

# THE PRESIDENT’S FOURTH BRANCH?

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*Unitary executive theory has taken hold of the administrative state, motivated by the view that agencies constitute a rogue fourth branch of government. Emboldened by the U.S. Supreme Court, the President has begun to interfere with administrative accountability to important criteria including statutory procedural requirements that impact both public participation and administrative due process, the expectation that agencies engage neutral expertise to implement the law, and the obligations of judicial review. As a result, this Essay argues, rather than constituting a fourth branch that is unaccountable to the President, the administrative state has been encouraged by the President and courts to become unaccountable to Congress. It is possible, however, that congressional and judicial oversight and intervention could encourage administration that is more consistent both with legislative mandates and with norms that legitimate the administrative state.*

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## INTRODUCTION

Presidential administration has grown in recent years.<sup>1</sup> Today’s political leaders and their supporters advocate for “increasing the president’s authority over every part of the federal government that now operates, by either law or tradition, with any measure of independence from political interference by the White House.”<sup>2</sup> Furthermore, the U.S. Supreme Court has increasingly begun “to restrict Congress’s ability to insulate administrative officials from presidential control.”<sup>3</sup> This movement has its roots in unitary executive theory,<sup>4</sup> which is the belief that both the U.S. Constitution and majoritarianism require the President to exercise all-encompassing control over administrative agencies, both executive and independent.<sup>5</sup> The rise of a unitary executive has, however, heightened the tension between presidential and legislative legitimation of the administrative state.

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1. See SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY* 64 (2020) (“[A]n energetic executive is a weaponized one” because “it can act quickly and repeatedly, . . . set the reform agenda, take quick action, change policies and through a flurry of actions keep the other two branches off balance.”).

2. Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 17, 2023), <https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html> [<https://perma.cc/RX2F-T7VA>]; Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 YALE L.J. 548, 560–61 (2019) (noting that President Donald J. Trump “and his administration appear to have fully embraced a vision of the unitary executive”); see also Brief for Respondent Supporting Petitioners at 14, *Lucia v. United States*, 138 S. Ct. 2044 (2018) (No. 17-130) (advocating that the Court strike down the removal protections provided to administrative law judges because of their “implications for the exercise of executive power”).

3. Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022).

4. See *id.* at 757; Isaac Chotiner, *Donald Trump’s Plan to Make the Presidency More Like a Kingship*, NEW YORKER (July 18, 2023), <https://www.newyorker.com/news/q-and-a/donald-trumps-plan-to-make-the-presidency-more-like-a-kingship> [<https://perma.cc/F2F8-ZPTB>].

5. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992).

Unitary executive theorists assert that the President is rightfully a strong principal as a constitutional matter.<sup>6</sup> And to be sure, when it comes to the execution of law, agencies are agents of the President and not of Congress alone.<sup>7</sup> In addition, statutes delegate broad discretion to agencies, and the President may oversee, if not direct, the exercise of this discretion.<sup>8</sup> However, the President's constitutional authority must be exercised in service of their essential constitutional responsibility to enforce the law.<sup>9</sup> Indeed, the President is a vessel for enforcing statutory law who is, arguably, both empowered and constrained by Article II of the Constitution in service of the goal of law execution.<sup>10</sup> In addition, Congress has a competing claim to control over the structure and function of administrative agencies as a result of constitutional authorities such as the Necessary and Proper Clause, Article I, Section 8.<sup>11</sup> The “deformation” of structures of independence established by Congress means, arguably, that “[n]ow the President can adopt [important policy] changes unilaterally.”<sup>12</sup>

Unitarians also rely on a majoritarian justification, based in the view that such expansive presidential power ensures that agencies remain accountable to an important elected official and are therefore democratically legitimate.<sup>13</sup> However, agencies can and should be held accountable to requirements and norms besides majoritarianism—namely, to legislative mandates and administrative due process obligations, as well as to norms of public participation, impartiality, and expertise. And yet, “[m]odern presidents regularly use their authority to advance their [own] policy agendas at the expense of the legislative policies of Congress,”<sup>14</sup> and they are at an institutional advantage to do so.<sup>15</sup>

This Essay, written for a *Fordham Law Review* symposium on unitary executive theory, argues that the Supreme Court has begun to expand presidential power in ways that compromise administrative fidelity to the provisions of the Constitution that empower Congress; to legislative mandates; and to public participation, fair administrative process, and expertise-focused values. More specifically, the Court has encouraged

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6. Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1224 n.352 (2022); Calabresi & Rhodes, *supra* note 5, at 1165 (noting the basis for unitary theory in a combination of the Vesting and Take Care Clauses of Article II of the Constitution).

7. Shah, *supra* note 6, at 1225.

8. *Id.* at 1224 n.352; Calabresi & Rhodes, *supra* note 5, at 1166.

9. *See* Shah, *supra* note 6, at 1174.

10. Calabresi & Rhodes, *supra* note 5, at 1168–69.

11. *Id.* at 1168, 1170 (noting that even “[u]nitary executive theorists concede that Congress has broad power under the Necessary and Proper Clause to structure the executive department”).

12. John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5, 5 (2022).

13. *See* Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 843 & n.229 (2021).

14. PRAKASH, *supra* note 1, at 216.

15. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 15 (2010).

presidential interference in administrative compliance with procedural requirements, allowed for the presidential shielding of agencies from judicial review, increased political control over the appointment of administrative adjudicators, and established unprecedented presidential power over the removal of independent agency heads.

Justice Robert H. Jackson once decried administrative agencies as comprising “a veritable fourth branch of the Government, which has deranged our three-branch legal theories.”<sup>16</sup> This characterization is directed particularly toward independent agencies.<sup>17</sup> In the absence of substantial, if not complete, presidential supremacy over the administrative state, unitary executive theorists are inclined to characterize the body of independent agencies as an unconstitutional “fourth branch,” emboldened by the legislature to be unaccountable to the President.<sup>18</sup>

This Essay posits, in contrast to this conventional critique, that the expansion of presidential power has encouraged administrative agencies to become increasingly unaccountable to Congress, the entity that enables and legitimizes the administrative state. First, agencies are in danger of operating outside of the three-branch structure when they fail to adhere to requirements set by the legislature. Second, presidential control has come to interfere with important aspects of agency legitimacy. One of these is administrative procedure, which “help[s] ensure that agency decisions track dominant

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16. *Fed. Trade Comm’n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

17. See Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 2033 n.332 (2019) (“[The] headless ‘fourth branch’ of government consists of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either.” (alteration in original) (quoting *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 886 (3d Cir. 1986))); *Arlington v. Fed. Comm’n Comm’n*, 569 U.S. 290 (2013) (Roberts, C.J., dissenting) (“The collection of agencies housed outside the traditional executive departments . . . is routinely described as the ‘headless fourth branch of government,’ reflecting not only the scope of their authority but their practical independence.”).

18. See Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 609 (2018) (“While Congress gave President Franklin Roosevelt much of what he wanted substantively in New Deal legislation, many New Deal agencies were set up as multi-member, independent commissions with limitations on the President’s power of removal. This ‘new and headless ‘fourth branch’ of government’ as President Roosevelt’s Administration termed it, was less under presidential and more under congressional control.” (quoting PRESIDENT’S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 29 (1937))). “If [unitary executive theorists] had their say, the Supreme Court would declare all [independent agencies] unconstitutional. In their view, the Constitution creates a ‘unitary executive,’ granting the president complete authority over the entire administrative establishment.” ACKERMAN, *supra* note 15, at 147. “Under this view, it is therefore something of an embarrassment that the Supreme Court has permitted conspicuous exceptions to this constitutional imperative. We now have independent special counsels, independent agencies, and other such exceptions, commonly thought to be inconsistent with the basic founding commitment to a ‘unitary executive.’” Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994).

legislative preferences.”<sup>19</sup> Agency legitimacy is further ensured by access to public participation, judicial review, fidelity to legislative mandates, and expertise in the administrative state.<sup>20</sup> As a result of the dismantling of administrative structures of independence and of presidential administration that undercuts agencies’ implementation of process and pursuit of criteria of legitimacy, the administrative state has arguably begun to function like a “fourth branch”—but to be clear, one that is becoming a creature of the President and thereby operating outside legislative mandates and expectations.

This Essay proceeds in two parts. Part I describes how Presidents have interfered both with the administration of law and with agency accountability to essential civil service values. First, this part suggests that administrative circumvention of statutory procedural requirements—as a result of presidentialism—has undermined the Take Care Clause, hindered administrative adherence to the text of statutory requirements, and interfered with agencies’ obligation to engage in policymaking in a manner that weighs the policy’s impact on and responsiveness to the public. To substantiate this assertion, Part I draws on the examples of presidentialism undercutting the notice-and-comment mandates of the Administrative Procedure Act<sup>21</sup> (APA), the environmental impact statement requirement of the National Environmental Policy Act of 1969<sup>22</sup> (NEPA), and other APA provisions for judicial review of agencies.

Second, Part I notes that the increasing number of agency officials subject to presidential appointment and removal power interferes with the legislature’s authority to structurally insulate agency adjudicators and officials per the Necessary and Proper Clause. Politicized appointments and removal have also reduced administrative accountability to the values and expectation, held by Congress and the public, that agencies promote impartiality and expertise in administrative decision- and policymaking. To support this position, this part highlights the judiciary’s efforts to enlarge the category of agency officials subject to constitutional appointments requirements and at-will removal, as well as the resulting negative influence of this development on fair adjudication and competent policymaking.

Part II argues that targeted congressional, judicial, and even administrative intervention could encourage the President to align the administrative execution of law with procedural requirements and expertise-focused norms. The Supreme Court has signaled acceptance of deteriorated policy and rulemaking procedures and begun to dismantle agency structures that foster

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19. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007). It is for this reason that the judiciary enforces procedure. *Id.*

20. See Brian D. Feinstein, *Legitimizing Agencies*, U. CHI. L. REV. (forthcoming) (manuscript at 14–15) (noting each of these paradigms as constitutive of agency legitimacy).

21. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

22. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.).

administrative independence. Nonetheless, even conservative justices (such as Justices Thomas and Roberts) have indicated that there are some limits to the Court's willingness to expand presidential power. Accordingly, this part advocates for the reinvigoration of the APA's notice-and-comment provisions and reiterates that agencies are distinctly accountable, as compared to the President, to statutory mandates such as NEPA and to judicial review under the APA. Part II also beseeches scholars and the Court to take seriously the repercussions of politicized appointments and removal decisions. More specifically, this part argues for detailing standards that limit the scope of political power to hire and fire experts and adjudicators and reinforcing the provisions of the APA that preserve deliberative and nonpartisan decision-making.

### I. PRESIDENTIAL INTERFERENCE IN AGENCY ACCOUNTABILITY

Unitary executive theory takes the view that Article II of the U.S. Constitution is expansive. However, unitarians overlook the fact that the Chief Executive exists, as a constitutional matter, to enforce the legislature's mandates.<sup>23</sup> Congress is, after all "the only actor given express power to prescribe the means of implementing *all* constitutional powers, including '[t]he executive Power.'"<sup>24</sup>

Take, for instance, the Take Care Clause. On the one hand, the Supreme Court has framed the Take Care Clause as a source of presidential authority to oversee rulemaking in some respects<sup>25</sup> and "to remove officers who do not follow the President's directives,"<sup>26</sup> in addition to other powers.<sup>27</sup> Some

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23. Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1270 (2020) ("The Founding generation understood 'executive power' to mean something both simple and specific: the power to execute law. This authority was constitutionally indispensable, but it extended only to the implementation of pre-existing legal norms and directives that had been created pursuant to some prior exercise of legislative authority. It wasn't just that the use of executive power was subject to legislative influence in a crude political sense; rather, the power was conceptually an empty vessel until there were laws or instructions that needed executing.").

24. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78 (2014) (quoting U.S. CONST. art II, § 1, cl. 1).

25. See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016).

26. *Id.* at 1836–37; see also Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2115 (2019) ("The Take Care Clause is also part of the justifications for, among other things, the President's unfettered ability to remove the heads of at least some types of executive agencies . . .").

27. These include the power to *not* enforce unconstitutional laws. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 587 (2008) ("[T]he President and executive agencies will refuse to follow or enforce a statute if they believe that it violates the Constitution."); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201 (2012); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008). These also include the power to engage in "prosecutorial discretion—a power that, as recent events have shown us, may give the President room to reshape the effective reach of laws enacted by Congress." Goldsmith & Manning, *supra* note 25, at 1837;

draw on this authority to justify an “unfettered ability to remove the heads of at least some types of executive agencies,”<sup>28</sup> despite this reading of the clause having only a “weak textual basis.”<sup>29</sup>

On the other hand, the Take Care clause obliges the President “to respect legislative supremacy.”<sup>30</sup> Complementarily, both executive and independent administrative agencies are fundamentally stewards of the law, pursuant to their role as agents of the executive branch.<sup>31</sup> This is why, even when those agencies act in response to executive orders or other legitimate directives issued by the President, “agency actions are evaluated by the courts per the mandates of law passed by Congress.”<sup>32</sup>

The Take Care Clause may appear to be at odds with itself,<sup>33</sup> but this is not the case. Rather, the Take Care Clause’s empowerment of and constraint of presidential authority contribute to the same goal: enabling the executive branch to execute the legislature’s will.<sup>34</sup> Accordingly, the President’s primary constitutional incentive for engaging in administration is (or should be) to hold agencies accountable to the law.<sup>35</sup>

*see also* Kent et al., *supra* note 26, at 2115 (“Proponents of prosecutorial discretion as within the province of the Executive invoke the Take Care Clause . . .”).

28. Kent et al., *supra* note 26, at 2115.

29. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 263 (2014).

30. Goldsmith & Manning, *supra* note 25, at 1837.

31. Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1168 n.320 (2021) (“[A]gencies’ policymaking authority is executive in nature—that is, associated with their duty to enforce the law.”); *see also* Adrian Vermeule, *No*, 93 TEXAS L. REV. 1547, 1557–60 (2013) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (suggesting this is the most agreed-upon theory about the origins of agencies’ policymaking power).

32. Shah, *supra* note 6, at 1221.

33. *See* Goldsmith & Manning, *supra* note 25, at 1838, 1863 (“[T]he functions that the Court ascribes to the Take Care Clause are often in unacknowledged tension with one another. For instance, deriving a strong prosecutorial discretion from the clause may collide with the scruple against [executive dispensation or suspension of the law] that the Court also reads into it.”).

34. As both a functionalist and unitary executive theorist have noted in unison, the Take Care clause ultimately serves as a “major limitation” on presidential power “because it underscores that the executive is under a duty to faithfully execute the laws of Congress and not disregard them.” William P. Marshall & Saikrishna B. Prakash, *Interpretation & Debate: Article II, Section 3*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/348> [<https://perma.cc/7ENG-G5PN>] (last visited Oct. 6, 2023).

35. The Take Care Clause extends “not only to the duties that fall upon [the President] personally in [their] official capacity, but also impose on him a duty of oversight to see that all lesser officials within the executive branch respect the same set of fiduciary duties that are imposed on the president.” EPSTEIN, *supra* note 29, at 247–48; Goldsmith & Manning, *supra* note 25, at 1836 (noting that the Take Care Clause “seems to impose upon the President some sort of duty to exercise unspecified means to get those who execute the law, whoever they may be, to act with some sort of fidelity that the clause does not define”); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 252 (1993) (“The use of the passive voice in the Take Care Clause indicates that the President will not necessarily be executing the laws directly, but only overseeing others to ensure their ‘faithful’ execution.”); Ryan J. Barilleaux & Christopher S. Kelley, *Introduction to THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 4 (Ryan J. Barilleaux & Christopher S.

Consider, as well, the Appointments Clause. Together, the Vesting Clause, Appointments Clause, and the Take Care Clause of Article II allow for presidential control over the appointment and removal of executive officers. As a constitutional matter, “[t]he President’s power to control policy begins with his appointment of those subordinates who formulate policy in the first instance . . . . [T]he power to remove may be equally necessary to achieve desired results.”<sup>36</sup> Unitary executive theorists therefore suggest that legislative requirements that preserve some measure of agency independence—including the hiring of administrative adjudicators outside of the Appointments Clause requirements and “for cause” removal protections for agency heads—infringe on the President’s constitutional power.

However, the Constitution also “grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties,” per provisions including the Necessary and Proper Clause.<sup>37</sup> Indeed,

[t]he Necessary and Proper Clause’s delegation of implementation power to Congress has two important consequences for constitutional law. First . . . the Court should displace Congress’s judgment only when Congress unreasonably interprets what is ‘necessary and proper.’ Second, in clashes between Congress and the President over separation of powers, the Necessary and Proper Clause counsels that the Court give priority to the (again, reasonable) judgments of Congress.<sup>38</sup>

Accordingly, judicial efforts to establish overwhelming presidential control over appointments and removal may conflict with Congress’s constitutional power to shape administrative structure, per the Necessary and Proper Clause. Put another way, by emboldening the President, the Court has intensified the ways in which both the executive and judicial branches interfere with congressional control of agencies.<sup>39</sup>

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Kelley eds., 2010) (“[T]he ‘take care’ clause . . . requires the president, with assistance from inferior executive branch officers, to ensure that the laws are faithfully executed.”); THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 97 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (“Presidents must ‘take Care that the Laws be faithfully executed,’ but this requires the assistance of others—others in the executive branch who are responsible to the president.” (quoting U.S. CONST. art. II, § 3, cl. 5)); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–78 (2015) (noting that the passive voice of the Take Care Clause necessarily implies law administration by someone other than the President).

36. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 953 (1980); see also Jonathan R. Macey, *Separate Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 698 (1992) (“The executive’s influence over agency policy stems from the presidential appointments power.”).

37. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., concurring in part and dissenting in part).

38. Manning, *supra* note 24, at 78.

39. Macey, *supra* note 36, at 697 (noting how the executive and judicial branches each “impedes Congress’s ability to control agencies”).



Support for presidential control over agencies is also based in the narrative that the President advances majoritarianism interests.<sup>40</sup> By influencing how agencies enforce the law, the President ensures that the law is enforced in a politically accountable manner.<sup>41</sup> However, “[a]lthough accountability to the electorate is often cited in support of presidential control of administrative decisionmaking, presidential intervention can itself reduce governmental accountability,”<sup>42</sup> including to legislative mandates.<sup>43</sup>

Narrow agency responsiveness to the interests of a single President may displace more meaningful and democratically legitimate legislative processes. For one, there is arguably a distinction between “popular” or “simple” accountability<sup>44</sup> and accountability to criteria, often valued by the legislature, that result in good policy and governance. Even the founders’ understanding of presidential accountability focused on “managerial accountability”—that is, “on competence and integrity, not policy, as the criterion for judging administration.”<sup>45</sup> Furthermore, public participation within the context of administration fosters democratic accountability in its own right.<sup>46</sup>

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40. See Daniel P. Rathbun, *Irrelevant Oversight: “Presidential Administration” from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 654 (2009) (“[T]he presidential control model justifies intense presidential involvement by its supposed tendency to make agencies accountable to the president and, by proxy, to his national electorate.”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465 (2003) (noting a longstanding “primacy of majority preference in conferring legitimacy within our constitutional order”); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2336 (2001); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 994 (1993) (arguing that majoritarianism is served by presidentialism); *id.* at 1006–07 (suggesting that presidential control forces the administrative state to remain accountable to the people).

41. See, e.g., Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 733–34 (2018) (arguing for more oversight of independent agency policymaking).

42. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456 (1987); see also Rathbun, *supra* note 40, at 654 (“The accountability critique of presidential control posits . . . that agencies hide behind a veil of presidential privilege, that the president hides behind a bureaucratic web, and that both entities are less accountable to the public as a result.”); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 997 (1997) (arguing that the premise that the President necessarily serves majoritarianism is “vulnerable” in part because “presidential politics can be successfully conducted with the support of considerably less than a majority of the citizenry”).

43. See Shah, *supra* note 6, at 1180 (arguing that presidential administration undermines agencies’ ability to execute their statutory mandates); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 586 (2021) (arguing that presidential administration can lead to “leaving agencies understaffed and without permanent leadership; marginalizing agency expertise; reallocating agency resources; occupying an agency with busywork; and damaging an agency’s reputation,” all of which weakens independent agency oversight).

44. See Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1749–54 (2009).

45. See *id.*

46. See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1700 (2009); see also Michael A. Fitts, *The*

Adherence to procedural mandates and prescribed administration structure encourages accountability to legislative expectations of impartiality and expertise, as well as constitutional due process norms, in lieu of reflexive loyalty to the interests of political leadership from administrative decision-makers.<sup>47</sup> Even “if constitutional principles do mandate political accountability for policymaking in the modern administrative state, this goal may not be furthered by centralizing all discretionary decision making in the President.”<sup>48</sup> After all, the extent to which the President is truly accountable to the people is unclear, given weaknesses in the electoral college; the inscrutability of popular interests; presidential responsiveness only to their voting base, as opposed to the country’s wishes as a whole; and so on.<sup>49</sup>

This part argues that the President—as opposed to Congress, as the story usually goes<sup>50</sup>—has begun to insulate agencies from valuable forms of accountability. More specifically, it considers the ways in which the President undermines their own constitutional responsibility to execute the law by interfering with the imposition of the legislature’s will, including as it pertains to procedural requirements fostering public participation and to substantive policy. It also observes how the President shields agencies from judicial review mandated by statute. Further, this part comments on how the expansion of the presidential/politicized appointment and removal of administrators and adjudicators both has shifted the legislative dictates of agency structure, created pursuant to Congress’s constitutional power, and has undermined both administrative due process and the administrative focus on expertise, prescribed and expected by the Constitution, Congress, and the public.

Part I.A showcases a paradigm in which presidents have directed agencies, via increasingly bold measures, to neglect statutory procedural requirements that foster public accountability and good governance. First, it illustrates that

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*Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 830 (1996).

47. See Bijal Shah, *Executive Influence on Federal Administrative Adjudication*, in A GUIDE TO FEDERAL AGENCY ADJUDICATION (3d ed.) (forthcoming) (manuscript at 8–9) (on file with author) (“Expanding political influence over the selection of agency adjudicators . . . may allow for greater presidential impact on the outcomes of administrative adjudication, or at least for the ‘easier selection of ideologically-aligned appointees.’ As a result, increasingly unconstrained political pressure may ‘imperil the impartiality that due process requires.’” (first quoting David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection and Precedential Rulemaking*, 40 J.L. ECON. & ORG. (forthcoming 2024) (manuscript at 24); and then quoting Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1695 (2020))).

48. Kitrosser, *supra* note 44, at 1749.

49. See Farina, *supra* note 42, at 996–97 (“[I]t is far from self-evident as a matter of political theory that simple majoritarianism, simply expressed through a single representative voice, is the ‘best’ interpretation of democracy.”); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 710 (2016); Bressman, *supra* note 40, at 466 (“[C]onstitutional theorists no longer assume that majoritarianism best explains the features of our constitutional structure.”); *id.* (arguing that majoritarianism increases the risk of arbitrary decision-making); Rathbun, *supra* note 40, at 654 (arguing that presidential majoritarianism is opaque).

50. See *supra* note 18 and accompanying text.

courts have endorsed reduced adherence to APA requirements for notice-and-comment rulemaking. Second, Part I.A confronts the deterioration of environmental impact assessments required by NEPA (commonly viewed as the “Magna Carta” of U.S. environmental law), including a sweeping mandate from President Donald J. Trump that systematized sidestepping the requirements of this statute. Third, it observes how presidentialism has compromised accountability to legislative mandates more generally by providing agencies cover from judicial review (that might better ensure they adhere to law).

Part I.B highlights recent cases that denigrate the constitutionality and legitimacy of agency officials that are excluded from the requirements of the Appointments Clause or that are structurally insulated to some extent from political removal. More specifically, it discusses how the White House has convinced the Supreme Court to increase political power over the appointment of lower-level agency officials and also won a decision from the Court declaring that an independent agency’s “for-cause” removal provisions interfere with the constitutional Appointments Clause. This precedent, and a case coming down the pipeline, indicate that the Court has emphasized presidential power over agencies’ duty to engage with the procedures and expertise mandated by Congress.

#### A. Undercutting Procedural Requirements

The growing tension between legislative and presidential preferences has impacted the quality of administration. On the one hand, statutory mandates, procedural and substantive, both animate and validate administrative action. On the other hand, the growth of presidential administration and the judiciary’s encouragement of its expansion have altered the extent to which agencies adhere to legislative requirements.<sup>51</sup>

From the mid-twentieth century through today, courts have expected the President and the agencies that the President directs to abide by statutory procedural requirements, even in the arenas of international customs and trade, a realm in which the President traditionally has plenary power.<sup>52</sup> The President’s refusal to do so would arguably be inconsistent with the Take

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51. See generally Shah, *supra* note 6.

52. See, e.g., *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (holding that President Franklin D. Roosevelt’s proclamation, which increased the duty on a Japanese product to equalize the difference between Japanese and domestic costs of production, followed the required statutory procedures of the Tariff Act of 1930); *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246 (Ct. Int’l Trade 2020), *rev’d*, 4 F.4th 1306 (Fed. Cir. 2021) (ruling that President Trump’s Proclamation 9772, which imposed tariffs on steel from Turkey, was “unlawful and void” because the President failed to follow procedures laid out in § 232 of the Trade Expansion Act of 1962). More specifically, the court explained that Proclamation 9772 was not timely because the President issued it beyond the “temporal window” following the U.S. Department of Commerce’s statutorily required investigation. *Id.* Although the U.S. Court of Appeals for the Federal Circuit reversed the lower court’s decision, the court still evaluated whether President Trump followed the statutory procedural requirements. See generally *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021).

Care Clause, which imposes the “duty . . . to get those who execute the law, whoever they may be, to act with some sort of fidelity” to the law<sup>53</sup> (namely, to statutes<sup>54</sup>).

In addition, presidentialism is not as important to administrative legitimacy as fidelity to legislation. In one case, the U.S. Court of Appeals for the Seventh Circuit considered whether an agency’s regulations implementing an executive order were invalid if the President did not have constitutional authority to issue the executive order directing the agency to act.<sup>55</sup> Here, the court found that the agency both acted within its statutory authority and did not behave in an arbitrary or capricious manner.<sup>56</sup> Therefore, the court declined to interrogate the constitutionality of the executive order that was the basis for the rule.<sup>57</sup> In this way, the court suggested that administration is governed primarily by legislation and that this governing primacy is not displaced by presidential power.<sup>58</sup> Were the legitimacy of administration shaped by presidentialism to an equally important degree, the court would have shown a greater interest in determining whether the executive order at issue was, in fact, lawful.

This section suggests that, nonetheless, agencies have begun to lessen their adherence to statutory procedural requirements at the President’s request and that courts have allowed presidentialism to unsettle fundamental legal and procedural values and norms espoused by lawmakers. This has led to the judiciary, including the Supreme Court, acquiescing to the weakening of administrative procedure resulting from presidential intervention. First, this section argues that because of presidential pressure to change or expand regulation in immigration and healthcare quickly and/or without public accountability, agencies have begun to issue legislative policies without following the notice-and-comment requirements of the APA. In addition, this section observes that presidents have pushed agencies to reduce their application of NEPA’s procedural requirements in an effort to defang environmental protection and allow regulated entities to operate with fewer constraints. Finally, this section notes that presidentialism shields agencies from judicial review that would enhance both fidelity to statutory mandates and good governance.

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53. Goldsmith & Manning, *supra* note 25, at 1836.

54. *Id.* at 1855–57 (noting that scholars are in agreement that the “laws” in the Take Care clause’s exhortation that the President “shall take care that the laws be faithfully executed” includes statutes).

55. *Clancy v. Off. of Foreign Assets Control*, 559 F.3d 595, 597 (7th Cir. 2009).

56. *Id.* at 597, 603.

57. *Id.* at 603 (“Because we find the regulations were a proper exercise of [the agency’s] authority under the [relevant statutes], we need not address Clancy’s argument that [Congress] unconstitutionally delegated authority to the President.”); *see also* Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 754 (2010) (noting that in *Clancy*, the court “simply left the [President’s] political declaration of an emergency unchallenged”).

58. *See Clancy*, 559 F.3d at 603.

### 1. Sidestepping APA Notice-and-Comment Provisions

“A hallmark of the Trump administration [was] its creation of significant administrative programs on the fly, based on ambiguous or implied textual authorities, and without any public input.”<sup>59</sup> This section illustrates that presidential intervention in agency action has changed the extent to which agencies adhere to the tenets of the APA—despite the APA’s status as a superstatute<sup>60</sup> or even, perhaps, as a “mini-constitution for the administrative state”<sup>61</sup>—and that the judiciary has acquiesced to this dynamic. As a constitutional matter, if an “activist President,” including one “with control over the rulemaking process . . . use[s] his power to press agencies beyond statutory limits,” such a President could “be guilty of unfaithful execution of the laws.”<sup>62</sup> As a matter of good governance, if presidential intervention dissuades agencies from soliciting public participation in rulemaking, such presidentialism interferes with accountability—both to the requirements of legislation and to democratic values of public participation—in the execution of the law.

Decades ago, Professor Thomas O. McGarity observed that “[m]ost documented presidential intervention [was] biased against regulation.”<sup>63</sup> Recent presidencies have been characterized by an urgent desire to accomplish regulatory goals that are responsive to partisan interests, which is often consistent with a deregulatory agenda. This urgency is exacerbated by the fact that the President serves a limited term and is thrown into relief when it seems unlikely that the President’s preferred policy will be made into law by Congress.

As a result of urgency and of a pointed set of policy interests, the President may pressure agencies to reduce public participation in the rulemaking process. In this way, agency sensitivity to the President’s goals disrupts administrative accountability to the participatory norms (and perhaps even the letter) of the APA’s regulation requirements. This dynamic underscores the concern that accountability to the President is not, in fact, consistent with democratic legitimacy.

This section argues that pressure from the President to accomplish policy goals has resulted in agencies shirking the APA’s notice-and-comment

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59. William Yeatman, *Trump’s Ad Hoc Administrative State*, CATO INST., Sept. 11, 2020, at 1 (“By ‘ad hoc administrative state,’ this paper refers to exercises of discretionary economic authority that are performed without undertaking procedural safeguards.”).

60. Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208–09 (2015) (noting that the APA “is one of the most important statutes in the United States Code”).

61. Cass R. Sunstein, *Here’s How Executive Orders Actually Work (Hint: Slowly)*, BLOOMBERG (Nov. 12, 2020), <https://www.bnnbloomberg.ca/here-s-how-executive-orders-actually-work-hint-slowly-1.1521633> [<https://perma.cc/HQM7-REZY>].

62. McGarity, *supra* note 42, at 455.

63. *Id.* at 454 (“There are literally hundreds of cases of the [White House Office of Management and Budget, or] OMB intervening in agency rulemakings to urge less stringent regulations, and almost no documented cases of OMB urging the agencies to regulate more stringently.”).

provisions. Notably, the APA's rulemaking provisions are notoriously bare-bones; nonetheless, the Supreme Court has declared that courts are not to read additional obligations into those provisions.<sup>64</sup> And yet, the U.S. Court of Appeals for the D.C. Circuit approved of an agency's decision not to respond to comments that opposed the agency's choice of policy as dictated by the President's preferences, in tension with the minimal requirement that agencies account for the concerns raised by significant comments.<sup>65</sup>

Moreover, the Supreme Court has allowed shortcuts to rulemaking that drain the regulatory process of meaning. For instance, the Court approved of an agency's use of interim final rules (IFRs), in which a final rule is issued *prior* to the notice-and-comment process,<sup>66</sup> despite the established view of IFRs as problematic to the expectation that notice and public participation occur in the regulatory process before the rule at issue is finalized.<sup>67</sup> The Court has also left open the possibility of an expanded "good cause" exception<sup>68</sup> that could allow agencies to neglect notice-and-comment rulemaking at the President's urging. As a result of these developments, presidential administration has undermined the administrative collection of information from public stakeholders and efforts to regulate in direct response to public interests.<sup>69</sup>

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64. *See* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

65. *See* *City of Waukesha v. Env't Prot. Agency*, 320 F.3d 228, 257–58 (D.C. Cir. 2003) (holding that agencies must respond "in a reasoned manner to those [comments] that raise significant problems" (quoting *Reytblatt v. Nuclear Regul. Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997))).

66. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999) ("Interim-final rules are rules adopted by federal agencies that become effective without prior notice and public comment and that invite post-effective public comment." (emphasis omitted)).

67. *See infra* note 96 and accompanying text.

68. 5 U.S.C. § 553(b)(3)(B) (permitting agencies to skip notice-and-comment procedures when "the agency for good cause finds" that "notice and public procedure[s] . . . are impracticable, unnecessary, or contrary to the public interest"); *see, e.g.,* *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("The [good cause] exception excuses notice and comment in emergency situations or where delay could result in serious harm." (citation omitted)); Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 250 (2020) (describing how courts have also applied the good cause exception "when prior notice could subvert complex statutory schemes" or "in circumstances involving implicit waiver by Congress"). However, if the government action at issue is substantial or would impose new duties on parties, courts are reluctant to apply an "unnecessary" good cause exception. *See, e.g.,* *United Airlines v. Brien*, 588 F.3d 158 (2d Cir. 2009).

69. *See* *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (noting that notice-and-comment procedures exist both for purposes of "public participation and fairness" and also "to 'assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions'" (alteration in original) (first quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); and then quoting *Guardian Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978))).

Presidents have a complicated role in administrative rulemaking,<sup>70</sup> and they have influenced the notice-and-comment process to varying degrees for some time. In the early 1980s, at the start of the Reagan administration, the Supreme Court legitimized presidential involvement in notice-and-comment rulemaking.<sup>71</sup> However, courts remained somewhat intolerant of presidential attempts (including from Presidents Ronald Reagan and William J. Clinton) to delay<sup>72</sup> or retract<sup>73</sup> rulemaking without a notice-and-comment process, at least in the context of environmental regulation. An exception to this resistance is that courts are sometimes,<sup>74</sup> albeit not always,<sup>75</sup> permissive of the withholding, by new administrations, of “regulations proposed under the prior presidential administration.”<sup>76</sup> In addition, lower courts have rebuked agency nonenforcement of statutes at the direction of the President,<sup>77</sup> perhaps

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70. See generally Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (offering several insights concerning the influence of the political branches on the initiation of rulemaking).

