



ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

Sourcebook of United States Executive Agencies

Jennifer L. Selin
David E. Lewis

Second Edition
October 2018

About the Administrative Conference of the United States

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

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

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

Chairman’s Foreword to the Second Edition

Of all the Administrative Conference’s many publications, none has assumed as prominent a role as the first edition of the *Sourcebook of United States Executive Agencies* (2012). All three branches of the federal government have found in the *Sourcebook* an invaluable guide to the statutory structure and organization of federal agencies available nowhere else.

They will find in the second edition a still more valuable guide. The second edition expands the coverage of the *Sourcebook* significantly (by, among other things, including agency bureaus), accounts for ongoing constitutional debates about agency structure, and addresses the renewed importance of “government-wide legal mandates” in the administrative state.

The Conference is very grateful and honored that Professors David Lewis and Jennifer Selin, the authors of the first edition, answered the Conference’s call to prepare a second. They might well have begged off to pursue any number of projects in furtherance of their important academic work rather than devote the countless hours (none of them well compensated, even by academic standards) required to prepare the second edition. Their willingness to do so should be recognized as an act of public service.

While the Conference commissioned this book, it does not reflect the Conference’s views. Only recommendations adopted by the Conference’s Assembly do so. That said, numerous Conference members contributed to this book along the way by sharing their expertise with the authors.

Those members are thanked in the authors’ acknowledgements. I wish to thank as well the following Conference staff who made publication of the second edition

possible: Gisselle Bourns for overseeing the project; Shawne McGibbon and David Pritzker for carefully reviewing the close-to-final manuscript; and Frank Massaro and Harry Seidman for seeing the final manuscript through to publication.

MATTHEW LEE WIENER
(ACTING CHAIRMAN)

Chairman’s Foreword to the First Edition

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

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

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

The laboring oars on this project belonged to our consultants, David Lewis and Jennifer Selin. At my urging and cajoling, Professor Lewis enthusiastically undertook this project and shared the research burden with his colleagues and graduate students at Vanderbilt University. The hours put into crafting this work are far too numerous to count, and they include a presentation by Professor Lewis on a preliminary draft to congressional staff in August 2012.



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

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

PAUL R. VERKUIL

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David E. Lewis is the William R. Kenan, Jr. Professor of the Department of Political Science at Vanderbilt University. He is the award-winning author of two books, *Presidents and the Politics of Agency Design* (Stanford University Press, 2003) and *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* (Princeton University Press, 2008). Professor Lewis is also the author of numerous articles on American politics and public-sector management performance. His work has been translated into Japanese and Spanish and has been written up in *Nature*, the *New York Times*, and the *Washington Post*. Professor Lewis holds a Ph.D. in political science from Stanford University.

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Table of Contents

Chairman’s Foreword to the Second Edition	ii
Chairman’s Foreword to the First Edition	iv
About the Authors.	vi
Acknowledgments	vii
Part I Introduction to the Second Edition	1
A. Need for This Report	4
B. Methodology	5
C. Structure of This Report	7
Part II What is the Federal Executive Establishment?	8
A. What is a Federal Agency?.	11
B. What This Report Omits	15
Part III Overview of the Federal Executive Establishment	17
A. Executive Office of the President.	18
1. Current Structure of the EOP	20
2. Controversies—Growth and “Czars”	25
B. Executive Departments	27
1. Executive Departments and Other Executive Agencies Compared	34
2. The Structure of Executive Departments	35
3. Variation in the Number of Employees and Political Appointees	39
C. Agencies Located Outside of the EOP and Executive Departments	40
1. What is an Independent Agency?.	42
2. Administrations	52
3. Multi-Member Bodies	52
4. Government Corporations and Government-Sponsored Enterprises (GSEs)	56
5. Other Forms of Government Agency: Non-profits and Regional Agencies	60

D. Federal Personnel System	62
1. The Modern Personnel System	62
2. Trends in Personnel Management	71
a) Thickening Government	71
b) Increase in Political Appointees	72
c) Increase in Agency-Specific Personnel Systems	75
d) Increased Role of Government Contractors	79
Part IV The Creation and Design of Federal Agencies	82
A. Why a New Agency Rather Than Existing Agencies?	84
B. Agency Reorganization and Termination	85
C. Why Do Federal Agency Designs Differ?	87
1. Insulating Agencies from the President	88
a) Multi-member Bodies	89
b) Limitations on Appointments	89
c) Protections Against Removal	96
d) OMB Review of Budgets, Regulations, and Communications	102
e) Control Over Agency Litigation	105
2. Insulating Agencies from Congress	106
a) Appropriations and Agency Self-funding	107
b) Agency Reporting Relationships	110
3. Other Key Structural Features	112
Conclusion	121
Appendix A-1: List of Agencies and Subunits—By Agency Name.	125
Appendix A-2: List of Agencies and Subunits—By Abbreviation	133
Appendix B: Senate Committees Confirming Agency and Subunit Nominees.	141
Appendix C: Agency Structure Codebook	150
Data Collection	150
Variables.	152

List of Tables

Table 1. Entities in the Executive Office of the President	23
Table 2. United States Executive Departments and Prominent Subunits.	29
Table 3. Overview of Agencies Outside the EOP and Executive Departments.	42
Table 4. Statutory Characteristics of Multi-Member Bodies with Fixed Terms	45
Table 5. Non-Multimember Agencies and Subunits with Statutorily Fixed Terms for Presidentially Appointed Leaders	48
Table 6. Agency-Specific Personnel Systems Authorized by Statute	76
Table 7. Statutory Limitations on the Types of Persons Who Can Be Nominated Agency Heads or Board Members	92
Table 8. Boards or Commissions Whose Membership the President Does Not Fully Select	94
Table 9. Statutory Limitations on the President’s Removal Power	97
Table 10. Agencies with Explicit Double “For-Cause” Protections	99
Table 11. Statutory Chair Selection and Retention Rules for Multi-Member Bodies	100
Table 12. Agencies Excluded from OMB Review of Budgets, Rulemaking, and Legislation.	104
Table 13. Agency Statutes Providing Sources of Funding Other than Appropriations.	109
Table 14. Agencies and Bureaus Completely Exempt from Appropriations	110
Table 15. Government-Wide Position Mandates (CFO, CIO, IG)	114
Table 16. Agencies Subject to the Sunshine Act	115
Table 17. Agencies with Authorizing Statutes That Require Prior Approval by Other Agency or Congress for Certain Actions	116
Table 18. Agencies with Statutory Adjudicatory Authority	117
Table 19. Details of Federal Agencies’ Rulemaking Activities	119

List of Figures

Figure 1. Expansion of Federal Merit System Coverage: Percentage of Federal Jobs in Federal Merit System, 1883-1952.	64
Figure 2. Simplified Depiction of Current Federal Civilian Personnel System	69
Figure 3. Total Number of Federal Government Appointees and Percentage Appointed, 1960-2008.	73

Part I

Introduction to the Second Edition

In 2012, the Administrative Conference of the United States published the *Sourcebook of United States Executive Agencies (Sourcebook)*. At that time, there was no authoritative, current treatment of the structure and organization of the federal executive establishment. Prior to the publication of the *Sourcebook*, the last effort to create such a treatment was in 1980 when Dr. Ronald C. Moe of the Congressional Research Service produced *The Federal Executive Establishment: Evolution and Trends* at the request of the Senate Committee on Governmental Affairs.¹ Admirable projects subsequently described different components of the executive establishment, but few works replicated the comprehensive view of Moe's earlier work.²

1. S. COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., *THE FEDERAL EXECUTIVE ESTABLISHMENT: EVOLUTION AND TRENDS* (Comm. Print 1980) (report authored by Ronald C. Moe of the Congressional Research Service) [hereinafter MOE REPORT].

2. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, *FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW* (June 8, 2011) [hereinafter KOSAR, GOV'T CORP.]; MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* (2015) [hereinafter BREGER & EDLES, *INDEPENDENT AGENCIES*]; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000) [hereinafter Breger & Edles, *Established by Practice*]; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2017); Jennifer L. Selin, *What Makes An Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015).

The *Sourcebook* described the agencies of the federal executive establishment³ and their diverse characteristics, motivated by the belief that a comprehensive examination of the executive establishment would aid in efforts to pinpoint problems and clarify the consequences of different design choices for agency performance. It was written as a resource for members of Congress and their staffs, agency officials, and the general public. The report described the diversity of federal agencies, their place in the executive establishment and structural characteristics, and how these features matter for political control and agency performance. Since its publication, the *Sourcebook* has served as a valuable resource for government employees, has been recognized by the United States Supreme Court and federal judiciary,⁴ and has been cited by scholars and practitioners in law,⁵ economics,⁶ public policy,⁷ political science,⁸ and public administration.⁹

Five years later, we embarked upon an update of the report to ensure that the *Sourcebook* provides an accurate account of today's federal executive establishment.

3. The *Sourcebook* uses the term “federal executive establishment” rather than “executive branch.” This choice reflects the fact that numerous federal agencies do not fit neatly in the executive branch. They have been created to be outside the direct control of the chief executive, and to a lesser extent Congress, and many push the boundaries of what is considered a federal agency. See MOE REPORT, *supra* note 1. See *infra* Part II for further discussion.

4. *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).

5. *E.g.*, Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1155 (2014); Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. U. L. REV. 91, 98 (2015); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 542 (2015); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2195 (2016); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 880 (2015); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN L. REV. 999, 1048 (2015).

6. Ethan Bueno de Mesquita & Dimitri Landa, *Political Accountability and Sequential Policymaking*, 132 J. PUB. ECON. 95, 96 (2015).

7. *E.g.*, *Examining the Use of Agency Regulatory Guidance, Part II: Hearing before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. (2016) (statement of Clyde Wayne Crews, Jr., Vice President for Policy/Director of Technology Studies, Competitive Enterprise Institute); MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., R43163, *THE PRESIDENT’S BUDGET: OVERVIEW OF STRUCTURE AND TIMING OF SUBMISSION TO CONGRESS* (July 25, 2013); John Kamensky, *How Big is Government? New ‘Map’ Shows Us Nobody Knows*, GOV’T EXECUTIVE (Jan. 16, 2013), <http://www.govexec.com/excellence/promising-practices/2013/01/how-big-government-new-map-shows-us-nobody-knows/60697/>.

8. *E.g.*, Vincent Arel-Bundock, James Atkinson, & Rachel Augustine Potter, *The Limits of Foreign Aid Diplomacy: How Bureaucratic Design Shapes Aid Distribution*, 59 INT’L STUD. Q. 544, 548 (2015); Sharece Thrower, *The President, the Court, and Policy Implementation*, 47 PRESIDENTIAL STUD. Q. 122, 133 (2017).

9. *E.g.*, Anthony M. Bertelli, Dyana P. Mason, Jennifer M. Connolly & David A. Gastwirth, *Measuring Agency Attributes with Attitudes Across Time: A Method and Examples Using Large-Scale Federal Surveys*, 25 J. PUB. ADMIN. RES. & THEORY 513, 538 (2015); Jason A. Grissom, Samantha L. Viano & Jennifer L. Selin, *Understanding Employee Turnover in the Public Sector: Insights from Research on Teacher Mobility*, 76 PUB. ADMIN. REV. 241, 246 (2016); Tina T. Moldogaziev & Chris Silvia, *Fostering Affective Organizational Commitment in Public Sector Agencies: The Significance of Multifaceted Leadership Roles*, 93 PUB. ADMIN. 557, 564 (2015).

The 2012 report relied extensively on the 2012 United States Code to identify federal executive agencies and catalogue their structural features. Since that time, the United States Code has changed over 14,000 times.¹⁰ While not all of these changes affected the contours of the federal executive establishment, many did. For example, in 2015, Congress removed the Surface Transportation Board from the jurisdiction of the Department of Transportation (making the Board its own entity).¹¹ In addition, recent legal and political decisions have affected the federal executive establishment. Legal rulings such as *PHH Corporation v. Consumer Financial Protection Bureau*¹² and *UC Health v. National Labor Relations Board*¹³ have had consequences for agency structure and governance. Furthermore, government-wide legal mandates have taken on renewed importance as politicians seek to exert more control over federal executive policy. For example, in 2017, Congress used the Congressional Review Act (CRA) 15 times to pass resolutions of disapproval regarding federal rulemaking.¹⁴ This second edition of the *Sourcebook* accounts for statutory, legal, and political changes like these. In addition, the update includes an expanded set of agencies, giving the *Sourcebook* a broader reach than the first edition.

Perhaps the most famous review of executive organization in United States history, the report of the President's Committee on Administrative Management (commonly referred to as the Brownlow Committee), described how the executive establishment had developed "without a plan or design like barns, shacks, silos, tool

10. OFFICE OF THE LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, UNITED STATES CODE TABLE OF SECTIONS AMENDED, ENACTED, OMITTED, REPEALED OR TRANSFERRED, <http://uscode.house.gov/classification/tables.shtml> (number of changes as of April 3, 2017).

11. Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 3 (2015).

12. 881 F.3d 75 (D.C. Cir. 2018) (en banc), *vacating* 839 F.3d 1, 14 (2016) (addressing the constitutionality of the Consumer Financial Protection Bureau's structure as an independent regulatory agency headed by a single individual).

13. 803 F.3d 669 (D.C. Cir. 2015) (reviewing agency quorum requirements).

