity of the use of terms (agency, administration, bureau, division, and office), no distinction is made in counting between whether something is called an "agency," "administration," "bureau," "office," or "division." *Source*: Agency statute.

Employees: The number of employees in the agency as of September 2011.[337] *Source*: Office of Personnel Management, *Central Personnel Data File*, (September 2011), http://www.fedscope.opm.gov/employment.asp. In cases where OPM does not collect employment data, researchers relied on other sources, such as Congressional Research Service reports, communications with agency officials, and secondary sources for estimates of agency employment.

Features Insulating from the President

Commission: (1) The agency is governed by a multi-member board or commission whose members are protected from removal except for neglect of duty or malfeasance in office; (0) The agency is not governed by a multi-member board or commission whose members are protected from removal except for neglect of duty or malfeasance in office. Some agencies do not have statutory for cause protections but are considered to have implied for cause protections because the

337. For agencies not listed in OMP's FedScope, the research team contacted each agency to obtain the number of federal employees working in that agency in 2011. These agencies are noted in the earlier discussion of the FedScope database. *See supra* note 27. If the agency directed a researcher to an outside source, that source is also identified in note 27.

agencies are "quasi-judicial and quasi-legislative."[338] These agencies are coded as a (1). Researchers considered multi-member boards or commissions as "quasi-judicial and quasi-legislative" if they participated in both rulemaking and adjudication. *Source*: Agency statute.

Commissioners/ Board Members: If the agency is a commission or has a board of directors, the number of *voting* members on the commission or board of directors. (.) denotes an agency is not a commission or does not have a board. *Source*: Agency statute.

Quorum Rules: (1) Statute specifies the number of commissioners or board members that constitute a quorum; (0) Statute does not specify the number of commissioners or board members that constitute a quorum; (.) Quorum rules not applicable because not a commission or board. *Source*: Agency statute.

Quorum Number: If Quorum Rules is coded (1), the number of members or commissioners the statute specifies to constitute a quorum. *Source*: Agency statute.

Political appointees:

PAS: Number of positions in agency subject to presidential appointment with Senate confirmation. *Source*: Staff of S. Comm. on Homeland Sec. & Gov't Affairs, 110th Cong., Policy and Supporting Positions (Comm. Print 2008), *available at* http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2008/pdf/GPO-

338. *See Blinder*, 855 F.2d 677; Fed. Election Comm'n v. Nat'l Rifle Aass'n Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).

PLUMBOOK-2008.pdf [hereinafter 2008 PLUM BOOK].

NA: Number of Senior Executive Service general positions in agency filled by non-career appointment. *Source*: 2008 PLUM BOOK.

SchC: Number of positions in agency filled by Schedule C Excepted Appointment. *Source*: 2008 PLUM BOOK.

PA: Number of positions in agency subject to presidential appointment without Senate confirmation that are not non-career SES positions or Schedule C positions. *Source*: 2008 PLUM BOOK.

XS: Number of policy and supporting positions in the agency subject to statutory excepted appointment that are not PAS, NA, SC, or PA positions. *Source*: 2008 PLUM BOOK.

Agency-specific Personnel System: For the purposes of the chapters of Title 5 relating to pay and allowances, certain agencies' employees are excluded from the definition of "employee"[339] and other agencies' statutes permit employment systems particular to that agency. Examples of statutory language indicating separate employment systems include "members, officers, and employees of the agency are not federal employees for any purpose"[340] or "rates of basic pay for all employees may be set and adjusted by the agency without regard to civil service provisions."[341] Other statutes allow for some agency employees to fall outside of civil service provisions but place limitations on

339. 5 U.S.C. § 5102 (2012).
340. 40 U.S.C. § 14301(b)(3) (2012) (Appalachian Regional Commission).
341. 7 U.S.C. § 2(a)(7)(B) (2012) (Commodity Futures Trading Commission).

the number. Examples of this sort of language include the agency "may appoint not more than 425 of the scientific, engineering, and administrative personnel of the Administration without regard to civil service laws."[342] Agency-specific personnel system is coded (3) if 5 U.S.C. § 5012 excepts agency employees from the definition of "employee"; (2) if the agency's statute permits the agency to use employment systems particular to that agency; (1) if the agency statute allows a limited number of employees to fall outside of civil service provisions; (0) if the statute does not specifically allow for any agency employees to fall outside of civil service provisions. *Source*: 5 U.S.C. § 5012 (2012); Agency statute.