71. See *Sierra Club v. Costle*, 657 F.2d 298, 298, 405–06 (D.C. Cir. 1981) (recognizing the need of “the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy”).

72. See, e.g., *Nat. Res. Def. Council, Inc. v. Env’t Prot. Agency*, 683 F.2d 752, 767 (3d Cir. 1982) (rebuking the delay, by executive order, of rules issued by the Environmental Protection Agency (EPA) concerning the release of toxic pollutants into publicly owned treatment works); see also William M. Jack, Comment, *Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration’s Card Memorandum*, 54 ADMIN. L. REV. 1479, 1503 (2002) (noting, in regard to this case, that the court decided that “[t]he indefinite postponement of a final rule is tantamount to a repeal, so as to require [notice-and-comment] rulemaking,” which the agency neglected to do).

73. See, e.g., *New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992) (remanding for reconsideration the EPA retraction of the portion of a proposed rule banning lead-acid battery combustion because the EPA failed to adequately explain why the ban was not the best way to reduce incinerator emissions); see also Herz, *supra* note 35, at 224 n.28 (1993) (suggesting “that EPA Administrator William Reilly was forced to cave in to White House commands,” namely from the U.S. Council on Competitiveness chaired by Vice President Dan Quayle, on the issue).

74. See, e.g., *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191 (D.C. Cir. 1996) (approving of the withdrawal of a George H.W. Bush administration rule by the Clinton administration despite the fact that the withdrawal did not undergo a notice-and-comment process); see also Jack, *supra* note 72, at 1490–92 (discussing the D.C. Circuit’s decision in *Kennecott*); *Chen v. Immigr. & Naturalization Serv.*, 95 F.3d 801 (9th Cir. 1996) (noting as acceptable the Clinton administration’s lack of publication of the withdrawal of a George H.W. Bush administration interim regulation).

75. See, e.g., *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (allowing intervenors to force an agency to consider a regulatory issue delayed by the George H.W. Bush administration).

76. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 70 & n.307 (2009) (noting that this is a fairly common occurrence but not discussing courts’ perception of it).

77. See, e.g., *Dabney v. Reagan (Dabney I)*, 542 F. Supp. 756, 768 (S.D.N.Y. 1982) (noting that the court rebuked President Reagan’s lack of action to enforce a statute but did not demand an immediate solution); *New York v. Env’t Prot. Agency*, 413 F.3d 3, 44 (D.C. Cir. 2005) (striking down provisions of a 2002 EPA rule, directed by the National Energy Policy Development Group chaired by Vice President Dick Cheney, as in violation of statutory enforcement requirements of the Clean Air Act, 42 U.S.C. §§ 7401–7671q).

because nonenforcement is legislative in nature.<sup>78</sup> (However, these nonenforcement decisions do not necessarily have teeth.<sup>79</sup>) All of these cases, whether resulting in judicial reproach or not, illustrate how Presidents seek to destabilize the procedure that undergirds regulation.

In the past decade, presidential interference in the APA's notice-and-comment provisions has been met with a mixed set of judicial responses. On the one hand, the Supreme Court invalidated regulations that furthered presidential preferences for enforcing Medicare and the Immigration and Nationality Act<sup>80</sup> because these "legislative rules"<sup>81</sup> did not go through a "sharply-defined" notice-and-comment process.<sup>82</sup> On the other hand, courts have accepted, in the wake of presidential directives, the weakening of those facets of rulemaking that ensure adequate public participation.<sup>83</sup>

For instance, the D.C. Circuit has noted that an agency may neglect the minimal requirements of informal rulemaking under the APA if adequate responsiveness to the President is at stake. In *Sherley v. Sebelius*,<sup>84</sup> the D.C. Circuit decided that the National Institutes of Health did not act arbitrarily

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78. See Watts, *supra* note 76, at 70 (noting that the withdrawal of discretionary rules, as in *Dabney I*, is quintessentially legislative in nature); Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 598 (2006) (noting that the previously passed rule, upheld in *New York v. Environmental Protection Agency*, was legislative).

79. After *Dabney I*, the Board of Directors of the Solar Energy and Energy Conservation Bank continued to fail to promulgate regulations or disperse funds as required by its enabling Act. See *Dabney v. Reagan (Dabney II)*, 559 F. Supp. 861 (S.D.N.Y. 1982). Nonetheless, the court again refused to implement a timeframe for doing so. See *id.* at 867. In *New York v. Environmental Protection Agency*, the agency "moved to effect its policy through an enforcement memorandum" after its rule underenforcing the Clean Air Act was struck down. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1063 (2013).

80. Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

81. See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1756 (2019) ("§ 553's notice-and-comment requirements do not apply when agencies issue policy statements . . . that merely advise the public of how the agency might exercise its discretion moving forward[, but] do apply when agencies enact legislative rules—meaning rules that carry the force and effect of law . . ."); see also *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) (invalidating a regulation initiated at the behest of President George H.W. Bush because the regulation, which reinterpreted a previous regulation, was a legislative policy but did not go through a notice-and-comment process).

82. See Bijal Shah, *Putting Public Administration Back into Administrative Law*, JOTWELL (June 12, 2018), <https://adlaw.jotwell.com/putting-public-administration-back-into-administrative-law/> [<https://perma.cc/U2CG-89NJ>]; see, e.g., *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810 (2019) (explaining that, after the government posted a new policy online, it "admitted that it hadn't provided notice and comment but argued it wasn't required to do so in these circumstances"); *Texas v. United States*, 809 F.3d 134, 161 (5th Cir. 2015) (discussing the federal government's argument that the policy in question was exempt from notice-and-comment rulemaking in part because it was an interpretive rule), *aff'd*, 136 S. Ct. 2271 (2016) (mem.).

83. See Ming Hsu Chen, *How Much Procedure Is Needed for Agencies to Change "Novel" Regulatory Policies?*, 71 HASTINGS L.J. 1127, 1129 (2020) (discussing the lack of procedural requirements for guidance documents on "novel legal and policy issues"); see, e.g., *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

84. 689 F.3d 776 (D.C. Cir. 2012).



when it ignored some comments raising concerns about human stem cell research, because those comments requested that the agency act in opposition to the requirements of an executive order expanding stem-cell research that the agency was “required to follow.”<sup>85</sup> In this way, the court permitted President Barack Obama’s policy interest to diminish the importance of certain comments to this particular regulatory process. Notably, however, the court added that the agency may follow the “President’s directives to the extent permitted by law” only.<sup>86</sup> In addition, the D.C. Circuit has indicated that agencies may create and initiate interagency coordination without a notice-and-comment process,<sup>87</sup> based partially on the view that the President’s constitutional authority validates administrative efforts to facilitate coordination.<sup>88</sup>

Moreover, the Court has approved of agencies’ use of post-promulgation rulemaking and motioned toward a more permissive good cause exemption to rulemaking, for regulations furthering political goals prompted by the “culture wars.” The APA strongly implies that “legally-binding legislative rules should be adopted only *after* notice and opportunity for public participation, not *before*.”<sup>89</sup> And yet, the Court recently allowed agencies to establish the controversial interim final rule (IFR) process as a convention, in violation of this principle.

The IFR process allows agencies to adopt a final rule before initiating the notice-and-comment process. Furthermore, the “final” rule, issued at the beginning of the process, need not be changed in response to post-promulgation comments received by the agency.<sup>90</sup> Consider *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,<sup>91</sup> which concerned the promulgation of rules by the U.S. Department of Health and

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85. *Id.* at 784–85 (allowing the National Institutes of Health to ignore comments received during a notice-and-comment rulemaking process); *id.* at 784 (“Following these commenters’ lead would directly oppose the clear import of the Executive Order . . .”).

86. *See id.* at 784–85 (“[The agency] may not simply disregard an Executive Order. To the contrary, as an agency under the direction of the executive branch, it must implement the President’s policy directives to the extent permitted by law.”).

87. In an opinion by then-Judge Kavanaugh, the D.C. Circuit decided that a coordination plan developed and implemented by two agencies was not a legislative rule requiring a notice-and-comment process. *See Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014); *see also* Shah, *supra* note 6, at 1203–04.

88. Notably, the coordination in this case was not, in fact, directed by the President himself. Although the decision focuses on the point that the coordination plan is a “rule of procedure” only, this discussion comes after an exhortation in the opinion that the coordination plan is legitimate as part and parcel of the power of both the “President, and his or her White House staff . . . to ensure that such consultation and coordination occurs in the many disparate and far-flung parts of the Executive behemoth.” *Nat’l Mining Ass’n*, 758 F.3d at 249–50; *see also* Shah, *supra* note 6, at 1203 (discussing how the presidential power to coordinate is a constitutional imperative that cannot be trampled by legislation).

89. Kristin E. Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2020), <https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/> [<https://perma.cc/AB38-EULW>].

90. *See supra* notes 66–65 and accompanying text.

91. 140 S. Ct. 2367 (2020).

Human Services and the U.S. Department of Labor following President Trump's executive order<sup>92</sup> expanding the exemption to the "contraceptive mandate"<sup>93</sup> of the Affordable Care Act.<sup>94</sup> More specifically, in this case "the Agencies issued two new IFRs: the Religious IFR and the Moral IFR . . . expand[ing] the existing exemption and Accommodation framework."<sup>95</sup>

Before *Little Sisters of the Poor*, "many scholars . . . perceived this sort of post-promulgation notice and comment process, absent a valid statutory exemption, to be contrary to the text of APA § 553 by putting the opportunity for public participation *after* rather than *before* the agency adopts legally-binding regulations."<sup>96</sup> Nonetheless, the majority in *Little Sisters of the Poor*, led by Justice Thomas, diminishes the importance of the APA's conventional order of process—comments first, then binding language—in favor of a sweeping endorsement of IFRs.<sup>97</sup>

In addition, the Court left open to agencies the argument that IFRs are justified by the good cause exemption to notice-and-comment rulemaking. The good cause exemption allows agencies to skip the notice-and-comment process when "the agency for good cause finds" that "notice and public procedure[s] . . . are impracticable, unnecessary, or contrary to the public interest."<sup>98</sup> In the past, the D.C. Circuit admonished agencies that the good cause standard "is to be narrowly construed and only reluctantly countenanced."<sup>99</sup> In *Little Sisters*, however, the agency, driven by the President's insistent bid for the expanded exemptions to the contraceptive

92. Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 9, 2017).

93. *Id.* at 2372–73 (defining the "contraceptive mandate" as the requirement that "certain employers . . . provide contraceptive coverage to their employees through their group health plans").

94. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S.C.); see *Pennsylvania v. President of the U.S.*, 930 F.3d 543, 558 (3d Cir. 2019) ("In May 2017, President Donald Trump issued an executive order directing the Agencies to 'consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under [42 U.S.C. § 300gg-13(a)(4)].'" (alteration in original) (quoting Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017)), *rev'd and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

95. *Pennsylvania*, 930 F.3d at 558.

96. Hickman, *supra* note 89 ("As a practical matter, it is well understood that, the further that agencies go down the road of the rulemaking process, the more committed they are to the regulations they have drafted, and the less likely they are to make changes in response to comments received. Consequently, the assumption and concern is that parties who might otherwise be interested in commenting will see a request for post-promulgation comments as insincere, designed to placate potential reviewing courts, so those parties will be discouraged from participating."); see also *Adoption of Recommendations*, 60 Fed. Reg. 43108, 43112 (Aug. 15, 1995) ("Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified.").

97. See *Little Sisters of the Poor*, 140 S. Ct. at 2384–85.

98. See *supra* note 68 and accompanying text.

99. *Mack Trucks, Inc. v. Env't Prot. Agency*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 236 F.3d 749, 754 (D.C. Cir. 2001)).

mandate,<sup>100</sup> claimed “good cause to waive notice and comment based on . . . the urgent need to alleviate harm to those with religious objections to the current regulations.”<sup>101</sup> Essentially, this rationalization for a good cause exemption to rulemaking requirements allowed the President’s interest in expedient policymaking to justify reduced administrative adherence to APA notice-and-comment requirements.

Initially, the U.S. Court of Appeals for the Third Circuit both noted and dismissed the agency’s claim of a good cause exemption.<sup>102</sup> However, in overruling the Third Circuit, the Supreme Court said only that the government’s good cause claim was unnecessary to consider, given the Court’s broader conclusions regarding the procedural validity of IFRs.<sup>103</sup> In other words, the Court did not dismiss the government’s novel definition of the good cause exemption in any way. This left open the possibility that the judiciary will eventually validate presidential haste as a legitimate reason to forgo notice-and-comment procedures. Since then, agencies under the Trump administration made “widespread use of the ‘good cause’ exemption” in order “to rush to complete their priorities before the next president t[ook] office,”<sup>104</sup> by issuing several rules without notice-and-comment procedures.<sup>105</sup>

Ultimately, the Supreme Court’s ruling in *Little Sisters* gives agencies a pathway to skirt notice-and-comment requirements. The Court’s approval of the IFR process in *Little Sisters* provides agencies the opportunity to pay only lip service to public comments; in addition, its ruling more broadly allows

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100. *See id.*

101. *Pennsylvania v. President of the U.S.*, 930 F.3d 543, 567 (3d Cir. 2019), *rev’d and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

102. *Id.*

103. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 n.14 (2020).

104. Courtney Rozen, *Trump’s Last-Minute Flubs Open Window for Biden to Rewrite Rules*, BLOOMBERG L. (Feb. 4, 2021), <https://news.bloomberglaw.com/daily-labor-report/trumps-last-minute-flubs-gift-biden-time-to-rewrite-regulations> [<https://perma.cc/9Y6S-HDSS>].

105. *See, e.g.*, Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures, 86 Fed. Reg. 2136 (Jan. 11, 2021) (codified at 40 C.F.R. pts. 87, 1030) (EPA rule concerning greenhouse gas emissions from new airplanes); Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (codified at 40 C.F.R. pt. 30) (EPA’s “secret science” rule, which limited what kinds of evidence the agency could rely on in making news rules); Medicare Program; CY 2021 Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies, 85 Fed. Reg. 84472 (Dec. 28, 2020) (amending 42 C.F.R. pts. 400, 410, 414–415, 423–425 (2021)) (Centers for Medicare & Medicaid Services rule on Medicare payments). Also, two rules concerning H-1B visas, issued by the U.S. Department of Labor and the U.S. Department of Homeland Security, forgo a proper notice-and-comment process by claiming the COVID-19 pandemic as a “good cause.” *See* Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-immigrants in the United States, 86 Fed. Reg. 26154 (May 13, 2021) (codified at 20 C.F.R. pts. 655–56); Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 Fed. Reg. 63918 (Oct. 8, 2020) (codified at 8 C.F.R. pt. 214).

presidential urgency to overshadow the administrative commitments to public participation.

## 2. Underenforcing the National Environmental Policy Act

NEPA provisions limit the administration of pro-corporate, infrastructure, and private sector policies at the expense of adequate protection of the environment; the statute is commonly known as the “Magna Carta” of U.S. environmental law.<sup>106</sup> This section asserts that presidential administration has undercut agency adherence to NEPA, thereby reducing accountability both to the statute’s requirements as well as to its emphasis on expertise in environmental protection. Furthermore, the judiciary has approved of agencies’ refusal to comply with NEPA mandates, based on reasons that privilege presidential power over legislative authority. In this way, courts are condoning presidentialism that directs agencies to shirk their responsibility to faithfully and knowledgeably execute this law.

During the George W. Bush administration, the Supreme Court held that the U.S. Department of Transportation’s failure to perform an environmental impact assessment to evaluate its new policy on motor carriers was not unlawful under the Clean Air Act<sup>107</sup> or NEPA.<sup>108</sup> According to the Court, the agency was obligated to follow the President’s directive, which entailed lifting a moratorium on the use of certain Mexican vehicles in the United States.<sup>109</sup> Essentially, NEPA did not “require an agency to prepare a full [assessment] due to the environmental impact of an action it could not refuse to perform,” given that the President had the authority to command this action.<sup>110</sup>

During the same administration, the U.S. Court of Appeals for the Ninth Circuit held that the U.S. Navy’s failure to assess the environmental impact of a possible accidental explosion resulting from a novel ballistic missile

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106. See Lisa Friedman, *Trump Weakens Major Conservation Law to Speed Construction Permits*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html> [<https://perma.cc/W842-BZEq>] (“Conservationists like to call the National Environmental Policy Act the ‘Magna Carta’ of environmental law . . . . It requires agencies to analyze and disclose the extent to which proposed federal actions or infrastructure projects affect the environment, from local wildlife habitat to the projected levels of greenhouse gas emissions that cause climate change.”); see also Amanda Jahshan, *NEPA: The Magna Carta of Environmental Law*, NAT’L RES. DEF. COUNCIL (July 26, 2013), <https://www.nrdc.org/experts/amanda-jahshan/nepa-magna-carta-environmental-law> [<https://perma.cc/F2AY-N26Y>] (demonstrating that the government itself refers to NEPA as the “‘Magna Carta’ of environmental law”).