14. U.S. Gov't Accountability Office, Congressional Review Act FAQs, <https://www.gao.gov/legal/congressional-review-act/faq> (last visited May 21, 2018). These resolutions overturned rules from the Departments of Defense (Pub. L. No. 115-11 (2017)); Education (Pub. L. No. 115-13 (2017), Pub. L. No. 115-14 (2017)); Health and Human Services (Pub. L. No. 115-23 (2017)); Interior (Pub. L. No. 115-5 (2017); Pub. L. No. 115-12 (2017); Pub. L. No. 115-20 (2017)); Labor (Pub. L. No. 115-17 (2017); Pub. L. No. 115-21 (2017); Pub. L. No. 115-24 (2017); Pub. L. No. 115-35 (2017)); and the Consumer Financial Protection Bureau (Pub. L. No. 115-74 (2017)); Federal Communications Commission (Pub. L. No. 115-22 (2017)); General Services Administration (Pub. L. No. 115-11 (2017)); National Aeronautics and Space Administration (Pub. L. No. 115-11 (2017)); Securities and Exchange Commission (Pub. L. No. 115-4 (2017)); and Social Security Administration (Pub. L. No. 115-8 (2017)). To put this in context, prior to 2017, Congress had only passed a resolution of disapproval on one rule. Pub. L. No. 107-5 (2001) (overturning a Department of Labor rule on the ergonomics program promulgated during the Clinton Administration). For additional information regarding renewed political attention to the Congressional Review Act see, for example, David Blackmon, *Little-Used Congressional Review Act Becoming An Indispensable Tool*, FORBES, Mar. 6, 2017, <https://www.forbes.com/sites/davidblackmon/2017/03/06/little-used-congressional-review-act-becoming-an-indispensable-tool/#7b289522b8c8>; Emmarie Huettman, *How Republicans Will Try to Roll Back Obama Regulations*, N.Y. TIMES, Jan. 30, 2017, https://www.nytimes.com/2017/01/30/us/politics/congressional-review-act-obama-regulations.html?_r=0.

sheds, and garages of an old farm.”¹⁵ The old farm metaphor, while a better characterization of the New Deal executive establishment than the current one, is useful. Like the first edition of the *Sourcebook*, this report is intended to be like a map that marks the different buildings in relation to one another and to the entire farm. It provides details about the different uses and designs of the buildings, how the farm has developed, and how all the buildings relate together. The report describes the evolution of the current executive establishment, looks backward to understand what now exists, and analyzes trends to see what may be coming.

A. Need for This Report

Any effort to think holistically about the structure of the executive establishment must begin at a fundamental level with an authoritative accounting of federal governmental units and how they are organized. The structures of federal agencies, from their location to features of their internal design, partly determine who has influence over non-statutory policy decisions and how well federal agencies perform in carrying out statutorily mandated responsibilities.¹⁶ Agency design choices also reflect national priorities. Structural choices serve to upgrade some matters for government attention and downgrade others. Whether a program is placed higher or lower in the hierarchy of an agency or whether an agency is an orphan in a larger agency with a decidedly different mission may determine what government does and how well it does it. Agency structure determines who gets to make decisions and how well those decisions will be implemented. It determines whether agencies will be responsive to the White House, Congress, or other key stakeholders, and who has access to decision-makers. This is important both when there is broad agreement about what course agencies should pursue and when there are important disagreements among the President and members of the House and Senate.

15. PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 32 (1937) [hereinafter PRESIDENT’S COMM. ON ADMIN. MGMT.].

16. For recent treatments about how the structure of federal agencies influences both policy and performance see, for example, PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905-1996 (2d ed. 1998); HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT (1971); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 (2003) [hereinafter LEWIS, AGENCY DESIGN]; HAROLD SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION (1998); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (J.E. Chubb and P.E. Peterson eds., 1989) [hereinafter Moe, *Bureaucratic Structure*]; Mathew D. McCubbins, Roger Noll, & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV 431 (1989); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176 (2004).

Each year the Government Publishing Office prints and makes available online the *United States Government Manual*,¹⁷ which is the official handbook of the federal government. Yet, the *Manual* is not written to provide information systematically on the structure and design of federal agencies.¹⁸ Every four years congressional committees with jurisdiction over federal personnel policy publish the *Plum Book*, but this document is designed to help the President and Congress make a careful evaluation of positions available for political appointment, rather than to describe the structure of the executive establishment.¹⁹ In contrast, the *Sourcebook* seeks to provide scholars and practitioners an overview of how the executive establishment is arranged. Thus, this report remains the primary authoritative treatment of the structure and organization of the federal executive establishment.

B. Methodology

A team of researchers worked over several months to provide the materials that are the basis of this report. At least two researchers read through the portions of the U.S. Code authorizing each federal department and agency or bureau.²⁰ Researchers noted statutory features of each agency along with a citation for each feature. A total of 67 statutory characteristics of agencies were tracked for 6 components of the Executive Office of the President (EOP), the 15 executive departments and 173 bureaus within

17. *E.g.*, NAT'L ARCHIVES & REC. ADMIN., THE UNITED STATES GOVERNMENT MANUAL (2016) [hereinafter NARA, GOV'T MANUAL], <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GOVMAN&browsePath=2017+Edition+%28August%29%3BGOVMAN-2017-08-02%3B-thumbnails%5C%2Fgovman2017.jpg&isCollapsed=false&leafLevelBrowse=false&ycord=0> (providing access to the 1995 to 2017 editions of the *United States Government Manual*).

18. The *Manual* details agency structure in simple organization charts and agency descriptions that are limited to a small number of characteristics. Not all agency entries include the same design details, and the *Manual* does not provide many important details about agency structure such as fixed terms, term lengths, and the number of appointees. *See id.* This may be a result of the fact that the *Manual* is often compiled by multiple individuals, some of whom are not familiar with each agency's statutory design or functions.

19. *E.g.*, STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, II4TH CONG., POLICY AND SUPPORTING POSITIONS (Comm. Print 2016), [hereinafter 2016 PLUM BOOK].

20. In the first edition of the *Sourcebook*, each researcher on the team was assigned approximately 15 agencies to research. Each researcher on the team found the original public law which established the agency and that law's corresponding updated section in the U.S. Code. Once each researcher completed coding each agency's statute, he or she sent it to the team lead. The team lead also coded the statutes for each of the agencies. After the team lead received the completed coding from the team, she compared the two coded versions of the data for each agency and resolved any discrepancies in the coding. The only exception to this pattern was for agencies that were the responsibility of the team lead. In the second edition, we updated the data for the agency and bureau statutes that previously had been analyzed in either the first edition of the *Sourcebook* or in Selin's *What Makes An Agency Independent?* dataset to account for statutory changes since the original data collection. *See Selin, supra* note 2 (data available at <http://faculty.missouri.edu/~selinj/data.shtml>).

those departments,²¹ and 78 agencies outside of the EOP and executive departments and 2 bureaus within those agencies.²² Researchers noted the location of each agency in relation to elected officials and each other (e.g., EOP, executive department, etc.), features of agency governance (e.g., multi-member structure, number of political appointees), agency powers (e.g., power to raise funds, independent litigating authority), and aspects of agency political oversight (e.g., Office of Management and Budget (OMB) review and congressional reporting requirements).²³ A brief codebook for the data is included in Appendix C. Full data, including data in accessible formats and statutory references for all coding, are publicly available from the Administrative Conference of the United States.

Mapping the federal executive establishment is an immense task, encompassing history, law, and political science. The topics are varied, from the development of the federal personnel system to contemporary political oversight of administration. Each of these topics has been a fertile research area for some time. The purpose of this report is not to replicate or redo the important work done by Congressional Research Service scholars, Government Accountability Office studies, or academics. Rather, this work borrows heavily from existing sources in mapping out the executive establishment, identifying key trends, and collecting data on key ways that agencies differ from one another and relate together. In the same way that a map of the United States cannot

21. The President's cabinet is an informal institution traditionally comprised of the Secretaries of the executive departments and other officials the President may designate. In this report the term "cabinet department" is shorthand for one of the 15 executive departments that comprise the primary units of executive administration. RONALD C. MOE, CONG. RESEARCH SERV., RL30673, *THE PRESIDENT'S CABINET: EVOLUTION, ALTERNATIVES, AND PROPOSALS FOR CHANGE* (2000) [hereinafter MOE, PRESIDENT'S CABINET].