Limitation on Appointments:

Citizen of U.S.: (1) Statute mandates that board members or commissioners or the agency head must be citizens of the United States; (0) Statute does not mandate that members/commissioners/agency head be citizens of the United States. *S ource*: Agency statute.

Civilian: (1) Statute mandates that board members or commissioners or the agency head must be civilians; (0) Statute does not mandate that members/commissioners/agency head be civilians. *Source*: Agency statute.

Geographic: (1) Statute places a geographic limitation on the nomination/selection of board members or commissioners or the agency head; (0) Statute does not place a geographic limitation on members/commissioners/agency head. A statute that advises

342. 51 U.S.C. § 20113(b)(1) (2012) (National Aeronautics and Space Administration).

the President to consider geography "to the maximum extent possible," "as nearly as practicable," or similar language is coded as a (1). *Source*: Agency statute.

Demographic: (1) Statute places a demographic limitation on the nomination/selection of board members or commissioners or the agency head; (0) Statute does not place a demographic limitation on members/commissioners/agency head. A statute that advises the President to appoint members so that the Board shall be diverse according to race, ethnicity, age, gender, or other characteristics "to the maximum extent possible," "as nearly as practicable," or similar language is coded as a (1). *Source*: Agency statute.

Expertise: (1) Statute places an expertise or experience limitation on the nomination/selection of members or commissioners or the agency head; (0) Statute does not place an expertise or experience limitation on members/commissioners/agency head. *Source*: Agency statute.

Conflict of Interest: (1) Statute places a conflict of interest limitation on the nomination/selection of members; (0) Statute does not place a conflict of interest limitation on members. *Source*: Agency statute.

Congressional Input: (1) Statute provides some mechanism for congressional input in the nomination process aside from confirmation; (0) Statute does not provide for congressional input. Examples of congressional input include "appointed by the President after taking into consideration the recommendation made by the Speaker of the House," "appointed by the President upon the recommendation of the President of the Senate," or similar language, and also includes those agencies where members of Congress are voting

members of the Board. *Source*: Agency statute.

Party Balancing: (1) If the agency is a commission or has a board of directors, the statute limits the number of members who may serve from the same party; (0) If the agency is a commission or has a board of directors, the statute does not limit the number of members who may serve from the same party; (.) Denotes an agency is not a commission or does not have a board. Statutes that require the President to select among recommendations from separate party leaders in Congress (e.g., Senate majority and minority leaders) but do not specifically place limits on the number of members who can be from one party are coded as (0).[343] *Source*: Agency statute.

Limitations on Removals

Fixed Terms: (1) Statute specifies a fixed term for members, commissioners, or agency heads; (0) Statute does not specify a fixed term for members/commissioners/agency head. *Source*: Agency statute.

Term Length: If Fixed Terms is coded (1), the number of years specified for each term. *Source*: Agency statute.

Staggered Terms: (1) If the agency is a commission or has a board of directors, Fixed Terms is coded (1), and the statute fixes the terms of the initial members of the commission or board so that nomination in future years will be staggered; (0) If the agency is a commission or has a board of directors, Fixed Terms is coded (1), and the statute does not fix terms so that nomination will be staggered; (.) The agency is not a commission or does not have a board of directors. *Source*: Agency statute.

343. *But see* Datla and Revesz, *Deconstructing Independent Agencies*, *supra* note 9.

For Cause: (1) Statute states that members of the commission or board or the agency head may only be removed by the President for "neglect of duty," "malfeasance in office," "inefficiency," or similar language; (0) Statute does not place limitation on the removal of members of the commission or board or the agency head. *Source*: Agency statute.

Double For Cause: (1) Agency identified as having two levels of "for cause" protection; (0) Agency not identified as having two levels of "for cause" protections. *Source*: Appendix A of the dissenting opinion of Justice Breyer in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.* 130 S. Ct. 3138 (2010).