107. 42 U.S.C. §§ 7401–7671q.

108. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004).

109. *Id.*

110. *Id.*; see also Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1593–94 (2018) (noting that in *Department of Transportation v. Public Citizen*, the Supreme Court held “that when an agency implements a policy decision made by the President, it is not required to analyze the environmental impacts of the President’s decision, because it has no control over the President”).

system did not violate NEPA or the Endangered Species Act.<sup>111</sup> The court reasoned that the agency action was taken pursuant to presidential orders, which are not subject to these statutes, and the agency had limited discretion to alter the implementation of those orders.<sup>112</sup> And during the Obama presidency, the U.S. District Court for the District of Columbia (DDC) declared that when “the State Department is acting solely on behalf of the President, and . . . is exercising purely presidential prerogatives,” it is not subject to judicial review under NEPA.<sup>113</sup>

Building on this trend, President Trump systematized the weakening of NEPA;<sup>114</sup> this was a departure from previous Presidents’ approach of directing agencies to flout NEPA’s requirements on a case-by-case basis. To this end, he initiated a series of directives<sup>115</sup> that constituted a more centralized approach to destabilizing the requirements of environmental law.<sup>116</sup> A few district courts have pushed back against the Trump

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111. 16 U.S.C. §§ 1531–1544.

112. *Ground Zero Ctr. for Non-violent Action v. U.S. Dep’t of the Navy*, 383 F.3d 1082, 1087 (9th Cir. 2004) (holding that the U.S. Navy’s failure to assess the environmental impact also did not fail review under the arbitrary and capricious standard); *see also* J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97, 131 (2016) (drawing on *Ground Zero Center for Non-violent Action* to assert that a “frequently employed strategy for arguing lack of discretion for purposes of . . . NEPA is . . . the ‘no discretion’ claim, in which the agency contends that its action is ‘purely ministerial’ . . . leaving no room for agency choice in the matter”).

113. *Nat’l Res. Def. Council, Inc. v. U.S. Dep’t of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009).

114. *See* Friedman, *supra* note 106.

115. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) (amending 40 C.F.R. pts. 1500–1508, 1515–1518); *see also* EXEC. OFF. OF THE PRESIDENT COUNCIL ON ENV’T QUALITY, FACT SHEET: MODERNIZING CEQ’S NEPA REGULATIONS (2020), <https://ceq.doe.gov/docs/laws-regulations/ceq-final-rule-fact-sheet-2020-07-15.pdf> [<https://perma.cc/LN2F-C67X>] (asserting that NEPA processes are long, expensive, and highly limited, and they “make it very challenging for large and small businesses to plan, finance, and build projects in the United States,” in order to justify new rule setting limits to the requirements of NEPA).

116. *See* Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENV’T L. REP. 10281, 10282 (2020) (arguing that the Trump administration is “radically undercut[ting] NEPA’s innovative and successful contributions to democratic governance”); Robert L. Glicksman & Alejandro E. Camacho, *The Trump Administration’s Latest Unconstitutional Power Grab*, REGUL. REV. (Aug. 24, 2020), <https://www.theregreview.org/2020/08/24/glicksman-camacho-trump-administration-unconstitutional-power-grab/> [<https://perma.cc/9MH8-3MMC>] (arguing that the latest Trump administration policy, which seeks to limit judicial review under NEPA, is unconstitutional).

administration's corrosion of NEPA,<sup>117</sup> but one of the directives, a finalized regulation, still stands.<sup>118</sup>

Overall, courts have exempted agencies acting under the President's command from NEPA's procedural requirements. In these examples, the agency would "not be held accountable [under the law] for the President's action."<sup>119</sup> Instead, "[t]he President's binding decision . . . recalibrated the agency's other procedural duties—not vice versa."<sup>120</sup> By authorizing agencies to ignore the requirements of blockbuster legislation at the President's request, the judiciary has entrenched in the administrative state a lack of consistent fidelity to both the law's requirements and its core aim: that agencies create policies with solicitude toward the environment.

### 3. Insulation from Judicial Review

This section argues that the President sometimes shields agencies from judicial review that could otherwise improve agency accountability to statutory requirements and expectations of good governance. As an initial matter, the Supreme Court has decided that the APA is not a statutory limitation on the President's power, which means that the President's actions are not subject to judicial review under the APA.<sup>121</sup> "The actions of the President cannot be reviewed under the APA because the President is not an 'agency' under that Act,"<sup>122</sup> notwithstanding that there is a debate regarding whether or not the President's actions should be reviewable under the APA.<sup>123</sup> Furthermore, the Supreme Court has declared that when the President is directing an agency in their own capacity, their exercise of

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117. See, e.g., *Backcountry Against Dumps v. U.S. Dep't of Energy*, No. 12-CV-03062, 2017 U.S. Dist. LEXIS 114496, at \*12 (S.D. Cal. Jan. 30, 2017) (finding that an agency decision—approved by a presidential permit per the requirements of Exec. Order No. 10,485, 18 Fed. Reg. 5397 (Sept. 3, 1953)—was both arbitrary and capricious and without observance of procedure required by law because the agency decision failed to adequately assess environmental impacts as required by NEPA); *Protect Our Cmty's. Found. v. Chu*, 12CV3062, 2014 U.S. Dist. LEXIS 42410, at \*16 (S.D. Cal. Mar. 27, 2014) ("[I]t is clear that this Court has been tasked to review agency actions such as the issuance of a Presidential permit by an agency, based on its own EIS [environmental impact statement] that was created to comply with NEPA.").

118. See *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43304.

119. See *White*, *supra* note 110, at 1594.

120. See *id.*

121. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

122. *Dalton v. Specter*, 511 U.S. 462, 476 (1994); see also *Franklin*, 505 U.S. at 800–01.

123. Compare Alan Morrison, *Presidential Actions Should Be Subject to Administrative Procedure Act Review*, in *RETHINKING ADMIN LAW: FROM APA TO Z 16* (2019), with Kagan, *supra* note 40, at 2350–51. See also Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 *ADMIN. L. REV.* 515, 566 (2018) ("[Kagan] contended that *Franklin v. Massachusetts*' holding that the president is not an 'agency' under the APA should not apply 'when the President step[s] into the shoes of an agency head.'" (alteration in original) (quoting Kagan, *supra* note 40, at 2351)).

presidential discretion is not reviewable under the agency's enabling statute.<sup>124</sup>

In addition to their own exclusion from judicial review, Presidents insulate agencies from oversight by the judiciary as well. More specifically, courts will sometimes exempt agencies from legislative requirements of judicial review after determining that the agency's actions were presidential in some respect or that the agency was exercising presidential authority. Therefore, proximity to the President sometimes allows agencies to escape judicial review under the APA and, thus, to avoid being held accountable to statutory requirements and expectations.

The Supreme Court suggested that exercises of presidential discretion, in this case by President Reagan, can be "grandfathered in" to an agency by a previous statute, such that subsequent legislation requiring additional administrative procedures may be ignored.<sup>125</sup> Also during the Reagan era, the D.C. Circuit deemed an agency policy unreviewable because it "involved . . . policy-making at the highest level by the executive branch."<sup>126</sup> In addition, the Seventh Circuit determined during this time period that because an agency acted pursuant to the President's authority to determine a "political question" under the enabling statute, this foreclosed "traditional judicial review" under the APA.<sup>127</sup>

The D.C. Circuit has also wrestled with whether to exempt an administrative entity from the Freedom of Information Act<sup>128</sup> (FOIA) by labeling it presidential. In the 1970s, the court held that the White House Office of Science and Technology Policy was not merely President Nixon's "staff," but a separate agency subject to constraints under the APA and

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124. See, e.g., *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112–13 (1948) (holding that the President's discretion to approve certain decisions of the Civil Aeronautics Board is not subject to judicial review because the President's decision in this context "derives its vitality from the exercise of unreviewable Presidential discretion").

125. See *Regan v. Wald*, 468 U.S. 222, 225–29 (1984) (acquiescing to a policy prohibiting U.S. citizens from spending money in Cuba, based in continued executive orders—by Presidents John F. Kennedy, James Carter, and Ronald Reagan—mandating currency restrictions against Cuba). The policy's focus on foreign affairs may have encouraged the Court to accord the agency plenary power. See Louisa C. Slocum, *OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 406 n.159 (2013) (citing *Regan v. Wald* to suggest that "agencies engaged in decisions about foreign affairs receive an even higher degree of deference").

126. *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 281 (D.C. Cir. 1989) (suggesting that the "attack [against the policy] d[id] not go to the lawfulness of the policy, but rather its wisdom" and discussing an instance in which an agency rule is characterized as unreviewable because it constituted a policy decision of the President, per both constitutional and statutory authority).

127. *Flynn v. Shultz*, 748 F.2d 1186, 1193–95 (7th Cir. 1984) (deciding that because the President's authority under a statute concerns a "political question," his determination was not subject to review under the APA); see also Kevin D. Hughes, *Hostages' Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity*, 26 COLUM. J.L. & SOC. PROBS. 555, 566 (1993) (noting that "the *Flynn* court argued that the Hostage Act's vagueness suggests that Congress intended the President to exercise broad discretion, foreclosing 'traditional judicial review' in this area" (quoting *Flynn*, 748 F.2d at 1193)).

128. 5 U.S.C. § 552.

FOIA.<sup>129</sup> Decades later, however, the court held that President Reagan's Task Force on Regulatory Relief, chaired by then-Vice President George Bush, was not an "agency" subject to FOIA.<sup>130</sup> Since then, Judge Patricia McGowan Wald and Professor Jonathan R. Siegel have suggested that even those "White House units whose sole function is to 'advise and assist' the President, rather than to perform line staff functions," might nonetheless be exempt from disclosure requirements like the President is.<sup>131</sup>

However, the D.C. Circuit has noted that even if agencies act at the direction of the President, they nonetheless behave under their own auspices—or rather, the auspices of the legislature—and therefore remain subject to judicial oversight.<sup>132</sup> In *Chamber of Commerce v. Reich*,<sup>133</sup> the D.C. Circuit restricted the President's directive on the ground that it was preempted by statutory authority—in this case, the National Labor Relations Act<sup>134</sup> (NLRA)—which rendered the agency subject to judicial review.<sup>135</sup> According to the court, even if the agency head "were acting at the behest of the President, this 'does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.'"<sup>136</sup> At the same time, there was disagreement as to whether such preemption is an improper restriction on presidential power or whether judicial review and the subsequent restriction of presidential power in this context is justified to ensure that the President does not exceed their congressionally delegated power.<sup>137</sup> In addition, a few district courts have not allowed an agency to "shield itself from judicial review under the APA for any action by arguing that it was 'Presidential.'"<sup>138</sup> Accordingly, an agency responding to a presidential directive is still required to abide by the APA<sup>139</sup> and, implicitly, the legislature.

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129. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

130. *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993).

131. Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 764 (2002).

132. See *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

133. 74 F.3d 1322 (D.C. Cir. 1996).

134. 29 U.S.C. §§ 151–169.

135. *Chamber of Com.*, 74 F.3d at 1338–39.

136. *Id.* at 1328 (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)).

137. Compare Charles Thomas Kimmitt, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in Chamber of Commerce v. Reich*, 106 YALE L.J. 811, 832 (1996) (arguing that allowing the statutory provisions of the NLRA to preempt an executive order "distorts the Supremacy Clause in a manner that severely restricts the President from acting through his legitimate executive order power in the field of labor relations"), with Gordon M. Clay, *Executive (Ab)Use of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573, 2574–75 (1996).

138. *Protect Our Cmty's Found. v. Chu*, No. 12-CV-3062, 2014 U.S. Dist. LEXIS 42410 (S.D. Cal. Mar. 27, 2014), at \*17 (finding agency exercise of authority delegated by the President reviewable under the APA); see also *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1031 n.3, 1047 (D. Minn. 2010) (acknowledging that agency actions taken in response to presidential directives are separately justiciable).

139. See *Thomas v. Pompeo*, 438 F. Supp. 3d 35, 43–44 (D.D.C. 2020) (concluding that the court had jurisdiction to hear a claim that a visa waiver determination made by the U.S.



At a more technical level, courts base reviewability on whether it is the agency's decision or a presidential determination that constitutes the "final action" under statute. If the agency's action is final, it is likely to be reviewable.<sup>140</sup> However, if the President's approval is required to finalize the agency action, neither the agency action nor the President's action is reviewable.<sup>141</sup> Indeed, a number of federal cases from the Obama era involve disputes as to whether the agency's action was (1) final, and therefore reviewable; (2) not final, and therefore not reviewable; or (3) subject to a presidential action or approval that constituted the "final action," which would mean that neither the agency's nor the President's actions were reviewable.<sup>142</sup> In a case involving a failure of the Environmental Protection Agency (EPA) to issue ozone standards under President Obama,<sup>143</sup> "the D.C. Circuit determined that it lacked jurisdiction to hear the challenge because the EPA had merely 'postponed' consideration of the ozone standard and there was no 'final' agency action to review."<sup>144</sup> As a result, Professor Kathryn Watts observes, "the President's involvement in the withdrawal [of ozone standards] was immune from judicial review."<sup>145</sup>

Complementarily, agency actions in pursuit of expansive presidential aims may be exempted from the APA if that action is taken pursuant to the agency's discretionary authority. In this way, the exercise of discretionary administrative authority can provide agency behavior directed by the President cover from judicial review, even if this behavior effectively results

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Department of State pursuant to a presidential proclamation violates the APA). "Although presidential actions—such as the Proclamation—are not subject to APA review, that does not mean that the failure to adjudicate a waiver is also unreviewable." *Id.* at 43 (citation omitted).

140. 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable."); *see also* Bijal Shah, *Heckler v. Chaney*, in *LEADING CASES IN ADMINISTRATIVE LAW* (forthcoming) (on file with author); Stephen Hylas, Note, *Final Agency Action in the Administrative Procedure Act*, 92 N.Y.U. L. REV. 1644, 1644 (2017).

141. *See* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1133 (2020) (noting that "agency action that requires the President's final approval" is not subject to APA review); Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 657 (2016) ("[W]hen the formal responsibility for ratifying an agency's decision rests with the President, review is not available: the agency's work cannot be reviewed because it is not final without action by the President, and the President's action cannot be reviewed because the President is not an agency.").

142. *See, e.g., In re Aiken Cnty.*, 645 F.3d 428, 437 (D.C. Cir. 2011); *Dalton v. Specter*, 511 U.S. 462, 476 (1994); *Protect Our Cmty's Found.*, 2014 U.S. Dist. LEXIS 42410, at \*13–14; *Sierra Club*, 746 F. Supp. 2d at 1031.

143. *Mississippi v. Env't Prot. Agency*, 744 F.3d 1334 (D.C. Cir. 2013).

144. Watts, *supra* note 49, at 714–15.

145. *Id.* at 715; *see also id.* at 711–15 (describing covert pressure from the George W. Bush administration and overt pressure from the Obama administration on the EPA regarding the setting of ozone standards); *EPA's New Ozone Standards: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 1–7 (2008) (opening statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform) (describing the impetus for the hearing as the disregard of science by the George W. Bush administration on multiple occasions, including the decision to reverse the EPA on the setting of ozone standards).

in a significant change to the law. In 2020, the D.C. Circuit found that an agency head that exercised discretionary authority granted by a governing statute (the Immigration and Nationality Act) to further President Trump's immigration goals was not subject to judicial review.<sup>146</sup> More specifically, the court held improper an injunction barring the implementation of a greatly expanded deportation process, based on an executive order issued by President Trump,<sup>147</sup> because the policy was exempt from APA review.<sup>148</sup> Notably, the exemption of this agency action from judicial review was justified by the fact that the APA does not govern purely discretionary agency action.<sup>149</sup>

The drafters of the APA intended to exclude from review only those administrative exercises of discretionary authority that have a narrow sweep.<sup>150</sup> If presidential involvement renders the exercise of administrative discretion unreviewable, this allows for unreviewable exercises of discretion to be more expansive and consequential than the APA intended. In this case, the agency implemented broadly punitive immigration enforcement measures under pressure from the President. And although the President's directives and resulting administrative policy in this instance both changed the breadth of immigration law and had significant implications for administrative due process, neither the directives nor the agency's policy were subject to judicial review, which meant that both escaped even minimal statutory constraints (such as the APA requirement that an administrative policy should not be arbitrary or capricious).<sup>151</sup>

### B. Dismantling Structures of Independence

According to the unitary executive theory—and as espoused by the Supreme Court—“the expansion of th[e] bureaucracy into new territories the Framers could scarcely have imagined” implies a constitutional “duty to ensure that the executive branch is overseen by a President accountable to

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146. *See Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020).

147. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017). The Biden administration revoked this order. *See* Creating a Comprehensive Regional Framework to Address the Causes of Migration, Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

148. *Make the Rd. N.Y.*, 962 F.3d at 633–34.