22. This report follows a variation of the definition of "agency" in the Administrative Procedure Act (APA), see 5 U.S.C. § 551(1) (2017), to identify all federal entities outside the legislative and judicial branches which are headed by one or more Senate-confirmed appointees.

23. To the extent practicable, we checked the final justifications with existing academic research on agency structure. Any discrepancies between the team's coding and existing research are footnoted in the complete codebook and appendix, made publicly available from the Administrative Conference of the United States. If discrepancies exist, they are often the result of the team using the provisions of the statutory law described above to code the structural features of the agency. By relying on the portions of the U.S. Code related to agency structure, it is possible that other statutory provisions outside of the establishing statute impose additional requirements on the agency or specify additional structural features of the agency. In addition, not all structural features are detailed in statute. Many are determined by agency action. Agencies promulgate regulations to implement law and clarify areas where statutory law is unclear. For example, many commission statutes are silent on the question of what constitutes a quorum in an agency, yet such rules are necessary for the functioning of the agency. Agencies subsequently clarify this uncertainty in regulation or bylaw. Finally, case law sometimes gives agencies features that differ from what is in a statute. For example, the statute authorizing the Securities and Exchange Commission does not include "for-cause" protections for the removal of commissioners. Yet, the courts have recognized the existence of "for-cause" protections in the agency despite no explicit mention in statute. *See, e.g.,* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Wiener v. United States*, 357 U.S. 349 (1958); *SEC. v. Blinder, Robinson, & Co.*, 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 488 U.S. 869 (1988). The choice to rely on statutory law was made for the sake of consistent coding across all agencies and to capture the structural arrangement agreed upon between Congress and the President.

provide detail about how to get around in downtown Baltimore, this report cannot delve deeply into some important and complex areas of government and administration. This does not suggest that a map of the United States or a street map of Baltimore is not useful. Rather, the purposes of the maps are different. Thus, this report takes a “map of the United States” level analysis of the federal executive establishment and, where possible, refers readers to other works more akin to street maps.

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

C. Structure of This Report

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

Part II

What is the Federal Executive Establishment?

The United States Constitution provides for three separate branches. Under textbook understandings of this structure, the legislative branch creates laws, the executive branch executes the laws, and the judicial branch adjudicates disputes and preserves fidelity to the laws and the Constitution. The Constitution does not, however, prescribe such a strict separation of powers. The federal government structure is better understood, in the words of Richard Neustadt, as a system of “separated institutions sharing power.”²⁴ The President has a constitutional role in the legislative process through the President’s power to recommend legislation, veto legislation (subject to congressional override), and provide information to Congress on the state of union. Congress oversees the execution of laws when it creates and funds federal programs and agencies. Congress confirms nominees and determines how lower-level officials will be selected. The legislature also conducts hearings and investigates the actions of public officials. Judges adjudicate the actions of legislators and executive branch officials. The Constitution provides for a system in which all three branches supervise and direct the activities of the agencies of government.

While executive branch agencies are responsible for carrying out most federal laws, employees in the legislative and judicial branches also do so. For example, the legislative branch includes what in common language would be called agencies as well,

24. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1990); *see also* LLOYD M. SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES* 14 (1923).

such as the Government Accountability Office (GAO), the Congressional Budget Office, and the Library of Congress, in addition to legislators, their staffs, and other officers of the legislature. Congress created most but not all of these agencies to serve the legislature as staff agencies.²⁵ For example, the GAO's self-described mission is to serve Congress by investigating how the U.S. government spends federal revenues.²⁶ The judicial branch includes the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission, in addition to the courts and their judges and officers.²⁷ These units provide administrative support for the federal courts, offer basic management support for the court system, and supply education and research about the court system and sentencing principles and guidelines. On the other hand, some administrative units provide support for all three branches of government. The Government Publishing Office is responsible for publishing official information for and about all three branches. The United States Botanic Garden, another instrumentality of the legislative branch, is a national botanic garden that "informs visitors about the importance, and often irreplaceable value, of plants to the well-being of humans and to earth's fragile ecosystems."²⁸ Neither agency self-evidently needs to be located in the legislative branch.²⁹

The bulk of federal administration is housed in the executive branch. Article II of the Constitution provides that "the executive power shall be vested in a President of the United States of America"³⁰ and historically federal employees working either in one of the executive departments or in scores of other entities (i.e., not a component of the Executive Office of the President or one of the executive departments) housed in the executive branch have carried out the functions of government, overseen and supervised by the three branches.³¹

25. The Legislative Branch also includes the Architect of the Capitol, Botanic Garden, Copyright Office, Medicaid and CHIP Payment and Access Commission, Open World Leadership Center, and Stennis Center for Public Service.

26. See U.S. GOV'T ACCOUNTABILITY OFFICE, ABOUT GAO: MAKING A DIFFERENCE FOR CONGRESS AND THE NATION (2011), http://www.gao.gov/about/gao_at_a_glance_2010_english.pdf.

27. See United States Courts, About Federal Courts, <http://www.uscourts.gov/FederalCourts.aspx> (last visited Aug. 20, 2018).

28. United States Botanic Garden, *About Us*, <http://www.usbg.gov/about-us> (last visited Oct. 30, 2017).

29. While the Government Accountability Office identifies itself as working for Congress, there is no reason why program evaluation of this type is necessarily a legislative activity. This begs the question of why this responsibility is housed in an agency in the legislative branch. The obvious answer is that Congress does not trust the executive branch to evaluate its own agencies and programs. Allen Schick, *Congress and the "Details" of Administration*, 36 PUB. ADMIN. REV. 521 (1976). *But see* *Bowsher v. Synar*, 478 U.S. 714, 729-732 (1986) (recognizing Congress has consistently viewed the Comptroller General, as head of the GAO, as an officer of the legislative branch).

30. U.S. CONST. art. II, § 1.

31. The executive departments are defined by statute. See 5 U.S.C. § 101 (2017) (defining the executive departments as the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security). What constitutes an "independent" agency is the subject of some disagreement that this report deals with below.

Some agencies do not fit comfortably into *any* of the three branches. Rather, they have been designed to be shielded from the control of elected officials. The Brownlow Committee referred to some of the agencies outside the executive departments as the “headless fourth branch of government”³² because they are designed to be insulated from presidential and, to a lesser extent, congressional control. Furthermore, many organizations connected to the federal government, such as federally chartered non-profits or mixed-ownership government corporations, even stretch the definition of an agency. While entities designed to be more or less insulated from the President or Congress are perhaps less responsive day-to-day to the directions of these elected officials, this does not imply that they are not democratically accountable. These entities still must comply with the law as it has been enacted and are subject to the investigations and inquiries of the two branches as well as additional legislation and informal pressure.

Thus, to capture adequately the organizational breadth of our federal governmental system, this report uses the term “federal executive establishment” (or “executive establishment”), which is in keeping with the terminology used in the *CRS 1980 Fed. Exec. Establishment Report*.³³ The term “federal executive establishment” is used here in the broadest sense both to reflect the diversity in federal organizations, as well as the fact that many federal entities do not neatly reside in the executive branch.