Bureau Fixed Term: (1) Sub-agency bureau has a fixed term; (0) No bureau inside agency has an official with a fixed term. *Source:* Agency statute.

ServePresident: (1) Statute specifies that officials serve at the pleasure of the President; (0) Statute does not specifically state that officials serve at the pleasure of the President. S*ource*: Agency statute.

Continuation Replacement: (1) If Fixed Terms is coded (1) and statute provides that a member or commissioner or the agency head whose term has expired may serve until a successor has been appointed and qualified; (0) If Fixed Terms is coded (1) and statute does not provide for continuation until replacement; (.) The commission or board members or agency head do not have fixed terms.[344] *Source*: Agency statute.

344. The Department of the Treasury's statute provides that, when a term of office of any officer of the Department ends, the officer may continue to serve until a successor is appointed and qualified. 31 U.S.C. § 329(a)(1) (2012). However, because the Secretary of the Treasury does not have a fixed term, the Treasury Department is coded (.)

Acting Service Rules: (2) Statute specifies that in the event of absence, disability, or vacancy at the position of agency head, the President may designate an individual to fill the vacancy; (1) Statute designates a specific official within the agency who may perform the agency head's duties in case of absence, disability, or vacancy and does not allow for presidential designation; (0) Statute is silent on acting service. *Source*: Agency statute.

Chair Selection and Retention

PAS Head of Commission:[345] (1) Statute specifies that the President, with advice and consent of Senate, appoints the agency head and the agency head is not an official from another agency;[346] (0) Statute does not specify that the President appoints the agency head with the advice and consent of the Senate. *S ource*: Agency statute.

President Selects Chair: (1) Statute specifies that the President designates the agency head but does not provide for Senate advice and consent; (0) Statute does not specify that the President designates the agency head without Senate advice and consent. *Source*: Agency statute.

Head Elected by Commission: (1) Statute provides that the head of the agency is elected from among members or commissioners

345. Co-chairmen selected by different means are coded as a (1) in two categories. For example, the Appalachian Regional Commission has co-chairmen—one appointed by the President and confirmed by the Senate, and one elected by the state members of the Commission. 40 U.S.C. §§ 14102(a)(1), 14301(b) (2012). This agency is coded as a (1) under PAS Head of Agency and as a (1) under Elected Head of Agency.

346. For example, the Managing Trustee of the Federal Hospital Insurance Trust Fund Board is the Secretary of Treasury. 42 U.S.C. § 1395i(b) (2012). This position is coded as a (0).

of the agency; (0) Statute does not provide for the election of the agency head.[347] *Source*: Agency statute.

Outside Head of Commission: (1) Statute specifies that the head of the agency is an official who also serves in a position in the administration that is outside of the agency; (0) Statute does not specify that the head of the agency is an outside official. For example, the Secretary of the Treasury is the Managing Trustee of the Federal Supplementary Medication Insurance Trust Fund Board. This Board is therefore coded (1). *Source*: Agency statute.

Chair Removal: If the agency is a multi-member board or commission and the chair of the board or commission is selected by the President or appointed by the President with the advice and consent of the Senate and is not a designated official from another agency, (1) Statute specifies a term of office for the chair of the agency; (2) Statute specifies that the chair may only be removed for inefficiency, neglect of duty, or malfeasance in office; (3) Statute specifies that the chair serves at the pleasure of the President, may be replaced at any time by the President, or other similar language; (0) Statute does not specify a term of office for the chair, does not state that the chair may only be removed for cause, and does not state that the chair serves at the pleasure of the President. Statutes that specify terms of office or for cause protections for board members or commissioners generally but are silent with respect to the chair specifically are coded (0). *Source*: Agency statute.

347. In the following agencies, the agency statute uses a term other than "elect": Nat.ional Mediation Board ("designate"); Tennessee Valley Authority ("select"); and U.S. Election Assistance Commission ("select").

Centralized OMB Review:

No OMB Budget Review:[348] (2) Statute requires the President to submit the agency's budget requests to Congress without revision, together with the President's own budget proposals; (1) Statute requires the agency to submit its budget directly to Congress without OMB review; (0) Statute is silent on OMB budget review. *Source*: Office of Mgmt. & Budget, Executive Office of the President, OMB Circular A-11 (2001); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, *Agencies with Legislative and Budget "Bypass" Authorities* (Feb. 20, 2001), *available at* http://www.citizen.org/documents/OMBDocument1.pdf.