149. *Id.*

150. First, the category of final agency action that is subject to judicial review under the APA is fairly broad. *See* Shah, *supra* note 140 (manuscript at 1) (noting that the APA permits review of any final agency action and that the category of final agency action is expansive). Second, the APA's arbitrary and capricious standard for review of agency action allows courts to review even those exercises of discretion that are not required by rulemaking or administrative adjudication. CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 14–15 (2017) (describing the arbitrary and capricious standard as the APA's “‘catch-all’ review standard” that applies to “informal rulemaking proceedings . . . and most other discretionary determinations an agency makes” (quoting *Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984))). Together, these factors suggest that the vast majority of agency action is subject to judicial review under the APA.

151. *See Make the Rd. N.Y.*, 962 F.3d at 635.

the people.”<sup>152</sup> Unitarians insist that the President has the constitutional authority to exercise the power “of the agency officials to whom the power to administer the law has been delegated by Congress,”<sup>153</sup> notwithstanding their reluctance to likewise subject the President to the statutory mandates that govern administrators, including the APA.<sup>154</sup>

Accordingly, unitary executive theorists may go so far as to declare that any structural separation from the President renders an agency unconstitutional.<sup>155</sup> Indeed, agencies that act with some independence or insulation from political influence are sometimes characterized as an unconstitutional “fourth” branch of the government operating outside of the formal separation of powers.<sup>156</sup> In addition, unitarians also believe that agency independence reduces administrative accountability by limiting the President’s ability to oversee or intervene in agency action.<sup>157</sup> From this perspective, presidential control is justified on the grounds that it increases democratic legitimacy.<sup>158</sup>

This section argues, in contrast, that recent cases extending Appointments Clause requirements to several administrative adjudicators and expanding the category of officials subject to at-will removal constitute a mechanism of presidential influence on agency decision- and policymaking that interferes with constitutional values and functional expectations rightfully imposed by the legislature on the administrative state. Arguably, it is now the President that is positioned to insulate agencies from their necessary allegiance to Congress and create of them a “fourth branch” cut off from their constitutional creator, the legislature.

In the past, the Supreme Court honored conventions of agency independence,<sup>159</sup> even though some of its members subscribe to unitary

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152. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020); *see, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (“The diffusion of power carries with it a diffusion of accountability.”).

153. *See Shah, supra* note 31, at 1127.

154. *See supra* notes 121–24 and accompanying text.

155. *See Calabresi & Rhodes, supra* note 5, at 1166.

156. *See supra* notes 17–18 and accompanying text.

157. *Free Enter. Fund*, 561 U.S. at 497–98 (“The diffusion of power carries with it a diffusion of accountability.”).

158. *See supra* notes 40–41 and accompanying text.

159. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 692–93 (1988) (“Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office.”); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (“If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935) (“The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid.”).

executive theory.<sup>160</sup> More recently, however, the unitary executive theory has reemerged in judicial decisions, which have begun to expand both the category of officials subject to a constitutional appointments process and the scope of the President's removal power.<sup>161</sup> In the wake of these decisions, the number of executive branch actors subject to constitutional appointments requirements and at-will removal has grown. This trend will likely continue.

Certainly, independent agencies are subject to executive hierarchy, and administrative adjudicators have only a qualified right to decisional independence.<sup>162</sup> And yet, administrative independence from political involvement in administration—including, but not limited to, constraints on the presidential power to appoint and remove agency officials—is both consistent with Congress's constitutional authority to form the government and important to the quality of both administrative adjudication and policymaking.<sup>163</sup> Both constitutional norms and requirements, as well as values of good governance, may suffer because of these recent judicial decisions.

First, growing presidential or judicial control over changes to agency structure, including the dismantling of for-cause removal provisions, may constitute a potential infringement on the legislative power to create and structure agencies and to define the roles of administrators under the Necessary and Proper Clause. Congress uses “its powers under the Necessary and Proper Clause to design effective administrative institutions.”<sup>164</sup> This includes the legislative assignment of the authority to implement a statute to administrators and not to the President. And this also “include[s] taking steps to insulate certain officers from political influence.”<sup>165</sup> As Justice Kagan has observed, it is a mistake “to ‘extrapolat[e]’ from ‘general constitutional language’” the understanding

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160. See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 786 (2016).

161. Cass R. Sunstein & Adrian Vermeule, *The Very Structure of Modern Government Is Under Legal Assault*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/opinion/us-government-constitution.html> [https://perma.cc/T74A-DJ9R] (arguing that recent cases suggest the Supreme Court is “calling into question the very structure of modern government”).

162. The decisional independence of administrative adjudicators can also be reduced through guidance, other documents, and generalized efforts by supervisors and political leaders; conversely, it can be enhanced by political appointees' respect for structures of agency independence. See generally Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129 (2017); see also *Ass'n of Admin. L. Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984), amended by No. 83-0124, 1985 WL 71829 (D.D.C. July 2, 1985).

163. It is for this reason that Congress often mandates for-cause removal provisions and structures that infuse agencies with independence, to varying degrees. See generally Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (providing a detailed discussion of how independence varies from agency to agency).

164. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2231 (2020).

165. *Id.*; see also *id.* at 2229–33 (providing historical and constitutional context for this statement).

that “Congress’s ability to legislate under the Necessary and Proper Clause” is “constrain[ed].”<sup>166</sup>

Indeed, the Supreme Court’s erosion of Congress’s “constitutional authority to insulate any federal agency or high-ranking civil officer from complete presidential control” means that Congress is in danger of losing “the most practical of its few remaining tools for ensuring federal administrative fidelity to legislative intentions.”<sup>167</sup> At the very least, the sheer diversity of agency structures—many headed by a single appointee subject to at-will removal, and others headed by balanced multimember boards with provisions for removal only “for cause”—infuses the executive branch with a variety of hierarchies and forms of accountability, thus diminishing the likelihood that structures of agency independence are likely to offend the President’s Article II powers.<sup>168</sup>

The exercise of extensive appointment or removal power may also allow the President or their proxies to direct agency adjudicators in a manner that leads to reduced administrative accountability to the values and expectations, held by Congress and the public, that agencies promote impartiality and expertise in administrative decision- and policymaking. As in other categories of political intervention, the President’s interests might lie in deregulation—for instance, in the financial sector or regarding matters of patent protection. Political control over adjudication may also provide “an opportunity for political supervisors to reward friends and punish enemies.”<sup>169</sup> Accordingly, the increasing politicization of administrative adjudicators may warp decisional independence, as adjudicators endeavor to meet the President’s policy demands. Expanded appointments power, the elimination of for-cause removal provisions, and other forms of improper influence negatively impacted administrative adjudication,<sup>170</sup> also because administrative adjudicators’ responsibilities contain “a due process dimension that does not burden other government officials.”<sup>171</sup>

In addition to exacerbating the “risk that adjudicators might otherwise unfairly favor agency enforcers,” Professors Rebecca Eisenberg and Nina Mendelson note that “political control of adjudication decisions” may be ineffective for “highly technical” decisions; may “tempt agencies to use

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166. *Id.* at 2231 (Kagan, J., concurring in part and dissenting in part) (quoting *Morrison v. Olson*, 487 U.S. 654, 690 n.3 (1988)).

167. A. Michael Froomkin, *In Defense of Administrative Agency Autonomy*, 96 *YALE L.J.* 787, 787–89 (1987); see also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *VAND. L. REV.* 599, 611 (2010) (explaining the benefits of independent agencies and their insulation from politics).

168. See Alex Zhang, *Separation of Structures*, 110 *VA. L. REV.* (forthcoming 2024) (manuscript at 62).

169. Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 *ADMIN. L. REV.* 1, 6 (2023).

170. See Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 *MINN. L. REV.* 39, 41 (2020).

171. Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of for Cause Protection*, 72 *ADMIN. L. REV.* 461, 462 (2020). See generally Kent H. Barnett, *Resolving the ALJ Quandary*, 66 *VAND. L. REV.* 797 (2013).

individual adjudications to establish new policies,” instead of engaging in rulemaking, which is more publicly accountable; and may, due to its more “haphazard” nature, render administrative adjudication less “consistent and accurate.”<sup>172</sup> And even Justice Kagan, in her foundational text on presidential administration, argued that “a properly presidentialist executive will show ‘restraint’” in regard to agency action “that in large measure depends on scientific methodology.”<sup>173</sup>

Finally, the legitimacy of agency action is based, to some extent, in the president’s validation of the agency actor,<sup>174</sup> perhaps even when the legislature has made clear that its intention in the enabling act was to foster independence “from pressures brought to bear by the President.”<sup>175</sup> Nonetheless, the judiciary has also endeavored to evaluate agency decision-making separately from the presidentialism that influences it. For instance, the Seventh Circuit considered whether the decisions made by an incomplete commission may be challenged based on a failure by the President to appoint commissioners.<sup>176</sup> Accordingly, commissioners were not held responsible for the President’s failure to appoint a full board, and their decisions were likewise validated by the court.<sup>177</sup> In this case, the court

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172. Eisenberg & Mendelson, *supra* note 169, at 5–6.

173. Mashaw & Berke, *supra* note 18, at 557 (quoting Kagan, *supra* note 40, at 2356); see also McGarity, *supra* note 42, at 456–57 (“When the President or his staff can secretly intervene into any stage of the regulatory process, accountability suffers.”).

174. See *Wolsey v. Chapman*, 101 U.S. 755, 770 (1879) (legitimizing an order by the Secretary of the Interior as the equivalent of a Presidential proclamation, which is required by statute, because the President “speaks and acts through” the appointed “heads of the several departments”); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL’Y 337, 369–70, 370 n.126 (2015) (arguing, by reference to *Wolsey* and other cases, that the Article II Appointments Clause contemplates that the President will designate “lieutenants” to enforce the law); *Westinghouse Elec. Corp. v. U.S. Nuclear Regul. Comm’n*, 598 F.2d 759 (3d Cir. 1979) (upholding the Nuclear Regulatory Commission’s decision to suspend—at the request of the President and in deference to his foreign policy pronouncement—rulemaking and related licensing proceedings required for the reprocessing of nuclear wastes and for the associated recycle of the plutonium).

175. *Westinghouse Elec. Corp.*, 598 F.2d at 775 (noting Senator Warren Magnuson’s view that “Congress intended that the [Nuclear Regulatory] Commission be independent not only from pressures brought to bear by the President, but from all external pressures.”); see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 591 n.347 (1989) (noting that *Westinghouse* was upheld “despite a challenge that such action impermissibly interfered with the agency’s independence”).

176. *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 475 (7th Cir. 1980) (confronting a challenge to Interstate Commerce Commission (ICC) decisions because the President left some commissioner seats vacant and holding that the ICC had the power to act even though its membership had fallen to five of eleven authorized positions).

177. *Assure Competitive Transp.*, 629 F.2d at 475 (“The problem, if there is one, lies not with the existing Commissioners, who have been validly appointed, or with the existing Commission, which is authorized by statute to act with vacancies. The only arguable illegality is on the part of the President, who may be, as alleged, intentionally or unreasonably failing to appoint a full complement of Commissioners.”). To be on the safe side, agencies have since regulated to avoid the possibility that vacancies might undercut agency decision-making. See Catherine L. Fisk, *The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, but Didn’t*, *Address in New Process Steel, L.P. v. NLRB*, 5 FIU L. REV. 593, 596–97 (2010).

found “that as a matter of sensible administration the vacancy of a majority of seats does not deprive the agency of the power to act”<sup>178</sup>—in other words, that the President’s failure to exercise a constitutional responsibility does not affect the legitimacy of agency decision-making.<sup>179</sup>

### 1. Politicized Appointment of Administrative Adjudicators

As Justice Sotomayor has observed, there is inherent tension between political control and adjudicative independence.<sup>180</sup> “[F]or many kinds of administrative adjudications[,] . . . political control can present dubious benefits and distinct risks.”<sup>181</sup> This section emphasizes the risks inherent to this dynamic cemented by the Supreme Court in recent years. In addition to possibly infringing on Congress’s constitutional authority to structure the federal government,<sup>182</sup> placing administrative law judges under the umbrella of constitutional appointments requirements may deteriorate the insulation from political influence that the legislature purposefully implemented.<sup>183</sup>

A unitary executive structure creates pressure on administrative adjudicators to engage with political concerns; this pressure, in turn, looms over their “special responsibility to serve the public with factual determinations that assure fairness and are largely outside politics.”<sup>184</sup> This interferes with administrative due process, which depends on unbiased and independent administrative adjudication.<sup>185</sup> More to the point, the expansion of the category of adjudicators subject to political appointments may be problematic due to its “specific influence on the substance of particular

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178. Fisk, *supra* note 177, at 597 (discussing *Assure Competitive Transp.*).

179. *Assure Competitive Transp., Inc.*, 629 F.2d at 471 (stating that “because the President is not a party,” a constitutional challenge was not proper). Agencies have regulated to avoid the possibility that vacancies might undercut agency decision-making. Fisk, *supra* note 177, at 597 (discussing a rule “permit[ting] the [Federal Trade Commission] to act in cases ‘where, due to vacancies, recusals, or a combination of the two, fewer than three commissioners can participate’” (quoting Kelly M. Falls, *A Quorum of One: Redefining Recusal Standards in the Federal Trade Commission*, 19 GEO. J. LEGAL ETHICS 705, 710–11 (2006))).

180. George Quillin & Jeanne Gills, *Justices Appear Conflicted About Status of Administrative Patent Judges*, SCOTUS BLOG (Mar. 3, 2021, 9:12 AM), <https://www.scotusblog.com/2021/03/justices-appear-conflicted-about-status-of-administrative-patent-judges/> [<https://perma.cc/2RHN-4C5Q>] (transcribing the oral argument in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021)); see also Adam Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769 (2023) (observing that these two perspectives are in tension with one another in separation-of-powers formalism).

181. Eisenberg & Mendelson, *supra* note 169, at 5 (discussing *United States v. Arthrex, Inc.*).

182. See *supra* notes 164–68 and accompanying text.

183. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part) (declaring that removing “for-cause” removal protection “wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure”).

184. Verkuil, *supra* note 171, at 462.

185. See Levy & Glicksman, *supra* note 170, at 41 (noting that the potential loss of civil service “protections is particularly problematic for officials engaged in administrative adjudication because an unbiased decision-maker is central to our concept of procedural fairness”).

adjudicative outcomes.”<sup>186</sup> Even when the President appears to shape decision- or policymaking *ex ante* only, by altering only the conditions under which they occur (for instance, through decisions to hire and fire officials), this may lead agencies to particular policy or decisional outcomes *ex post*.

In *Lucia v. Securities & Exchange Commission*,<sup>187</sup> the Court declared that administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are “inferior officers” subject to the Appointments Clause of the Constitution.<sup>188</sup> In doing so, *Lucia* rendered illegitimate the decisions of SEC ALJs because they were hired by SEC staff and therefore not properly appointed under Article II.<sup>189</sup> This decision seemed to be an implicit rebuke of the position, previously held by the judiciary, that unconstitutional appointment does not invalidate an ALJ’s prior actions.<sup>190</sup> In any case, *Lucia* transformed ALJs “from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission.”<sup>191</sup>

*Lucia* “was transmuted almost immediately through political channels to apply broadly across the government.”<sup>192</sup> After *Lucia* was decided, President Trump produced an unusual executive order that sought to constrain the scope of discretionary adjudication practices.<sup>193</sup> More specifically, this executive order eliminated the role of the U.S. Office of Personnel Management (OPM) in selecting ALJs and removed ALJs from the competitive service (a contingent of government employees protected, to some extent, from politicized hiring and firing).<sup>194</sup> In doing so, President Trump sought “to place them more squarely within the constitutional appointments framework,” which would have increased political appointees’ and presidential influence over agency adjudication.<sup>195</sup>

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186. See Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 859 (2015).

187. 138 S. Ct. 2044 (2018).

188. *Id.* at 2051 & n.3 (ruling that SEC ALJs are “officers of the United States” and thus, per the Appointments Clause of the Constitution, must be appointed by the President or a “department head”—in this case, the SEC itself—and not by Commission staff).

189. See *id.* (holding that ALJs of the SEC are subject to the Appointments Clause); see also Andrew C. Michaels, *Retroactivity and Appointments*, 52 LOY. U. CHI. L.J. 627, 628 (2021) (noting the unanswered question of whether ALJs’ “prior actions become invalid” if “a court holds that certain administrative judges were not constitutionally appointed”).

190. See *supra* notes 176–79 and accompanying text.

191. See *Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part).

192. Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 3–4 (2019).

193. Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018) (exempting all ALJs appointed under 5 U.S.C. § 3105 from competitive civil selection).

194. *Id.*; see Memorandum from Jeff T. H. Pon, Dir., Off. of Pers. Mgmt., to Heads of Exec. Dep’ts and Agencies, Executive Order—Excepting Administrative Law Judges from the Competitive Service (July 10, 2018); Memorandum from the Solic. Gen., U.S. Dep’t of Just., to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018) (instructing that all the ALJs and “similarly situated administrative judges” should be appointed under the Appointment Clause).

195. Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, REGUL. REV. (July 23, 2021), <https://www.theregreview.org/2021/07/23/shah-agency-adjudication/> [<https://perma.cc/F458-PSDR>]; see Memorandum from the Solic. Gen., U.S. Dep’t of Just., to Agency Gen. Counsels, *supra* note 194; Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July



*Lucia* and these subsequent developments “challenge the longstanding consensus in favor of civil service protections for federal officers as a means of preventing cronyism and political patronage,” which exacerbates bias in administrative adjudication.<sup>196</sup> Indeed, these developments have the potential to impact adjudicators beyond ALJs,<sup>197</sup> particularly those that preside over informal adjudications, many of whom benefit from fewer APA protections for decisional independence than do ALJs.

A more recent case, *United States v. Arthrex*,<sup>198</sup> amplified the effects of *Lucia* by suggesting that administrative adjudicators could even be characterized as “principal officers.”<sup>199</sup> In *Lucia*, the Supreme Court wrestled with whether SEC ALJs were officers of any sort, subject to constitutional appointments. But in *Arthrex*, the U.S. Court of Appeals for the Federal Circuit had little trouble concluding that administrative patent judges (APJs) in the U.S. Patent and Trademark Office (PTO) were officers.<sup>200</sup> In addition, the Federal Circuit determined that APJs, as they stood, were principal officers, in part because they issued final written decisions on patentability.<sup>201</sup> Moreover, the Supreme Court came to the same conclusion.<sup>202</sup>

Rather than severing the existing appointment provisions of the statute and placing the adjudicators at issue under more restrictive appointment requirements, as in *Lucia*, the Court in *Arthrex* remedied the constitutional defect in the PTO’s structure by subjecting APJ decisions to review and revision by the PTO Director, thus converting APJs into inferior officers. But technical patent adjudications require “greater, not less, independence from those potentially influenced by political factors.”<sup>203</sup> By giving the PTO Director unilateral control over all agency adjudication, the Court increased political influence over APJs and prevented “Congress from establishing a patent scheme consistent with” APJs’ need for independence to issue expert decisions.<sup>204</sup>

Overall, the Court has begun “a new line of Article II doctrine holding that the President possesses the power to review and direct decisions made by any executive-branch official.”<sup>205</sup> Together, *Lucia* and *Arthrex* strengthened political power over adjudicators in three distinct ways and at slightly

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10, 2018); see also *Guidance on Administrative Law Judges After Lucia v. SEC*, 132 HARV. L. REV. 1120 (2019).

196. Levy & Glicksman, *supra* note 170, at 41.

197. See Verkuil, *supra* note 171, at 468–71 (arguing that *Lucia*, together with the Solicitor General’s memorandum and an executive order expanding the reach of this case, will impact many decisionmakers beyond those with the designation of “Administrative Law Judge”).

198. 141 S. Ct. 1970 (2021).

199. Shah, *supra* note 195.

200. See *Arthrex, Inc., v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated sub nom.* *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

201. *Id.* at 1334.

202. *Arthrex*, 141 S. Ct. at 1985.

203. *Id.* at 1996 (Breyer, J., dissenting).

204. See *id.*

205. Cox & Kaufman, *supra* note 180, at 1784.

different points in the presidential hierarchy: the Supreme Court's decision in *Lucia*, by necessitating the hiring of certain ALJs by the President or agency head; the Federal Circuit's decision in *Arthrex*, by calling for at-will removal of APJs by the agency head; and the Supreme Court's decision in *Arthrex*, by expanding direct agency head control over technical administrative adjudication by an ALJ. "After *Arthrex*, political control of adjudication is not just permissible[, but] may be constitutionally required,"<sup>206</sup> according to the unitary executive model adopted by the Court. Since the decision, a congressional investigation revealed "that most administrative patent judges believed that" political "management and oversight affected their decisional independence."<sup>207</sup>

## 2. Expanded At-Will Removal of Independent Agency Heads (and Adjudicators)

The buttressing of political power over independent agency heads interferes with the legislature's power to create and structure agencies.<sup>208</sup> In addition, it induces those officials to reduce their commitment to the good governance ideals of expertise and nonpartisanship in policymaking, values that motivate the legislature to in-state agency independence in the first place, in favor of sensitivity to the President's interests. Unfettered presidential removal power may also be more likely to lead to incompetence and corruption than to the accountability imagined by unitary executive theorists.<sup>209</sup>

This section argues that the Supreme Court has weakened the statutory protection from at-will removal enjoyed by independent agency heads that staves off some of these dynamics. In *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>210</sup> the Court decided that the President has the power to remove the sole head of an independent agency at will, despite the longstanding convention allowing independent agency heads to be insulated by "for cause" removal provisions from undue political influence.<sup>211</sup> The *Seila Law* decision resolved its quandary by severing the offending portion of the enabling statute.<sup>212</sup> By requiring that the head of the Consumer Financial Protection Bureau (CFPB) be removable by the President at will, *Seila Law* subordinates the law and essential mission governing this agency—"to protect consumers from financial abuses and to serve as the

206. *Id.* at 1783.

207. Jeremy S. Graboyes, Christopher J. Walker & Matthew L. Wiener, *Adjudication Developments in 2022*, ADMIN. & REGUL. L. NEWS, Winter 2023, at 15.

208. See *supra* notes 164–68 and accompanying text.

209. See Martha Kinsella, *Supreme Court Preview: Collins v. Mnuchin and the Expanding 'Unitary Executive' Theory*, JUST SECURITY (Dec. 8, 2020), <https://www.justsecurity.org/73746/supreme-court-preview-collins-v-mnuchin-and-the-expanding-unitary-executive-theory/> [<https://perma.cc/M57S-5E84>].

210. 140 S. Ct. 2183 (2020).

211. *Id.* at 2199–201 (limiting *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), to multimember, expert, partisan balanced agencies and limiting *Morrison v. Olson*, 487 U.S. 654 (1988), to inferior officers only).

212. *Id.* at 2209–11.

central agency for consumer financial protection authorities”<sup>213</sup>—to the interests of any given President. Although a few scholars argue that the potential expansion of presidential power has been overstated,<sup>214</sup> this depends on whether Congress can effectively adjust to *Seila Law* by constraining the President’s power in other ways.<sup>215</sup>

By expanding the scope of the President’s power and refusing to apply existing precedent,<sup>216</sup> the Court in *Seila Law* also contracted Congress’s authority to create and empower independent agencies and administrators.<sup>217</sup> And yet, the Court made this decision based on uncertain constitutional reasoning. It is “bad enough to ‘extrapolat[e]’ from the ‘general constitutional language’ . . . an unrestricted removal power,”<sup>218</sup> but it is “still worse,” Justice Kagan noted in her *Seila Law* opinion, “to extrapolate from the Constitution’s general structure (division of powers) and implicit values (liberty) a limit on Congress’s express power to create administrative bodies.”<sup>219</sup> Even the majority conceded that “no one doubts Congress’s power to create a vast and varied federal bureaucracy.”<sup>220</sup> And yet, “the Court wholeheartedly accepted the strongly unitary position [and] . . . left a great deal of room for constitutional challenges to many independent regulatory commissions in their present form.”<sup>221</sup>

213. Jeanne Sahadi, *CFPB: What It Does and Why Its Future Is in Question*, CNN, <https://www.cnn.com/2023/03/03/success/cfpb-consumer-financial-protection-bureau/index.html> [<https://perma.cc/TJF5-HCS9>] (Mar. 3, 2023 4:24 PM).

214. See Timothy G. Duncheon & Richard L. Revesz, *Seila Law as an Ex Post, Static Conception of Separation of Powers*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/> [<https://perma.cc/U2MT-ZMTR>].

215. See *id.* (“[N]ow that *Seila Law* forbids one kind of limitation on the removal power, Congress will likely substitute alternate methods of influencing agencies, either in amending the CFPB’s structure or when designing future single-headed agencies.”).

216. See Bernard W. Bell, *Revisiting the Constitutionality of Independent Agencies*, REGUL. REV. (July 21, 2020), <https://www.theregreview.org/2020/07/21/bell-revisiting-constitutionality-independent-agencies/> [<https://perma.cc/RQK3-G55G>].

217. By “eliminating the independence of the [CFPB] . . . , a majority of the Supreme Court cast a dark constitutional cloud over the long-established idea that Congress has the power to allow agencies to operate independently of the president.” Sunstein & Vermeule, *supra* note 161; see also Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/> [<https://perma.cc/AY4H-XFWU>] (“The protection of a single officer from removal without cause is understood to be a threat to both liberty and democracy. But, somehow, giving absolute power to a single person to direct the actions of every principal officer in the government (perhaps with some exceptions for multimember commissions) on pain of discretionary removal is said to be necessary to the protection of those same values”).

218. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2243 (2020) (Kagan, J., concurring in part and dissenting in part) (quoting *Morrison v. Olson*, 487 U.S. 654, 690 n. 29 (1988)); see *supra* note 166 and accompanying text.

219. *Seila L.*, 140 S. Ct. at 2243–44.

220. *Id.* at 2207 (majority opinion) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

221. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 117; see also Ganesh Sitaraman, *The Political Economy of the*

More recently, *Collins v. Yellen*<sup>222</sup> brought to the forefront whether independence from political pressure in the form of “good cause” removal provisions can render an agency unconstitutional and, relatedly, whether courts must set aside an action that the agency took while operating under this protection from at-will removal.<sup>223</sup> As in *Seila Law*, *Collins* featured a single agency head—in this case, of the Federal Housing Finance Agency (FHFA)—that could only be removed by the President “for cause.”<sup>224</sup> Among other things, the Justices should have grappled with whether the powers of the Director of the FHFA are sufficiently different from those of the head of the CFPB to justify a different outcome in *Collins* than the one in *Seila Law*,<sup>225</sup> as well as whether the validity of the agreement regulating Fannie Mae and Freddie Mac should hinge on this removal issue, even though it was drafted, in fact, by an acting director and the head of the Treasury, both of which are removable by the President at will.

Instead, the Court decided that *Seila Law* is “all but dispositive” and therefore that the structure of the Housing and Economic Recovery Act of 2008,<sup>226</sup> which restricts the President’s power to remove the Director of the FHFA, violated the separation of powers.<sup>227</sup> Therefore, shareholders contended, an impactful agreement between the FHFA and the U.S. Department of the Treasury concerning the regulation of “mortgage giants Fannie Mae and Freddie Mac in the wake of the 2008 housing crisis” should be invalidated.<sup>228</sup> The better approach, according to this case, appears to be policymaking by an agency beholden to the President’s goals, potentially at the expense of nonpartisanship and expertise, in response to a polarizing problem like the national housing crisis. In the meantime, the Supreme Court remanded this case to the lower court to determine the proper remedy based on the harms suffered by the offending “for cause” removal provision.

Finally, “[b]y requiring removal restrictions to be deferential to the executive authority,” *Lucia*,<sup>229</sup> discussed in the previous section, also challenged “established statutory schemes”<sup>230</sup> that mandate fair and impartial

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*Removal Power*, 134 HARV. L. REV. 352, 355–57 (2020) (placing *Seila Law* “within the context of the rise of the unitary executive theory”).

222. 141 S. Ct. 1761 (2021).

223. *Id.*

224. *Id.* at 1770.

225. *Id.* at 1805 (Sotomayor, J., concurring in part and dissenting in part) (pointing out that the Court’s decision in *Seila Law* distinguished the FHFA from the CFPB on the ground that the FHFA does not possess “regulatory or enforcement authority remotely comparable to that exercised by the CFPB” (quoting *Seila L.*, 140 S. Ct. at 2202 (2020))).

226. Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as amended in scattered sections of the U.S.C.).

227. *Collins*, 141 S. Ct. at 1783.

228. Amy Howe, “*Very Hard Questions*” in *Dispute over Fannie Mae, Freddie Mac Shareholder Suit*, SCOTUS BLOG (Dec. 9, 2020), <https://www.scotusblog.com/2020/12/argument-analysis-very-hard-questions-in-dispute-over-fannie-mae-freddie-mac-shareholder-suit/> [<https://perma.cc/MU4W-SQNR>] (describing the oral argument before the Supreme Court in *Collins v. Mnuchin*).

229. *See supra* notes 187–97 and accompanying text.

230. *See Verkuil, supra* note 171, at 469.

decision-making in administrative adjudication.<sup>231</sup> In the same vein, the Supreme Court is poised to hear *Jarkesy v. Securities & Exchange Commission*.<sup>232</sup> In this case, the U.S. Court of Appeals for the Fifth Circuit evaluated provisions governing the removal of administrative adjudicators. The court applied a functional test for determining whether for-cause removal provisions are constitutional, established by *Morrison v. Olson*,<sup>233</sup> to hold that SEC ALJs must be removable without cause because they are “sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions, in part because their decisions are final and binding.”<sup>234</sup> If *Jarkesy* stands, the threat of termination by SEC Commissioners would raise doubts over whether hearings before the ALJs are consistent with due process or APA provisions that insulate ALJs from influence by agency heads.

The immigration context serves as a cautionary tale for the possible fallout of *Jarkesy*. For some time, immigration judges have faced significant pressure to make decisions according to the interests and views of political leadership,<sup>235</sup> and Attorneys General (AGs) have consistently overturned relatively impartial administrative adjudications to make immigration policy in furtherance of a presidential interest in more stringent immigration enforcement.<sup>236</sup> Furthermore, President Trump continued to influence decisions to remove immigration judges, thus undermining their decisional independence.<sup>237</sup> If the Supreme Court allows the Fifth Circuit’s decision in *Jarkesy* to stand, the threat of at-will termination would further reduce SEC ALJ adherence to fair decision-making, as they begin to face obstacles to impartiality similar those encountered by immigration judges.

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231. Roberta S. Karmel, *Little Power Struggles Everywhere: Attacks on the Administrative State at the Securities and Exchange Commission*, 72 ADMIN. L. REV. 207, 247–48 (2020).

232. 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023) (mem.).

233. 487 U.S. 654 (1988).

234. *Jarkesy*, 34 F.4th at 464 (noting that “SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding”).

235. See Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 644–45 (2020). More specifically, in this context, adjudicators have been subject to quotas and other guidance dictating their docket, as well as punitive measures such as disqualification from their post for decisions that do not reflect the preferences of political leaders. See *id.*

236. See generally Shah, *supra* note 162 (arguing that the Attorney General’s referral and review mechanism has been used to contravene the law).

237. See Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 625–30 (2020); see also *id.* at 583 (arguing that, as an empirical matter, the Trump administration took “a particularly aggressive approach to reshaping immigration courts, which [President Trump] ha[d] publicly and repeatedly denigrated”); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 643–44 (2020) (noting that, during the Trump administration, “a group of retired immigration judges and [Board of Immigration Appeals] members . . . expressed deep concern about the consequences for due process associated with political involvement in immigration adjudications, and the National Association of Immigration Judges (NAIJ) . . . filed a related grievance”).

## II. REINVIGORATING ADMINISTRATIVE ACCOUNTABILITY

Presidential preferences and haste are likely to continue to weaken agency adherence to statutory requirements, including substantive mandates as well as requirements governing administrative procedure and the judicial review of agencies. Recent decisions have expanded the President's power to appoint and remove administrative adjudicators and heads of independent agencies. As the previous part discussed, the former of these dynamics is arguably inconsistent with the President's duty to take care that the laws are faithfully executed<sup>238</sup> and may weaken the legitimacy of administration by causing more disruptions in the implementation of law and in public participation in the regulatory process.<sup>239</sup> The latter, involving decreasing agency independence from presidentialism, may both be inconsistent with Congress's constitutional power to structure agencies<sup>240</sup> and reduce agency accountability to the values of impartiality and expertise encouraged by structural insulation from political influence.<sup>241</sup>

This part offers some suggestions to coax the President and the rest of the executive branch into employing the author's model of presidential administration,<sup>242</sup> in which the President exercises control over agencies to support and amplify agencies' capacity to implement legislation and pursue good governance as intended by Congress. Part II.A argues that courts should reinforce legislative requirements and treat agencies as distinct from the President in certain contexts. Part II.A.1 advocates for the judicial reaffirmation of the minimum procedural requirements of the APA notice-and-comment provisions. Part II.A.2 suggests that courts carefully distinguish agencies from the President, for purposes of enforcing statutory mandates such as NEPA and ensuring that administration is subject to adequate judicial oversight. Part II.B advises that the Court consider the potential fallout of intensifying political control over independent regulatory commissions and agency adjudicators. In lieu of deferring to legislation mandating structural separation, Part II.B.1 argues that courts should, at the very least, establish guidelines clarifying when constitutional appointment and removal requirements in fact apply to lower-level officials—in particular, to administrative adjudicators. Finally, Part II.B.2 encourages more robust judicial enforcement of the provisions of the APA that ensure deliberative and untainted administrative adjudication.

### *A. Reinforcing Public Participation and Administrative Substantiation*

Agencies' efforts to pursue the President's interests have led to notice-and-comment rulemaking and environmental policies bereft of substantiation and process, as well as to limitations to the judiciary's ability

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238. *See supra* notes 25–35 and accompanying text.

239. *See supra* notes 44–46 and accompanying text.

240. *See supra* notes 37–39 and accompanying text.

241. *See supra* notes 47–49 and accompanying text.