In 2017 the federal executive establishment employed approximately 2.68 million civilians³⁴ in either a part- or full-time capacity, excluding an undisclosed number of persons working in the intelligence agencies. By comparison, the legislative and judicial branches employed approximately 33,000 persons each.³⁵ The military services are comprised of approximately 1.38 million persons.³⁶ In addition to part- and full-time federal employees, private contract employees paid by the federal government also

32. PRESIDENT’S COMM. ON ADMIN. MGMT., *supra* note 15, at 40.

33. MOE REPORT, *supra* note 1.

34. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, at 62 (2017) [hereinafter OMB, 2018 ANALYTICAL PERSPECTIVES]. This estimate includes all executive branch civilian employees, including the Postal Service and Postal Rate Commission. For the purposes of counting federal civilian employees, it bears noting that the foregoing totals exclude government contractors and employees of federal entities that are not staffed by federal employees (e.g., federally sponsored non-profits).

35. *Id.*

36. *Id.*

perform substantial work for the federal government, as do state and local employees and other workers whose salaries are paid by federal grant dollars.³⁷

A. What is a Federal Agency?

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

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include the Congress; the courts of the United States; the governments of the territories or the possessions of the United States; the government of the District of Columbia; . . . agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; courts martial and military commissions; [or] military authority exercised in the field in time of war or in occupied territory[.]³⁸

By this definition, any instrumentality of government that is not otherwise located in the legislative or judicial branch would seem to be an agency. Yet, what about an enterprise such as the Federal Agricultural Mortgage Corporation that is governed by

37. See, e.g., JOHN J. DI IULIO JR., BRING BACK THE BUREAUCRATS (2014) (demonstrating that federal bureaucratic tasks are increasingly outsourced to contractors, state, and local governments); PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017) (evaluating the role of contractors and private sector solutions to government performance and highlighting the need for an executive establishment that can deliver federal services). The federal government does not systematically keep track of the number of contract employees. One source estimated the number of contract employees at 3.7 million in 2015. See Paul C. Light, *The True Size of Government*, THE VOLCKER ALLIANCE, at 3 (2017) [hereinafter Light, *True Size of Gov't*], https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf. Nation Analytics constructed this estimate using the records of every federal government contract transaction recorded in 2015 and analyzing each purchase using the Department of Commerce’s Bureau of Economic Analysis regional input/output model of the U.S. economy. The estimate includes direct and indirect employment created by the contracts, but does not include jobs created as byproducts of contract spending. Additionally, to measure the true size of government, one would also want to measure the number of employees paid by federal grants. An estimate of the total blended federal workforce in 2015, which includes federal, contract, and grant employees, is over 7.3 million. *Id.* at 4. The Taxpayers Right-to-Know Act (S. 317), considered by the 115th Congress, would require agency heads to track the number of federal employees and contractors required to implement every federal program and service in their agency.

38. 5 U.S.C. § 551(1) (2017). The definition also excludes functions performed as a result of mortgage insurance law.

a board in which two thirds of the members are selected by private shareholders rather than the President?³⁹ Even more difficult are cases where Congress has created private corporations or venture capital funds, as they pursue public ends as private entities.⁴⁰

Courts have recognized that the APA's definition of agency is not entirely clear,⁴¹ and there has been a substantial amount of litigation over which government entities fall within the various legal classifications of agency.⁴² Since what constitutes an agency under the APA is governed on a case-by-case basis through litigation, there is no authoritative list of government agencies. Every list of federal agencies in government publications is different. For example, FOIA.gov lists 118 separate executive agencies that comply with the Freedom of Information Act requirements imposed on every federal agency.⁴³ This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 305 unique or sub-component units as agencies.⁴⁴ An even more inclusive listing comes from USA.gov, which lists over 600 government departments and agencies.⁴⁵

When Congress creates programs, it most often delegates responsibility for these programs to an executive department, a component of an executive department, or other agencies of various types. However, the recipient of delegated authority need not be a federal agency since Congress delegates authority to states, local governments,

39. See 12 U.S.C. § 2279aa-2(b)(2) (2017).

40. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-97, *FEDERALLY CREATED ENTITIES: AN OVERVIEW OF KEY ATTRIBUTES* (2009) (identifying 7 different types of federally created entities, including federally funded research and development centers) [hereinafter GAO, *FEDERALLY CREATED ENTITIES*].

41. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (“The statutory definition of ‘agency’ is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.”).

42. Some of this litigation involves the Freedom of Information Act (FOIA) and the Government in the Sunshine Act. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (the President is not an “agency” subject to the provisions of the APA); *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009) (the Office of Administration within the Executive Office of the President is not an agency covered by FOIA); *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990) (the Defense Nuclear Facilities Safety Board is an “agency” within the meaning of the Sunshine Act); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038 (D.C. Cir. 1985) (the Council of Economic Advisers is not an “agency” for the purposes of FOIA or the Sunshine Act); *Nicholson v. Brown*, 599 F.2d 639 (5th Cir. 1979) (the definition of “agency” for the purposes of FOIA is broad enough to encompass military authority). For a more thorough legal discussion of what constitutes an “agency” under other laws, see O’Connell, *Bureaucracy at the Boundary*, *supra* note 2, at 894-96.

43. Department of Justice, *Data*, <http://www.foia.gov/data.html> (last visited April 5, 2018).

44. NARA, *GOV'T MANUAL*, *supra* note 17.

45. U.S. Gen. Servs. Admin., *A-Z Index of U.S. Government Departments and Agencies*, <https://www.usa.gov/federal-agencies/a> (last visited Oct. 30, 2017) [hereinafter GSA, *A-Z Index*].

and private sector entities as well.⁴⁶ State and local governments help implement key federal programs such as Medicaid. Congress empowers private litigators to pursue a public function in the enforcement of federal laws by altering economic incentives for such behavior and allowing access to federal courts.⁴⁷ While it is clear that state and local governments and private sector firms are not federal agencies,⁴⁸ since the 1960s, Congress also has delegated authority to entities that are neither typical government agencies nor completely private organizations or local governments.⁴⁹ These entities take a variety of forms: government-sponsored enterprises (GSEs) such as the Federal National Mortgage Association (Fannie Mae); joint federal-state regional development agencies such as the Appalachian Regional Commission; federally funded research centers such as the Rand Corporation; federal research laboratories like Los Alamos and Oak Ridge National Laboratories; venture capital funds such as OnPoint Technologies (Army) and Red Planet Capital (National Aeronautics and Space Administration), created by the U.S. Government to invest in companies whose products might be of use to the federal government; and congressionally chartered nonprofit organizations such as the National Academy of Public Administration. Disentangling which of these entities is an “agency” is difficult, particularly since many are wholly or partly owned and directed by private sector actors.⁵⁰

Given such definitional difficulties, the term “federal agency” (or “agency”) in this report refers to a clearly delineated set of federal entities. “Agency,” as used here,

46. *E.g.*, PAMELA J. CLOUSER McCANN, *THE FEDERAL DESIGN DILEMMA: CONGRESS AND INTERGOVERNMENTAL DELEGATION* (2016); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L. J.* 534 (2011); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 *NW. U. L. REV.* 62 (1990); Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367 (2002).

47. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 *AM. J. POL. SCI.* 821 (2008).

48. Indeed, the point has been litigated with consistent results. *See, e.g.*, *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) (state agencies are not an “agency” within the meaning of the APA); *Singleton Sheet Metal Works v. City of Pueblo*, 727 F. Supp. 579, 581 (D. Colo. 1989) (city receiving federal funding does not constitute an “agency” under the APA); *Sowell’s Meats and Servs. v. McSwain*, 788 F.2d 226 (4th Cir. 1986) (state agencies do not fall within the provisions of FOIA).

49. The appeal of non-traditional agency structures stems from a number of factors. First, these agencies often have the patina of a private sector firm and the symbolic sense that they are somehow more efficient than a government agency. Their use is consistent with management trends popularized in the last two decades. Second, these structures avoid the existing rules and regulations attached to federal management and also limit presidential and congressional influence. KEVIN R. KOSAR, *CONG. RESEARCH SERV.*, RL30533, *THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS* (2011) [hereinafter *KOSAR, QUASI GOV’T*].

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

refers to a federal executive instrumentality directed by one or more political appointees nominated by the President and confirmed by the Senate (the instrumentality itself rather than its bureaus, offices, or divisions).⁵¹ We exclude entities connected to the government of the District of Columbia and international and multilateral organizations, such as the United Nations or International Monetary Fund, whose governance is a shared enterprise between the United States and other nations.

However, given the political importance of many agency bureaus (e.g., Food and Drug Administration, Internal Revenue Service), we also catalogue subunits within the above-classified agencies that Congress and the President recognize as politically important.⁵² We include subunits within a larger agency (as defined above) that: (1) promulgated a rule reported to Congress under the Congressional Review Act in

51. First, to identify whether an agency was executive in nature, we relied on the definition of executive agency in 5 U.S.C. § 105 (2017) (an executive agency means “an Executive department, a government corporation, and an independent establishment”). We then generated a list of any instrumentality that was listed in any of the following sources: 2016 PLUM BOOK, *supra* note 19; CHRISTOPHER M. DAVID AND MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS (2016); NARA, GOV’T MANUAL, *supra* note 17; Office of Personnel Management, *FedScope Employment Cubes* (Sept. 2017), <http://www.fedscope.opm.gov/employment.asp> hereinafter [OPM, *FedScope*]; GSA, A-Z Index, *supra* note 45. After doing this, we identified the original public law that established the agency and that law’s corresponding citation in the U.S. Code. Each researcher on the team then read that section of the Code to not only extract information about the agency’s structure, but also to make sure that the agency fit our definition of executive agency. Most agencies were relatively easy to classify because their statutes specify the type or location of the agency. For example, the provision establishing the Sentencing Commission clearly states that the agency is established as part of the judicial branch, and thus would not classify as executive. 28 U.S.C. § 991 (2017). However, some agencies did require a bit of judgment. We classified multi-member boards and commissions as “agencies” if any of the voting members of the board or commission are nominated by the President and confirmed by the Senate. Additionally, if a single individual manages the day to day operations of an entity, but is subject to a board of governors or other similar body, we classified that entity as an agency if any of the voting members of the board are nominated by the President and confirmed by the Senate. Finally, for some agencies, the U.S. Code did not explicitly identify the location of the agency in a particular branch. For example, USA.gov lists the Architect of the Capitol as an agency in the federal government. Yet the U.S. Code does not explicitly identify or include the Architect of the Capitol among the entities listed in 5 U.S.C. § 105 and does not reference it as an agency in the organizational provisions addressing agencies generally. *See, e.g.*, 5 U.S.C. §§ 101-105 (2017). However, because the agency’s structure and general powers and duties are defined in Title 2 “The Congress,” we considered it legislative in nature. Only a handful of agencies required this sort of judgment.

52. Some subunits are legally or traditionally considered “independent” yet are statutorily defined as existing within a larger agency. *See, e.g.*, 12 U.S.C. § 5491(a) (2017) (establishing the Bureau of Consumer Financial Protection as an “independent bureau” within the Federal Reserve System); 42 U.S.C. § 7171(a) (2017) (establishing the Federal Energy Regulatory Commission within the Department of Energy as an independent regulatory commission). Because these entities are statutorily organized as subunits, we classify them as such.

2016;⁵³ or (2) are listed in both the September 2016 Employment Cube in the Office of the Personnel Management’s Central Personnel Data File⁵⁴ and in an agency’s organization chart in the 2016 Government Manual as directly reporting to an Under Secretary or the equivalent;⁵⁵ or (3) are excluded from all of the above for national security reasons.⁵⁶

B. What This Report Omits

This report focuses primarily on the top leadership and activities of agencies in the Executive Office of the President, executive departments, agencies located outside of the EOP and executive departments, and politically recognized component bureaus. Inside the included federal agencies and subunits are hundreds of bureaus, administrations, divisions, offices, working groups, and committees, which are characterized in this report in a general way. For purposes of clarity, however, it is important to acknowledge what is largely omitted. For example, the General Services Administration coordinates and tracks more than 1,000 federal advisory committees made up of over 70,000 persons.⁵⁷ The overwhelming majority of these committees are attached to specific departments and agencies. In addition, among federal agencies there are hundreds of interagency committees created to facilitate cooperation among agencies

53. List obtained through a search of the U.S. Government Accountability Office’s Congressional Review Act database for rules published in the *Federal Register* between January 1, 2016 and December 31, 2016. U.S. Gov’t Accountability Office, *Congressional Review Act*, <https://www.gao.gov/legal/congressional-review-act/overview> (last visited May 21, 2018). The CRA requires that, before a rule becomes effective, the agency promulgating the rule must submit a rule report to each house of Congress and to the Comptroller General. 5 U.S.C. § 801(a)(1)(A) (2017). The law contains exemptions for rules concerning monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee. *See id.* § 807. Compliance with this legal requirement is relatively high (89.12 percent), yet agencies are less likely to report a rule in times of divided government. Jennifer L. Selin, *Political Control, Bureaucratic Responsiveness, and Agency Structure* (July 16, 2014) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with author). While this may raise concern that an entity would be excluded from the definition of “bureau” due to statutory exemptions to the CRA or strategic decisions not to report a rule due to divided government, it is likely such an entity will be captured by one of the other two aspects of the definition of bureau. To ensure that each rule report in the CRA database accurately accounted for the bureau responsible for the rule, we cross-referenced each rule with the *Federal Register*.

54. OPM, *FedScope*, *supra* note 51.

55. NARA, GOV’T MANUAL, *supra* note 17. This definition excludes administrative offices that are common across many agencies, such as Offices of Public Affairs, General Counsel Offices, and the like.

56. These bureaus include the Department of Defense’s Defense Intelligence Agency, Joint Improvised-Threat Defeat Agency, National Geospatial-Intelligence Agency, and the National Security Agency and the Department of Energy’s National Nuclear Security Administration.