NO OMB Rule Review: (1) The agency is exempted from submitting all regulatory actions to the administrator of the Office of Information and Regulatory Affairs; (0) The agency is not exempted from OIRA review. *Source*: Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); 44 U.S.C. § 3502 (2012).

No OMB Communications Review:[349] (2) The agency asserts "informal" legislative bypass authority without any explicit authority, statutory or otherwise, even though OMB Circular A-19 does

348. The Federal Aviation Administration and the Surface Transportation Board, which are both part of the Department of Transportation, have statutorily-based budgetary bypass authority. However, because the entire Department of Transportation does not have bypass authority, DOT is coded (0).

349. The Federal Aviation Administration and the Surface Transportation Board (both part of the Department of Transportation), as well as the Offices of the Comptroller of the Currency, Thrift Supervision, and National Taxpayer Advocate (all part of the Department of the Treasury), have statutorily-based legislative bypass authority. However, because neither the entire Department of Transportation nor the Department of the Treasury have bypass authority, these departments are coded as (0).

cover the agency; (1) Statutory law exempts

the agency from submitting its communications to Congress to OMB for coordination and clearance prior to transmittal to Congress; (0) The agency must submit communications to Congress to OMB for coordination and clearance prior to transmittal to Congress. *Source*: Agency statute; 12 U.S.C. § 250 (2012); Office of Mgmt. & Budget, Executive Office of the President, OMB Circular No. A-19 (1979); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, *Agencies with Legislative and Budget "Bypass" Authorities* (Feb. 20, 2001), *available at* http://www.citizen.org/documents/OMBDocument1.pdf.

Independent Litigating: In general, the Attorney General retains full authority over all litigation, civil and criminal, to which the United States, its agencies, or its departments are parties, unless otherwise authorized by law. Some statutes establish an exception to the Attorney General's authority and expressly authorize an agency to represent itself in legal proceedings. Courts interpret these statutes narrowly, and only statutes that are clear and unambiguous will establish an exception.[350] The researchers also interpret the statutes narrowly. (1) Agency authorizing statute includes provisions relating to independent litigating authority; (0) Statute does not include provisions concerning the agency's ability to represent itself in legal proceedings. *Source*: Agency statute.

350. *E.g.*, United States v. California, 332 U.S. 19 (1937); United States v. Morgan, 222 U.S. 274 (1911).

Independent Sources of Funding: (1) Statute authorizes the agency to accept, use, and dispose of gifts, donations, or property (real, personal, or mixed) in furtherance of the agency's purposes; (2) Statute authorizes the agency to charge and collect reasonable administrative fees for products, services, access to data, etc.; (3) Statute authorizes the agency to lease, purchase, acquire, own, hold, improve, or otherwise deal in property (real, personal, or mixed); (4) Statute authorizes the agency to invest or reinvest any property (real, personal, or mixed) or monies; (5) Statute establishes a working capital fund or other similar fund to be available to the agency without fiscal year limitation for one or more purposes; (6) Statute authorizes the agency to participate in activities generally associated with the business of banking, such as the authority to receive deposits, to insure credit risks of loss, to borrow and lend money, to purchase, sell, and guarantee securities, or other similar functions; (7) Statute authorizes agency to assess and collect fees or charges for the purpose of covering a substantial portion of the cost of operating expenses incurred by the agency;[351] (9) Statute authorizes agency to accept a source of funding outside of appropriated monies that is not in the coding scheme. *Source*: Agency statute.

351. Even if the statute authorizes a specific agency within an executive department to collect fees, that department is not, as a whole, funded substantially by such fees and therefore does not fall under (7). For example, while the Federal Energy Regulatory Commission must assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that year, the Department of Energy is coded (2) because these fees do not cover a substantial portion of the operating costs of the entire Department of Energy. In addition, a list of agencies that do not accept appropriations from Congress was compiled using Note, *Budgetary Autonomy and Removal Protection*, *supra* note 133, at 1824.