242. *See generally* Shah, *supra* note 6.

to oversee the quality of administration.<sup>243</sup> As a result, the executive branch may be in danger of failing to uphold its responsibility to execute the law, and the President may be weakening administrative legitimacy based in the good governance aspects of legislation and in the pluralist values of public participation. This section argues that administrative adherence to statutory requirements should be revived, especially in this context. More specifically, agencies should be held accountable to the minimal requirements of the APA's notice-and-comment provisions. In addition, agency action must be adequately distinguished from presidential directives that may drive those actions, so that agencies adhere to legislative requirements such as NEPA and are subject to sufficient judicial review under the APA.

### 1. Preserving APA Notice-and-Comment

Presidentialism provides agencies an excuse for watering down the informal rulemaking requirements of the APA. By legitimizing the IFR and presidentially driven "good cause" exceptions, the Supreme Court has allowed agencies to weaken their attention to public participation in rulemaking. And agencies have continued to show themselves willing to further hurried rules,<sup>244</sup> rely on inadequate notice-and-comment procedures,<sup>245</sup> and even proffer pretextual<sup>246</sup> justifications to further the policy preferences of the President. However, the Court has also indicated that it is hesitant to allow agencies to sidestep notice-and-comment requirements altogether when pursuing the President's policy interests.<sup>247</sup> This section argues that courts should continue to police distortions of the APA's rulemaking requirements, particularly when the President is involved in the policy at issue, and hold agencies accountable to the APA's notice-and-comment provisions even when agencies act urgently pursuant to the President's interests.

*Vermont Yankee v. National Resource Defense Council, Inc.*<sup>248</sup> limits courts, as a matter of statutory interpretation, from adding to the bare requirements of the APA. Given this expectation, courts should also insist that the executive branch, as a matter of statutory execution, cannot choose to underenforce the minimum obligations of the APA. The judicial response to agencies diluting APA notice-and-comment provisions to further immigration policies has been promising. For example, one case in the DDC held that the agency should have used notice-and-comment rulemaking to promulgate a Trump-era policy narrowing the availability of certain

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243. See *supra* Part I.A.

244. See Eric Lipton, *A Regulatory Rush by Federal Agencies to Secure Trump's Legacy*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/regulatory-rush-federal-agencies-trump.html> [<https://perma.cc/YA6D-NKSK>].

245. See Shah, *supra* note 6, at 1260–61; *supra* notes 82–105 and accompanying text.

246. See Shah, *supra* note 6, at 1261–62.

247. See *supra* notes 81–82 and accompanying text.

248. 435 U.S. 519 (1978).

immigration benefits.<sup>249</sup> In addition, courts enjoined a restrictive immigration IFR soon after publication in the federal register.<sup>250</sup>

In addition, courts should refine their approach to allowing post-promulgation notice-and-comment processes such as IFRs. For instance, Professor Kristin Hickman and Mark Thomson have outlined a potential “middle ground” per which courts scrutinize post-promulgation notice-and-comment periods and allow them only under limited circumstances.<sup>251</sup> First, they argue, “courts should expressly adopt a strong—if rebuttable—presumption that rules promulgated using postpromulgation notice and comment are invalid.”<sup>252</sup> Agencies may rebut this presumption by demonstrating responsiveness to comments that were submitted<sup>253</sup> and showing evidence that pre-promulgation notice-and-comment procedures were not eschewed in bad faith.<sup>254</sup> The authors also advise courts to credit “postpromulgation notice and comment where agencies make significant efforts to publicize the opportunity to postpromulgation public comment . . . by hosting public meetings on the interim final rule or conducting significant online campaigns encouraging postpromulgation comments.”<sup>255</sup> These judicial inquiries would limit agencies’ ability to use presidentialism as a justification for substandard attention to public participation in rulemaking.

Consider President Trump’s executive order directing OPM to regulate in order to render much of the civil service subject to at-will removal.<sup>256</sup> President Joe Biden has since eliminated this proposal.<sup>257</sup> But should a future President resuscitate it, as is possible,<sup>258</sup> courts should hold the agency’s implementation of this presidential directive to the APA’s informal rulemaking criteria. In addition, courts should be skeptical of claims that such regulation is merely one “of agency organization, procedure, or practice” and therefore not subject to notice-and-comment requirements.<sup>259</sup> Such a rule would have a broad impact on not only the rights of current federal employees who would lose certain employment protections,<sup>260</sup> but also, as a result, on the landscape and quality of administration overall.

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249. See *ITServe All., Inc. v. Cisna*, 443 F. Supp. 3d 14, 37 (D.D.C. 2020).

250. *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018) (codified in 8 C.F.R. pts. 208, 1003, 1208).

251. Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 306 (2016).

252. *Id.* at 310.

253. *Id.* at 315.

254. *Id.* at 316.

255. *Id.* at 318.

256. See Shah, *supra* note 6, at 1200.

257. See *id.*

258. See *id.*

259. See, e.g., 5 U.S.C. § 553(b)(3)(A) (exempting from notice-and-comment requirements “rules of agency organization, procedure, or practice”); *id.* § 553(a)(2) (exempting from notice-and-comment requirements rules concerning “a matter relating to agency management or personnel”).

260. See Shah, *supra* note 6, at 1201 n.207.



Courts should also be certain to apply any other relevant statutory procedural requirements that reinforce the use of notice-and-comment procedures.<sup>261</sup>

In addition, *Little Sisters* creates the possibility that agencies will expand the good cause exemption, which allows agencies to forgo a notice-and-comment process in rulemaking altogether, by leveraging presidential urgency to justify omitting it.<sup>262</sup> However, federal courts have remained a bulwark against recent exploitation of the good cause exemption in the immigration context. Notably, these decisions imply that agencies cannot excise notice-and-comment requirements if they are driven to do so primarily by the President's urgency, as suggested by overly broad justifications for the exception.

First, the DDC issued a nationwide injunction vacating a restrictive asylum rule promulgated with haste and issued a decision determining that neither the good cause nor the "foreign affairs function" exceptions to notice-and-comment rulemaking applied to this asylum rule.<sup>263</sup> Second, two regulations issued by the U.S. Department of Labor and the U.S. Department of Homeland Security (DHS) were struck down by a federal judge, who found that the COVID-19 pandemic did not constitute a "good cause" allowing the agencies to forgo notice-and-comment processes for the rules, which tighten restrictions in the H-1B nonimmigrant visa program.<sup>264</sup>

In general, courts should examine closely any efforts to curtail the notice-and-comment process to ensure administrative alignment with the expectations of the APA. Agencies, too, should reconsider their efforts to curtail or eliminate notice-and-comment processes, lest doing so increases the likelihood that a court will ultimately invalidate the regulations at issue. Over time, as courts continue to treat the IFR and good cause exceptions with some skepticism, agencies will likely become more cautious in response.

## 2. Disaggregating Agencies from the President

Agencies are often characterized as proxies of the President, particularly by unitary executive theorists.<sup>265</sup> Even in popular conversation,

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261. See, e.g., 5 U.S.C. § 1103(b)(1) (requiring the Director of OPM to use notice-and-comment rulemaking); *id.* § 1105 (subjecting the Director of OPM to the notice-and-comment requirements of § 553).

262. See *supra* notes 100–05 and accompanying text.

263. See *Cap. Area Immigrs.' Rts. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020).

264. *Chamber of Com. v. Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077, 1087 (N.D. Cal. 2020); see also *supra* note 105 and accompanying text (discussing these rules); Zolan Kanno-Youngs & Miriam Jordan, *Trump Moves to Tighten Visa Access for High-Skilled Foreign Workers*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/h1b-visas-foreign-workers-trump.html> [https://perma.cc/37UW-4AQQ] ("The changes will be published this week as interim final rules, meaning that the agency believes it has 'good cause' to claim exemption from the normal requirement to obtain feedback from the public before completing them.")

265. See *Shah, supra* note 6, at 1224 n.352 ("Unitary executive theorists hold an expansive view of the President's constitutional power that asserts she has the constitutional power not only to direct agency actions, but also to 'step directly into the shoes' of administrators and

governmental policies furthering the President's agenda are described as the efforts of a particular President or the White House, even though the policies are accomplished or perhaps even initiated by an agency pursuant to authority delegated by the legislature.<sup>266</sup> However, “distinguishing between the President, who possesses ‘the executive power’ under Article II, and a series of administrators, who are granted delegated authority to act by statute, proves to be crucial to understanding the broader debate” over executive power.<sup>267</sup>

Despite the enduring conflation of the President and executive agencies, agencies have “distinct legal personalities” and are not merely legal extensions of the President.<sup>268</sup> Agencies are enabled to act directly by legislation, and it is Congress that sets up the constraints of each administrative office and the expectations that agencies enforce the law with fidelity to statutory mandates and to expectations of administrative legitimacy and good governance.<sup>269</sup> This section argues that, for the general purposes of evaluating administration, agencies should be understood as separate from the President, with their own set of responsibilities. More specifically, Congress, courts, and agencies themselves should disaggregate agency action from presidential administration to ensure that even policies spurred by the President are held to legislative standards and subject to sufficient judicial review.

First, courts might excavate the *ex parte* communication doctrine that limits political interference in certain informal rulemaking processes<sup>270</sup> to

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act in their place.” (quoting Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1205 (2013)).

266. See Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 Nw. U. L. REV. 989, 1026–27 (2018) (“‘[A]gencies that are relatively insulated from presidential control [can] receive a large share of articles that mention the president,’ and vice versa.” (alterations in original) (quoting Alex I. Ruder, *Agency Design, the Mass Media, and the Blame for Agency Scandals*, 45 PRESIDENTIAL STUD. Q. 514, 531 (2015))). “Tellingly, some media outlets reported—mistakenly—that [Deferred Action for Parents of Americans] had been announced via an executive order signed by Obama.” Manheim & Watts, *supra* note 81, at 1758; see, e.g., John Cassidy, *Obama Goes Big on Immigration*, NEW YORKER (Nov. 21, 2014), <https://www.newyorker.com/news/john-cassidy/obama-goes-big-on-immigration> [<https://perma.cc/487M-DPGM>]. President Trump’s reelection campaign credited him with “officially” mandating the question be added to the Census. *New York v. U.S. Dep’t of Com.*, 315 F. Supp. 3d 766, 775 (S.D.N.Y. 2018). This practice dates back at least as far as President Clinton, who was famously credited with pushing for the regulation of tobacco, although in fact, the U.S. Food and Drug Administration (FDA) itself was the driving force behind this interest. See Kagan, *supra* note 40, at 2281; see, e.g., Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. TIMES (Aug. 24, 1996), <https://www.nytimes.com/1996/08/24/us/clinton-approves-a-series-of-curbs-on-cigarette-ads.html> [<https://perma.cc/BLC8-X4NK>] (“Mr. Clinton authorized the Food and Drug Administration to curb the industry’s access to young children through ‘advertising that hooks children on a product.’”).

267. Cary Coglianese & Christopher S. Yoo, *Introduction: The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1597–98 (2016).

268. Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 CONST. COMMENT 489, 494 (2009).

269. See generally Shah, *supra* note 6.

270. *Home Box Off., Inc. v. Fed. Comm’n Comm’n*, 567 F.2d 9 (D.C. Cir. 1977) (declaring that presidential involvement in informal rulemaking violates *ex parte* principles);

ensure that rulemaking—once undertaken—remains distinct, or relatively “untainted” by the President’s interests, in practice. Arguably, *ex parte* presidential influence in informal rulemaking is “contrary to the pluralistic values that underlie that procedure.”<sup>271</sup> Limiting such influence could offset, to a small degree, similarly anti-pluralist efforts to reduce or eliminate notice-and-comment processes in rulemaking.<sup>272</sup> For instance, it could dissuade presidential interference driving agencies to engage in IFRs or to seek good cause exceptions from notice-and-comment altogether.

Even if courts decline to pursue this approach, agencies have a responsibility to be accountable to criteria, such as those represented by notice-and-comment processes, beyond the concerns of the President. At least one agency has heeded this responsibility. For instance, OPM initiated a notice-and-comment process<sup>273</sup> to implement an executive order directing the exemption of administrative law judges from the competitive service,<sup>274</sup> even though the President tried to find a way for the executive branch to sidestep this process.<sup>275</sup>

Second, the legislature could ensure that agencies adhere to NEPA’s mandates even when acting in response to presidential directives. Presidents have sought and won exceptions to NEPA requirements for quite some time.<sup>276</sup> As a response, Congress could reiterate, in enabling or addendum legislation, that NEPA’s environmental impact statement requirements apply to agencies under all circumstances. In the meantime, courts might begin to limit exceptions to NEPA resulting from presidential involvement or directives, or at least to stave off the more centralized, systematic approach to undercutting NEPA taken by the President in recent years.<sup>277</sup>

Third, courts should distinguish administrative responsibilities as primarily accountable not to presidential initiatives, but rather to statutory requirements, including for purposes of judicial review. Doing so requires acknowledging that agency action is both distinct from and beholden to a

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*id.* at 57 (noting that the case involved not adjudication or quasi-judicial actions, but rather “informal official action allocating valuable privileges among competing private parties”).

271. McGarity, *supra* note 42, at 459 (arguing that “*ex parte* presidential influence over informal rulemaking is entirely contrary to the pluralistic values that underlie that procedure, and it represents a step back toward autocracy”); see *Home Box Off., Inc.*, 567 F.2d at 56 (“[E]qually important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all our administrative law [and] could be no question of the impropriety of *ex parte* contacts here. Certainly any ambiguity . . . has been removed by recent congressional and presidential actions.”).

272. See *supra* Part I.A.2.

273. Administrative Law Judges, Proposed Rule with Request for Comments, 85 Fed. Reg. 59207 (Sept. 21, 2020) (codified at 5 CFR pts. 212–213, 302, 930).

274. See *supra* notes 194–95 and accompanying text.

275. VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10172, CAN A PRESIDENT AMEND REGULATIONS BY EXECUTIVE ORDER? 1 (2018) (“Somewhat unusually, the order [concerning the placement of ALJs into excepted service] directly amends three provisions in the CFR [Code of Federal Regulations], rather than directing an agency to amend the regulations.”).

276. See *supra* Part I.A.1.

277. See *supra* notes 114–16 and accompanying text.

separate set of governing criteria than presidential action. In *Department of Homeland Security v. Regents of the University of California*,<sup>278</sup> the Court did just that.<sup>279</sup> More specifically, the Court declared that, per the APA, the DHS was obligated to articulate a reason for rescinding its Deferred Action for Childhood Arrivals (DACA) immigration program and to consider various options for rescission independently, regardless of a presidential directive ordering the agency to terminate the program.<sup>280</sup>

DACA allowed certain undocumented immigrants whom DHS viewed as having favorable qualities—and therefore as a low priority for deportation—to apply for a two-year deferral of deportation.<sup>281</sup> Those immigrants granted such “forbearance” were also eligible for work authorization and various federal benefits.<sup>282</sup> The agency, responding to a curt missive from the AG that represented President Trump’s immigration goals, rescinded the program immediately (literally, the day after it received the AG’s request).<sup>283</sup>

In *Regents*, the Court applied arbitrary and capricious review to determine that DHS failed to analyze whether the benefits portion of DACA could be severed from the policy granting forbearance against deportation and also failed to assess whether there were reliance interests that must be taken into account in the decision to rescind.<sup>284</sup> The Court made the point that although there were various aspects of the decision to rescind that the AG letter did not speak to, DHS was nonetheless obligated to consider matters outside the scope of the AG’s letter. In doing so, DHS might well have concluded that only part of the program should be rescinded or that the program should be tapered off in a manner that minimized the impact on current DACA recipients.

Implicitly, the Court was suggesting that agencies’ behaviors are evaluated by separate requirements outside of those issued by political appointees and that agencies themselves have the responsibility to hold themselves accountable to mandates outside of those set by the President. Just as agencies may question whether they have the statutory authority to pursue the President’s goals,<sup>285</sup> so too are agencies obligated to resist pressure from the President to pursue administrative actions with haste or in other ways that preclude matters dictating a policy’s legitimacy, such as reliance interests.<sup>286</sup>

Finally, if the judiciary declines to distinguish agency action from presidential action, it might endeavor to make its current doctrine more consistent with this approach. For example, the judiciary (or Congress)

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278. 140 S. Ct. 1891 (2020).

279. *See id.* at 1906–07.

280. *See id.* at 1907–10.

281. *Id.* at 1901.

282. *Id.*

283. *See id.* at 1902.

284. *See id.* at 1910, 1913.

285. *See* Shah, *supra* note 6, at 1233–44.