57. *See* U.S. Gen. Servs. Admin., *Federal Advisory Committee Act (FACA) Management Overview*, <http://www.gsa.gov/portal/content/104514> (last visited Oct. 30, 2017) (providing background on the implementation of the Federal Advisory Committee Act); *see also* SUSAN MOFFITT, MAKING POLICY PUBLIC: PARTICIPATORY BUREAUCRACY IN AMERICAN DEMOCRACY (2014) (dealing with advisory commissions); SEIDMAN, *supra* note 16, at 197-202 (discussing advisory commissions).

on policies and issues that are shared across the executive branch.⁵⁸ These units of the executive establishment receive little attention in this report.

This report self-consciously relies primarily on the statutory language of authorizing statutes rather than on administrative practice. So, for example, when the report lists features of agencies such as “for-cause” protections from removal or quorum requirements for multi-member bodies, it relies on agency authorizing statutes rather than commission rules, administrative common law, or agency practice. The choice to rely on statutory law was made for the sake of consistent coding across all agencies and to capture the agreed-upon structural deal made between Congress and the President. The reliance on statutory language has the virtue of comparability and consistency across agencies, but it also has the vice of omitting how agencies may be similar or different in practice in some cases. The Securities and Exchange Commission provides an example. Statutory law does not include explicit “for-cause” protections against the removal of commissioners, but courts have accepted that the commissioners have such protections.⁵⁹ By focusing on which agencies’ statutes include explicit “for-cause” provisions, this report does not explain the reality of how commissioner tenure may operate in practice.

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

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

59. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010) (assuming that SEC commissioners are protected from removal by “for-cause” provisions, in part because neither party argued otherwise); *SEC v. Blinder, Robinson, & Co.*, 855 F.2d 677 (10th Cir. 1988) (recognizing implicit “for-cause” protection for SEC commissioners because the SEC, as with the FTC, is an administrative body created by Congress to carry into effect legislative policies). *But see* *Free Enter. Fund*, 561 U.S. at 546 (Breyer, J. dissenting) (arguing that statutory silence implies the absence of for-cause protections).

Part III

Overview of the Federal Executive Establishment

The federal executive establishment is comprised of several parts. It includes the Executive Office of the President, the executive departments, and free-standing agencies of various types—administrations, commissions, and government corporations and other agencies. By far, the most significant component is the executive departments. The vast majority of federal employees work in an executive department, and most federal authority is carried out by an executive department or one of its subunits.⁶⁰ These entities may be identified under a variety of terms such as agency, bureau, administration, division, or service. Over eighty percent of federal civilian personnel work in one of the 15 executive departments.⁶¹ The remainder work in an agency in the Executive Office of the President or in some type of agency outside the executive departments. Agencies in the EOP primarily assist the President in carrying

60. Approximately 1.884 million civilians work in executive departments, as compared to approximately 589,000 in the Postal Service and the Postal Regulatory Commission and 202,500 in other federal agencies. OMB, 2018 ANALYTICAL PERSPECTIVES, *supra* note 34, at 61-62 (2017). For estimates of the total delegated authority of each agency in the federal executive establishment, see Jennifer Selin, Who Has the Power? The Accumulation of Delegated Authority in Federal Executive Agencies (May 25, 2018) (working paper, on file with author).

61. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, at Table 16.2 (2017). Of the federal employees who work in an executive department, over sixty percent work in one of three departments—Defense, Veterans Affairs, or Homeland Security. *Id.*

out constitutional or statutory responsibilities, and many EOP employees see it as their job to work for the President. Other agencies, outside the departments and the EOP, are not subject to the direction of a departmental Secretary, and often have characteristics that limit presidential and, to a lesser extent congressional, influence over agency decision-making and actions.⁶² These “independent” agencies come in a variety of forms: administrations, boards, commissions, government corporations, or other hybrid agencies.⁶³

This section reviews the agencies in the different parts of the executive establishment and describes the personnel system that defines and populates these agencies. Within these agencies there are two broad classes of employees governed by different rules for selection and removal: 1) political appointees and 2) career civil servants. The former are selected by political officials, usually from outside the career civil service, and they provide policy direction to the agency. The latter are employees whose hiring, firing, promotion, and demotion are governed by merit and protected by federal law and regulation.⁶⁴

A. Executive Office of the President

The modern executive establishment includes a robust constellation of agencies whose primary purpose is to aid the President in carrying out the President’s constitutional and statutory responsibilities.⁶⁵ The development of a statutorily specified staff for the President is a relatively modern phenomenon. Early presidents paid for White House staff from their personal salaries,⁶⁶ and Congress did not appropriate money for

62. As this report will discuss below, there are some independent agencies that look very much like executive departments, and some agencies inside executive departments with features that insulate them from the control of the President.

63. What constitutes an “independent” agency is the subject of some debate, with some scholars focusing on the location of agencies and others relying on structural features, particularly “for-cause” removal protections, to define an independent agency. See *infra* Part III.C.

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

65. Harold C. Relyea, *The Executive Office Concept*, in *THE EXECUTIVE OFFICE OF THE PRESIDENT: A HISTORICAL, BIOGRAPHICAL, AND BIBLIOGRAPHICAL GUIDE 3* (Harold C. Relyea ed., 1997) [hereinafter Relyea, *Executive Office*]. As with other categorizations and typologies, there are exceptions. In 1974, Congress established the Office of Federal Procurement Policy within the Office of Management and Budget. Yet, this agency was intended to be congressionally-oriented and reports to Congress. See MOE REPORT, *supra* note 1, at 13; SEIDMAN, *supra* note 16, at 43-44.

66. JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY 4* (1992). John Hart argues that the lump sum provided presidents was actually intended by Congress to cover the President’s salary and expenses and that their intention was to pay for a small staff. Over time, however, the distinction between the President’s salary and money for the President’s expenses in that lump sum was lost. JOHN HART, *THE PRESIDENTIAL BRANCH 13-14* (2d ed. 1995).

presidential staff until 1857.⁶⁷ Historically, presidential staffs were small, comprised of secretaries, clerks, stenographers, and messengers. Presidents often employed relatives or acquaintances to work for them in the White House.

Dramatic changes in the nation expanded the role and size of the national government and the management responsibilities of the President. A combination of factors including, but not limited to, the mobilization for the Civil War, industrialization, massive immigration, technological change, and widespread pressure to lessen the impacts of economic booms and busts and systemic disruptions to major national systems (transportation, economy, trade) generated pressure for an expanded scope of activities for the national government. Public pressure for greater government involvement resulted in new federal programs and new agencies and federal employees to implement them. The small national government in 1860, comprised of six executive departments and a handful of minor agencies, grew to ten executive departments and a score of powerful independent agencies by 1920.⁶⁸ The expansion of the national government generated new difficulties in the federal management of agencies and spending. With the nudging of presidents, Congress granted the President increasing resources to manage the executive branch and other responsibilities.⁶⁹ In 1921, Congress enacted the Budget and Accounting Act of 1921, which created the Bureau of the Budget.⁷⁰ While formally housed in the Department of the Treasury during the period from 1921 to 1939, presidents used the Bureau to collect and manage budget estimates from federal agencies and coordinate activities of the departments and agencies.⁷¹

The creation of a permanent professional staff formally attached to the presidency did not come until 1939.⁷² In response to the Great Depression, President Roosevelt and Congress embarked on a dramatic New Deal domestic program that substantially expanded federal employment and the federal executive establishment. Scores of new agencies were created to put the New Deal program into effect. Between 1933 and 1944, federal employment exploded from 603,587 to 3,332,356 workers.⁷³

67. In 1833, Congress appropriated money for a secretary to help sign land patents on the President's behalf, but Congress did not consider this person as part of the President's staff. HART, *supra* note 66, at 17.