Congressional Oversight

Committees Confirming Appointments:[352] The names of the committees in the Senate handling nominations for presidential appointee positions requiring Senate confirmation. *Source*: Henry B. Hogue, Maureen Bearden & Terrence L. Lisbeth, Cong. Research Serv., RL30959, Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations (2008), *available at* http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm (for agencies not covered in Hogue et al.).

Reporting Requirements:[353] Number of statutorily mandated recurring agency reports to Congress in primary authorizing statute, excluding Inspector General, Comptroller General, or Government Accountability Office reports. *Source*: Agency statute.

Number Committees: Number of committees specified by statute as overseeing the agency in any way, including, *inter alia*, receiving reports, hearing testimony, or exercising a

352. Senate committees of the 112th Congress include: Agriculture, Nutrition, and Forestry; Appropriations; Armed Services; Banking, Housing, and Urban Affairs; Budget; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Finance; Foreign Relations; Health, Education, Labor, and Pensions; Homeland Security and Governmental Affairs; Indian Affairs; Judiciary; Rules and Administration; Select Committee on Ethics; Select Committee on Intelligence; Select Committee on Aging; Small Business and Entrepreneurship; and Veterans Affairs.

353. House committees of the 112th Congress include: Agriculture; Appropriations; Armed Services; Budget; Education and the Workforce; Energy and Commerce; Ethics; Financial Services; Foreign Affairs; Homeland Security; House Administration; Intelligence; Judiciary; Natural Resources; Oversight and Government Reform; Rules; Science, Space, and Technology; Small Business; Transportation and Infrastructure; Veterans' Affairs; and Ways and Means.

legislative veto. *Source*: Agency statute.

Reporting Committees: The names of the committees included in the NumberCommittees count. *Source*: Agency statute.

Other Key Structural Features

Government-Wide Management Laws

CIO: (1) The agency is statutorily mandated to have a Chief Information Officer; (0) The agency is not statutorily mandated to have a Chief Information Officer. *Source*: Clinger-Cohen Act, 40 U.S.C. § 11315 (2012) (incorporating 40 U.S.C. § 11314(c) (2012)).

IG: (3) The agency is an "establishment" as defined by the Inspector General Act of 1978 and has an Office of Inspector General that is headed by an Inspector General who is appointed by the President by and with the advice and consent of the Senate;[354] (2) The agency is a "designated federal entity" as defined by the Inspector General Act of 1978 and the OMB published list of designated federal entities and has an Office of Inspector General that is headed by an Inspector General who is appointed by the agency; (1) The agency is a "federal entity" as defined by the Inspector Generals Act of 1978 and the OMB published list of federal entities and has an audit office that is required to report an annual audit and investigative activities to each house of Congress and the Director of OMB; (0) The agency is not an "establishment," a "designated federal entity," or a

354. Even though the Inspector General Act does not include them, the Central Intelligence Agency and the Office of the Director of National Intelligence are coded as a (3) because they have statutorily-mandated, PAS Inspector Generals. *See* 50 U.S.C. § 403q (2012) (the Central Intelligence Agency's IG requirements); 50 U.S.C. § 403-3h (2012) (the Office of the Director of National Intelligence's IG requirements).

"federal entity." *Source*: Inspector General Act of 1978, 5 U.S.C. §§ App. 3(2), (8G) (2012). *See also* Office of Mgmt. & Budget,, 74 Fed. Reg. 3656-57 (Executive Office of the President Jan. 21, 2009); U.S. Government Accountability Office, *Inspectors General: Reporting on Independence, Effectiveness, and Expertise* (2011).

CFO: (2) The Chief Financial Officers Act mandates that the agency have a Chief Financial Officer appointed by the President and confirmed by the Senate; (1) The Chief Financial Officers Act mandates that the agency have a Chief Financial Officer appointed by the head of the agency and is a career appointee from either the competitive service or the Senior Executive Service; (0) The Chief Financial Officers Act places no requirements on the agency. *Source*: Chief Financial Officers Act, 31 U.S.C. § 901(b) (2012).