286. *See* Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L. J. (forthcoming 2024) (manuscript at 1) (observing that reliance considerations have “developed into a robust form of judicial review over agency action”).

might assert that the APA governs a President when the President is involved in an agency action, which is somewhat distinct (in theory, if not in practice) from the view that the President should be subject to the APA. Indeed, even if the President remains exempt from the APA,<sup>287</sup> the APA should “likely still govern the actions of executive branch agencies *implementing* a presidential directive.”<sup>288</sup> Commentators have suggested as much and have noted the extent to which this is feasible despite existing doctrine exempting the President from APA review more generally.<sup>289</sup>

### *B. Bolstering Impartial and Expert Decision-Making*

Partisan appointment decisions and the threat of politically based removal both dissuade agencies from impartial and expert decision- or policymaking<sup>290</sup> and are based in an interpretation of the Constitution that may offend Congress’s authority.<sup>291</sup> This section argues that the judiciary should acknowledge the drawbacks of expanding the President’s appointments and removal authority and build standards that limit their impact. Ideally, courts would ensure high-quality administration by “defer[ring] to Congress’s judgments about the appropriate structure of the federal government, including the degree to which agency heads should be shielded from direct presidential control.”<sup>292</sup> If they do not take this approach, then courts should issue guidelines that clarify the scope of the constitutional appointments power with precision. At minimum, courts should hold agencies accountable to the values of impartiality and process, regardless of the presence of countervailing political pressure, by leaning on the APA to better protect the integrity of agency adjudication overall.

#### 1. Moderating Political Removal and Appointments

The judiciary’s recent expansion of the number of administrative adjudicators subject to the Appointments Clause may lead to undesirable consequences, including the elevation of partisan interests over requirements, norms, or values that are mandated or prized by the legislature.<sup>293</sup> This section suggests that since courts are in a “poor position” to understand the trade-offs between political control over and independence in administrative

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287. *See supra* notes 121–24 and accompanying text.

288. BRANNON, *supra* note 275, at 2.

289. *See supra* note 122.

290. *See generally supra* Part I.B.

291. *See supra* notes 37–39 and accompanying text.

292. Jack M. Beermann, Seila Law: *Is There a There There?*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann/> [<https://perma.cc/LPV2-5GFK>]; *see also* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225 (2020) (Kagan, J., concurring in part and dissenting in part) (“[T]he Constitution . . . mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture. The Court today fails to respect its proper role.”).

293. *See supra* Part I.B.

adjudication,<sup>294</sup> the Supreme Court should walk back its unitary executive vision of Article II, furthered in *Seila Law*, by allowing removal protections for independent agency heads to remain standing.<sup>295</sup>

Given that the Court is unlikely to do this, this section also argues that clarifying the conditions of constitutional appointment could ameliorate some of the repercussions of politicized hiring and firing.<sup>296</sup> In the wake of *United States v. Arthrex*, politically controlled adjudication may come to comprise much of the administrative state.<sup>297</sup> And yet, “[a]lthough the Court has increasingly required greater executive control over agencies through its Article II Take Care Clause and Vesting Clause rulings, it has not decided how much political control over agency *adjudicators* these clauses require.”<sup>298</sup> Importantly, more precise guidance from the Court would assist the legislature in creating statutes establishing adjudicative independence that the Court would have to respect.

As to slowing down its unitary executive project, the Court could fine-tune its *Seila Law* holding in a future decision by establishing that legislative provisions insulating multimember regulatory commissions from at-will removal are allowed to remain in place and by creating rules to guide the exercise of removal authority more generally. Given its current ideological composition, the Court might be persuaded by arguments that suggest engaging with formalist and originalist approaches to the separation of powers to support structures of independence in the administrative state. Arguably, *Seila Law* deployed what Professor Jodi Short calls a “facile formalism” that deemed unconstitutional a single agency head with for-cause removal without a sufficiently nuanced—or genuinely formalist—analysis.<sup>299</sup> More specifically, Short suggests that the Court’s decision fails an important component of formalism, in that it does not provide a “clear, predictable doctrinal application.”<sup>300</sup> In addition, Professor Jed Handelsman Shugerman argues that an originalist reading of the law interpreted in an essential case establishing unitary executive theory, *Myers v. United States*,<sup>301</sup> “supports, rather than undermines, Congress’s power to limit presidential removal.”<sup>302</sup> These views offer a set of constitutional justifications for the Supreme Court to walk back its rather aggressive

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294. Eisenberg & Mendelson, *supra* note 169, at 6.

295. 140 S. Ct. 2183 (2020).

296. See generally *supra* Part I.B.

297. Cox & Kaufman, *supra* note 180, at 1773.

298. Eisenberg & Mendelson, *supra* note 169, at 7.

299. Jodi L. Short, *Facile Formalism: Counting the Ways the Court’s Removal Jurisprudence Has Failed*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 14, 2020), <https://www.yalejreg.com/nc/facile-formalism-counting-the-ways-the-courts-removal-jurisprudence-has-failed-by-jodi-l-short/> [<https://perma.cc/C8A8-X34P>] (“Facile formalism is not anchored in constitutional text . . . . Facile formalism is based on abstractions not grounded in law or logic. Facile formalism is a thin veil to cloak the exercise of raw power to impose normative preferences.”).

300. *Id.* (arguing that the Court failed to apply *Seila Law* to clear effect in *Collins v. Yellen*).

301. 272 U.S. 52 (1926).

302. Brief of *Amicus Curiae* Jed H. Shugerman in Support of Court-Appointed *Amicus Curiae* at 2, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563).

approach in *Seila Law* and become consistent once more with its conventional approach, according to which it has “left most decisions about how to structure the Executive Branch” to Congress.<sup>303</sup>

As to clarifying requirements, in *Lucia* the Court failed to offer clear guidelines as to which administrative adjudicators are subject to constitutional appointment.<sup>304</sup> Likewise, in *Arthrex*, the Court neglected to specify when an administrative adjudicator is an officer and/or principal officer, and moreover, chose not to confront the inconsistency between casting APJs as principal officers and ensuring that they are able to issue decisions with neutral expertise.<sup>305</sup> To mitigate the lack of precision and lucidity in these decisions, the Court should detail criteria for determining which adjudicators remain exempt from politicized appointment and removal. Although this may not accomplish the ideal paradigm for ensuring high-quality and impartial adjudication, it might stave off a complete slide into an administrative state (or “adjudicative state”)<sup>306</sup> consisting primarily of what Professors Adam Cox and Emma Kaufman call “presidential adjudication.”<sup>307</sup>

As to which criteria should be used to determine if an adjudicator is an “officer,” Justice Sotomayor offers a suggestion in her *Lucia* dissent: “To provide guidance to Congress and the Executive Branch, [the Court sh]ould hold that one requisite component of ‘significant authority’ is the ability to make final, binding decisions on behalf of the Government.”<sup>308</sup> Without this authority, an ALJ would remain an employee that is not subject to appointment by an agency head, per the requirements of the Appointments Clause of the Constitution. With final, binding authority subject to no agency oversight, an adjudicator may, under certain circumstances, be subject to appointment by an agency head or court of law.

As to which criteria might transform an officer into a “principal officer,” the Court should reinvigorate and offer clear guidance on how to apply *Edmond v. United States*,<sup>309</sup> penned by Justice Antonin Scalia and joined by a unanimous Court, which dictates that an ALJ that has a supervisor is an inferior officer, at most.<sup>310</sup> On this front, Justice Thomas offered a voice of

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303. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in part and dissenting in part) (noting that “this Court has left most decisions about how to structure the Executive Branch to” legislation that “the Court has repeatedly approved [and that] provide[s] the model for the removal restriction” that the Court nonetheless eliminated in *Seila Law*).

304. See *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2065 (2018) (Sotomayor, J., dissenting) (“But this Court’s decisions have yet to articulate the types of powers that will be deemed significant enough to constitute ‘significant authority’” such that an administrative adjudicator should necessarily be deemed an officer for constitutional appointment purposes.).

305. See *supra* notes 198–204 and accompanying text.

306. Cox & Kaufman, *supra* note 180, at 1173.

307. See *id.* at 1783.

308. *Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting).

309. 520 U.S. 651 (1997).

310. *Id.* (holding that the appointment of two judges by an agency head was valid because such judges were inferior officers within the clause’s meaning, by reason of the fact that the

reason in his *Arthrex* dissent (joined in relevant part by Justices Stephen G. Breyer, Sotomayor, and Kagan).<sup>311</sup> Justice Thomas explained that, as decided in *Edmond*, “there can be no dispute that administrative patent judges are, in fact, inferior: They are lower in rank to at least two different officers.”<sup>312</sup> Furthermore, the PTO Director “exercises a broad policy-direction and supervisory authority over” APJs and is “responsible for providing policy direction and management supervision.”<sup>313</sup> Accordingly, as Justice Thomas argues broadly, the Court should have applied *Edmond* to find that APJs are inferior.<sup>314</sup> Instead, the majority in *Arthrex* missed an opportunity to find that APJs are inferior officers, at most, by neglecting its own decision in *Edmond*, which found that an administrator must lack a supervisor to require appointment by the President.<sup>315</sup>

## 2. Reinforcing the APA’s Requirements for Administrative Adjudication

Finally, courts should hold the line against political pressure on agency decision-makers by vigorously applying those provisions of the APA—including the ex parte communication bar, substantial evidence standard, and prohibition against action unreasonably delayed—to protect the integrity of formal administrative adjudication. In general, courts have shown some interest in limiting direct White House involvement in agency processes<sup>316</sup> and could very well continue this approach by constraining involvement by not only the President, but also the President’s political appointees, in everyday administrative adjudication.

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judges were supervised—in this case, by the General Counsel and by the Court of Appeals for the Armed Forces).

311. Shah, *supra* note 195; *see also* United States v. Arthrex, 141 S. Ct. 1970, 1997 (2021) (Thomas, J., dissenting).

312. *Arthrex*, 141 S. Ct. at 2000; *see also* Shah, *supra* note 195. The fact that Justice Thomas penned this opinion is notable, “given his litany of originalist critiques of *Edmond* (in the portion of his *Arthrex* dissent that is joined by no one).” *Id.*

313. *Arthrex, Inc., v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1331 (Fed. Cir. 2019) *vacated sub nom.* United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

314. *See Arthrex*, 141 S. Ct. at 2000 (Thomas, J., dissenting).

315. *See generally id.*

316. “Where, as here, there is considerable evidence that suggests that improper political pressure may have influenced agency decisionmaking, it is necessary to allow extra-record discovery to uncover whether that is true.” *Sokaogon Chippewa Cmty. v. Babbitt (Sokaogon II)*, 961 F. Supp. 1276, 1286 (W.D. Wisc. 1997) (requiring judicial deliberation in the first instance because the ex parte communication at issue entailed legislators and the Office of the White House directly contacting the agency); *see also Sokaogon Chippewa Cmty. v. Babbitt (Sokaogon I)*, 929 F. Supp. 1165, 1179 (W.D. Wisc. 1996) (noting that, in June of 1995, the White House Office of Political Affairs faxed a letter directly to the U.S. Department of the Interior, which represented “both congressional and presidential contact with the department”); *Sokaogon II*, 961 F. Supp. at 1283 (discussing this communication as well). *But see* *Wilmington United Neighborhoods v. U.S. Dep’t of Health, Educ. & Welfare*, 615 F.2d 112, 118 (3d Cir. 1980) (holding that even if the secretary’s decision to approve the state-designated planning agency’s approval of a hospital’s capital project was influenced by a letter from a business leader and personal friend of the President, this did not make approval subject to review, given the statutory bar to review).



First, presidential *ex parte* communication pits “Article II’s requirement that the president be able to consult confidentially with his agents on matters of general regulatory policy . . . against Congress’s determination that a particular issue [i]s best dealt with through a formalized, quasi-judicial process.”<sup>317</sup> The expansion of political appointments and removal of administrative adjudicators has furthered tipped the scales toward executive power. To preserve the legislative prerogative to ensure expert and impartial administrative decision-making, courts should apply precedent ensuring that political figures do not taint formal administrative adjudication further.<sup>318</sup> Furthermore, courts could choose to read formal hearing requirements into informal adjudication,<sup>319</sup> particularly when there is a “congressional mandate that certain decisions be quasi-adjudicative” in order to limit “executive influence over the agency’s decision.”<sup>320</sup>

In addition, courts should ensure that initial decisions by low-level factfinders and adjudicators are considered an integral part of the record and weighted heavily *vis-à-vis* determinations by executive agency heads,<sup>321</sup> especially since the latter may be made based on political interests.<sup>322</sup> This could also include limiting the extent to which presidential councils<sup>323</sup> and White House agencies (like the Office of Management and Budget)<sup>324</sup> have the power to direct agency policies in a manner that is inconsistent with substantial evidence.

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317. William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 628 (2002).

318. See *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (declaring that the President is considered an *ex parte* contact in violation of the APA).

319. See *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950) (noting that a statute need not require agencies to engage in formal adjudication for a court to require formal adjudication in decisions to sanction or deport).

320. Araiza, *supra* note 317, at 628.

321. See *Universal Camera Corp. v. Nat’l Lab. Rels. Bd.*, 340 U.S. 474 (1951) (declaring that the substantial evidence standards require courts to give weight to independent factfinders’ determinations of credibility, as well as other factors like agency determinations based on specialized expertise, and that the court must ensure that it did not “cherry pick” from the record to substantiate its decision).

322. See, e.g., Shah, *supra* note 162 (substantiating the argument that the AG often adjudicates immigration decisions on the basis of political interests).

323. See, e.g., *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 626, 662 (1980) (deciding that an agency determination, made on the basis of a recommendation from the President’s Council on Wage and Price Stability, was not based on substantial evidence); see also Kagan, *supra* note 40, at 2367 (referring to this case as one that suggests a “heightened suspicion of presidential, as opposed to agency, policymaking”).

324. See, e.g., *Pub. Citizen Rsch. Grp. v. Tyson*, 796 F.2d 1479, 1483–84 (D.C. Cir. 1986) (holding that the agency’s decision not to issue a rule following OMB recommendations was not supported by substantial evidence); Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 712 n.79 (2007) (“The agency’s decision to follow OMB recommendations . . . lacked substantial evidence.”); Robert V. Percival, *Who’s in Charge?: Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2534 (2011) (“Because agency decisions must be consistent with the underlying regulatory statutes and supported by evidence in the administrative record, if the White House dictates a result that is inconsistent with the regulatory statute or the rulemaking record, the decision is vulnerable to being overturned in court, as occurred in *Public Citizen Health Research Group v. Tyson* . . .”).

Finally, courts should ensure that agencies do not unreasonably delay required actions<sup>325</sup> because of pressure from the White House. This concern is particularly relevant to the politically motivated delay of rules backed by scientific evidence, including those promulgated by the FDA and the EPA, which could result in the politicization of policies to the detriment of their quality and effectiveness.<sup>326</sup>

#### CONCLUSION

Congress has been characterized by unitary executive theorists as “insulating” agencies from accountability to the President and thereby creating an unconstitutional fourth branch of government. But the President has a responsibility to execute the law in a manner that is consistent both with the legislature’s constitutional power and with important conceptions of administrative legitimacy. This Essay suggests, in light of recent events, that it is the President that is insulating agencies from rightful oversight and control by the legislature. More specifically, the exercise of presidential power over administrative agencies has begun to undercut Congress’s constitutional authority; faithfulness to legislative requirements enshrined in the APA and in environmental protection law; and adherence to norms furthered by procedural requirements and structural insulation, including those focused on public engagement, fairness, and expertise. Furthermore, the Supreme Court has allowed this to happen and, to some extent, has led

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325. Courts may compel “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); see *Norton v. S. Utah Wilderness*, 542 U.S. 55 (2004) (holding that § 706(1) of the APA authorizes courts to compel agency action when the agency has failed to take a discrete agency action that it is required to take).

326. See, e.g., *Pub. Citizen Health Rsch. Grp. v. Comm’r, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) (remanding case to lower court to determine whether the FDA had unreasonably delayed the promulgation of the rule). In this case, the White House succumbed to pressure from lobbyists and blocked the promulgation of the FDA’s rule. *Id.* at 27; see also Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1067 n.28 (1986). After four years of litigation, the FDA was eventually forced to promulgate the rule. *Pub. Citizen Health Rsch. Grp. v. Young*, 909 F.2d 546 (D.C. Cir. 1990); Morrison, *supra* (noting that the FDA continued to attempt to block the regulation, but continued litigation to promulgate it was eventually successful); see also *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. Mar. 23, 2009); Watts, *supra* note 49, at 711 (“By pushing the FDA to disregard scientific findings and to consider factors that were not tied to the relevant statutory inquiry, presidential control tainted the FDA’s decisional process [in *Tummino v. Torti*] and delegitimized the FDA’s actions.”); James T. O’Reilly, *Losing Deference in the FDA’s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939 (2008) (discussing the politicization of the FDA, particularly by the George W. Bush administration); *Nat’l Res. Def. Council, Inc. v. Env’t Prot. Agency*, 683 F.2d 752, 755 (3d Cir. 1982) (concerning the indefinite postponement of rules by executive order); Jack, *supra* note 72, at 1503 (noting that the indefinite delay of a final rule is “tantamount to a repeal” and subject to notice-and-comment rulemaking); *Env’t Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (ordering EPA to promulgate regulations after failing to meet the statutory deadline due to OMB interference); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REGUL. 407, 436 n.117 (1997) (discussing “[t]he President’s formal ex post control” over agencies and noting that, in *Environmental Defense Fund v. Thomas*, the court found “that OMB had illegally interfered in EPA rule-making”).

the charge. Ultimately, this Essay cautions that the recent judicial interest in forming a more unitary executive should not overshadow courts' duty to ensure that the administrative state remains accountable to its creator, Congress, and to the legislative values that ensure good administration.