Sunshine: (1) The agency is subject to the Government in the Sunshine Act of 1976; (0) The agency is not subject to the Government in the Sunshine Act of 1976. Ambiguity resulting from the Act's provision relating to the phrase "collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate"[355] is resolved by following the rule of *Symons v. Chrysler Corporation Loan Guarantee Board*,[356] which does not count ex officio members or members of the agency who are appointed to other offices. For example, the Federal Hospital Insurance Trust Board, which is composed of the Commissioner of Social Security, the Secretaries of the Treasury, Labor, and Health and Human Services, and two members of the public appointed by the President by and with the advice

355. 5 U.S.C. § 522b(a)(1) (2012).
356. 670 F.2d 238 (D.C. Cir. 1981).

and consent of the Senate is coded (0).[357] *Source*: Agency statute; Government in Sunshine Act of 1976, 5 U.S.C. § 522b (2012).

Review Commissions: In some agencies, agency decisions must be reviewed or approved by an external body before the decisions go into effect. For example, the Postal Regulatory Commission may set aside any United States Postal Service decision to close or consolidate any post office if the Commission finds the decision to be arbitrary or capricious.[358] (1) Statute establishes a review commission for the agency or any sub-part of the agency; (0) Statute does not establish a review commission for the agency. The review commission must currently be in operation. *Source*: Agency statute.

Advisory Commissions: (1) Statute establishes an advisory commission attached to the agency or any of its subparts; (0) Statute does not establish an advisory commission for the agency. The advisory commission must either currently be in operation or have the option of being established. Terminated advisory commissions do not qualify. *Source*: Agency statute.

Establish Advisory Commissions: (1) Statute specifies that one or more advisory commissions may be established to advise the agency, or any of its subparts, in any way; (0) Statute

357. Note that this coding is for the entire agency and does not consider entities within an agency. For example, the National Council on the Humanities (which is composed of 26 members appointed by the President with the advice and consent of the Senate), falls under the Sunshine Act, but the National Endowment for the Humanities (which is headed by a single chairperson appointed by the President by and with the advice and consent of the Senate), does not, and is, therefore, coded (0).
358. 39 U.S.C. § 404(d)(5) (2012).

does not specify that advisory commissions may be established. *Source*: Agency statute.

Action Requires Approval: Some agencies cannot take specific action without getting prior approval from one or more actors outside the agency. This approval may come from another part of the executive branch, or may come in the form of a legislative veto. For example, the Chief Executive Officer of the Corporation for National Community Service cannot issue regulations establishing a selection and compensation system for the Corporation's employees without first obtaining the approval of the Director of the Office of Personnel Management.[359] Similarly, the Commodity Futures Trading Commission cannot implement any plan to charge and collect fees until that plan is approved by the House Agriculture Committee and the Senate Agriculture, Nutrition, and Forestry Committee.[360] (1) Statute specifies that one or more agency actions require outside approval before being taken; (0) Statute does not specify that any agency actions require outside approval. *Source*: Agency statute.

Legislative Veto: (1) Statute specifies that one or more agency actions cannot be taken until approved by Congress or a committee in Congress; (0) Statute does not specify that Congress must approve one or more agency actions. *Source*: Agency statute.

Rulemaking: (1) Statute authorizes agency to promulgate rules and/or regulations; (0) Statute does not specifically authorize agency to promulgate rules and/or

359. 42 U.S.C. § 12651d(c)(7) (2012).
360. 7 U.S.C. § 16a(a) (2012).

regulations. *Source*: Agency statute.[361]

Economically Significant Rule: (1) Agency has promulgated an economically significant rule in the last 15 years; (0) Agency has not promulgated an economically significant rule in the last 15 years. *Source*: Office of Information and Regulatory Affairs, Office of Management and Budget, Historical Reports, *available at* http://www.reginfo.gov/public/do/eoHistoricReport (information on economically significant rules).

No Rulemaking: (1) Agency has not promulgated a rule via formal or informal rulemaking in the last 15 years; (0) Agency has promulgated a rule in the last 15 years. *Source*: Federal Register (https://www.federalregister.gov).

Rulemaking with hearing: (1) Agency has promulgated a rule through *formal* rulemaking in the last 15 years; (0) Agency has not promulgated a rule through *formal* rulemaking in the last 15 years. *Source*: Federal Register (https://www.federalregister.gov).

Adjudication: (1) Statute gives agency, or any sub-part of the agency,[362] the authority to conduct or hold hearings or adjudication, take testimony, receive evidence, employ administrative law judges, or other similar adjudicatory functions; (0) Statute does not specifically authorize adjudication or the

361. The coding for this variable was also verified by using the Federal Register's website to confirm that the agency had promulgated at least one rule in the last 15 years. *See* National Archives and Records Administration, *Federal Register - Article Search*, https://www.federalregister.gov/articles/search.
362. For example, several bureaus within executive departments have adjudication authority, whereas the departments as a whole do not conduct adjudication (see, e.g., Departmental Appeals Board in the Department of Health and Human Services; Executive Office for Immigration Review in the Department of Justice).

employment of administrative law judges. Mere authority to conduct hearings is not enough to constitute a coding as (1). There must be some evidence in the statute that the authority to conduct hearings is accompanied by some other function indicative of adjudication (the ability to subpoena witnesses, etc.). *Source*: Agency statute; Association of Administrative Law Judges, *Agencies Employing Administrative Law Judges,* http://www.aalj.org/agencies-employing-administrative-law-judges (last accessed Aug. 29, 2012).

Adjudication (APA): (1) Main authorizing statute includes reference to adjudicatory portion of APA (5 U.S.C. § 554); (0) main authorizing statute does not reference to adjudicatory portion of APA (5 U.S.C. § 554). For coding purposes, cross reference tables in the United States Code Annotated were reviewed to find agencies identified under the APA provision relating to adjudication (5 U.S.C. § 554). This list includes the agencies with citations that directly reference the procedures as outlined in that section. Each reference was read to be sure that the provision included, rather than excluded, adjudicatory proceedings under 5 U.S.C. § 554. *Source*: Agency statute; United States Code Annotated.

Administrative Law Judges: (1) Agency Employs Administrative Law Judges; (0) Agency does not employ administrative law judges. *Source*: Association of Administrative Law Judges , Agencies Employing Administrative Law Judges, http://www.aalj.org/agencies-employing-administrative-law-judges (last accessed Aug. 29, 2012).

Administrative Law Judges (2): (1) Agency Employs Administrative Law Judges; (0) Agency does not employ administrative law judges. *Source*: Appendix C of the dissenting opinion of Justice Breyer in *Free Enterprise Fund v. Public Company Accounting Oversight Board* 130 S. Ct. 3138 (2010).

Department of Justice
Department of Labor
Department of State
Department of the Interior
Inter-American Foundation
James Madison Memorial Fellowship Foundation
Legal Services Corporation
Merit Systems Protection Board
Metropolitan Washington Airport Authority
Millennium Challenge Corporation
Mississippi River Commission
Morris K. Udall Scholarship Foundation
National Aeronautics & Space Administration
National Archives & Records Administration
National Consumer Cooperative Bank
National Council on Disability
National Credit Union Administration
National Endowment for the Arts
National Endowment for the Humanities
National Institute of Building Sciences
National Labor Relations Board
National Mediation Board
National Railroad Passenger Corp
National Science Foundation
National Security Education Board
National Transportation Safety Board
Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects
Office of Government Ethics
Office of Management & Budget
Office of National Drug Control Policy
Office of Personnel Management
Office of Science & Technology Policy
Office of Special Counsel
Office of the U.S. Trade Representative
Overseas Private Investment Corporation
Peace Corps
Postal Regulatory Commission
Privacy & Civil Liberties Oversight Board
Railroad Retirement Board
Securities & Exchange Commission
Securities Investor Protection Corporation
Selective Service System
Small Business Administration
Social Security Administration
Social Security Advisory Board
State Justice Institute
Tennessee Valley Authority
U.S. African Development Foundation
U.S. Agency for International Development
U.S. Election Assistance Commission
U.S. Institute of Peace

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Nuclear Regulatory Commission
Occupational Safety & Health Review Commission
Office of Administration
Office of the Director of National Intelligence
Office of Navajo & Hopi Indian Relocation
U.S. International Trade Commission
U.S. Postal Service
U.S. Trade & Development Agency
White House Office