68. Among the independent agencies established during this period were the Civil Service Commission, the Interstate Commerce Commission, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission.

69. MOE REPORT, *supra* note 1, at 4-5; LOUIS FISHER, PRESIDENTIAL SPENDING POWER 31 (1975).

70. Pub. L. No. 67-13, 42 Stat. 20 (1921).

71. SHORT, *supra* note 24, at 437. The President was provided the ability to select the director and assistant director of the Bureau of the Budget without Senate confirmation. HART, *supra* note 66, at 32.

72. See generally MATTHEW J. DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH (1996) (providing an excellent history of the growth of presidential staffing during this period).

73. HISTORICAL STATISTICS OF THE UNITED STATES 5-127 (Carter et al. eds., 2006).

With New Deal expansion, however, came concerns about management.⁷⁴ After the 1936 election, in which federal management was an issue, President Roosevelt appointed the aforementioned Brownlow Committee to study the organization and management of the federal executive establishment.⁷⁵ In 1937, the Committee presented its report and recommended an expansion in presidential staff. Congress ultimately acceded to these recommendations and enacted the Reorganization Act of 1939.⁷⁶ Reorganization Plan No. 1 formally created the EOP in 1939.⁷⁷ The new EOP included among its initial components the White House Office, the Bureau of the Budget (later OMB), and the National Resources Planning Board.⁷⁸

1. Current Structure of the EOP

The EOP is best understood not as an agency in its own right, but as a warehouse that contains many distinct agencies and offices. Since its creation, the EOP has included anywhere from three to 17 presidential staff agencies.⁷⁹ Every President since Roosevelt inherited an EOP and White House Office staff structure from previous administrations. Some aspects of the existing structure worked well for the new presidents and other parts were inconsistent with the changing political and electoral incentives of presidents. Presidents ignored parts of the EOP and made institutional adjustments by creating new units and eliminating or merging others.⁸⁰ More than 50 different units have been included in the EOP at one time or another since its creation in 1939, with a majority persisting only one or two administrations.⁸¹ Often it was the parts created by Congress in statute that were ignored or needed alteration. For example, President Truman needed a while to warm to the National Security

74. See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 17-31 (2012) (providing an account of criticisms of the administrative state after New Deal expansion).

75. BURKE, *supra* note 66, at 6.

76. The recommendations of the report initially were entangled in larger political disagreements between the President and Congress stemming from Roosevelt's attempt to enlarge the size of the Supreme Court ("court packing"). HAROLD C. RELYEA, *CONG. RESEARCH SERV.*, 98-606, *THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW* 6-8 (2008) [hereinafter RELYEA, CRS]; BURKE, *supra* note 66, at 7; HART, *supra* note 66, at 28.

77. Under the authority of the Reorganization Act of 1939, the President was empowered to submit reorganization plans to Congress. These plans for reorganizing the government (i.e., creation, reorganization, and elimination of agencies) would go into effect after 60 days unless both chambers of Congress had passed a concurrent resolution disapproving the plan. Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 562-3 (1939).

78. Several months later, in September 1939, President Roosevelt issued Executive Order 8248, which organized the EOP and detailed its initial components. Exec. Order No. 8248, 4 Fed. Reg. 3864 (Sept. 12, 1939).

79. See RELYEA, CRS, *supra* note 76, at 12-24 (providing a comprehensive list of EOP agencies created, reorganized, and eliminated since 1939).

80. Terry M. Moe, *The Politicized Presidency, in THE NEW DIRECTION IN AMERICAN POLITICS*, (J.E. Chubb and P.E. Peterson eds., 1985) [hereinafter Moe, *Politicized Presidency*].

81. RELYEA, CRS, *supra* note 76; HART, *supra* note 50, at 66.

Council, and President Eisenhower ultimately added a national security advisor to manage this apparatus.

Among federal agencies, EOP agencies are usually the most responsive to the President.⁸² While some components of the EOP, such as the Office of Management and Budget, are still comprised largely of career employees, a larger percentage of employees in EOP agencies are political appointees than in other agencies.⁸³ EOP agencies also generally lack the structural characteristics such as party balancing limitations on political appointees or fixed terms and protections from removal that can insulate entities from presidential control.⁸⁴ The multi-member boards in the EOP have strong chairs and no protections from removal. Employees in the EOP also differ from other federal employees because of the common recognition of EOP employees' primary loyalty to the President as opposed to their agencies or to Congress. Other federal employees in agencies located outside of the EOP may have a limited personal loyalty to the President and may see their work as being more directly tied to congressional committees and agencies.

While Congress is responsible for creating a number of agencies inside the EOP, Congress historically has given the President a significant amount of freedom in the structure and management of the EOP, contributing to the President's ability to increase the responsiveness of EOP agencies.⁸⁵ Presidents may create new units in the EOP and temporarily use existing appropriated funds to pay for the operations

82. See Selin, *supra* note 2 (the agencies located within the EOP rank as having the most political structures in terms of policy).

83. Among EOP agencies, the White House Office, Executive Residence, National Security Council, and Office of the Vice President are staffed entirely by persons who serve at the pleasure of the president. BRADLEY H. PATTERSON, *TO SERVE THE PRESIDENT: CONTINUITY AND INNOVATION IN THE WHITE HOUSE STAFF* (2008).

84. As discussed below, presidential appointments to many commissions are limited by the requirement that no more than a bare majority be from one political party. LEWIS, *AGENCY DESIGN*, *supra* note 16.

85. RELYEA, CRS, *supra* note 76; HART, *supra* note 66, at 148; Relyea, *Executive Office*, *supra* note 65.

of the unit.⁸⁶ Ultimately, however, Congress must approve the new unit by explicitly authorizing it or approving appropriations that have been supported by budget documents that describe the new unit. Congress, however, only rarely contests these funds. Congress has been deferential to presidential choices involving EOP agencies in the same way that presidents have been reluctant to modify legislative branch appropriations.

The EOP currently includes 12 units that employ 1,876 persons.⁸⁷ Table 1 includes a list of the components of the EOP along with staff size and budgets as well as dates they were added to the EOP. The most visible component of the EOP is the White House Office. The White House Office is a complex institution in its own right. According to one count, it includes 135 distinct offices from the Office of Legislative Affairs to the staff of the Executive Residence.⁸⁸ Importantly, it includes what are commonly referred to as “West Wing” staff such as the Chief of Staff, White House Counsel, and Press Secretary, as well as a number of other assistants and deputy assistants to the President.⁸⁹ The term “White House” or “White House Staff” can refer to different entities and persons depending upon the context. Sometimes

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

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

Pub. L. No. 78-359, 58 Stat. 387 (1944).

This provision has been amended and now reads:

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

(b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section.

31 U.S.C. § 1347 (2017). The amended provision has been interpreted to require only that an agency’s existence be included in larger budget justifications presented to Congress. *See* LEWIS, AGENCY DESIGN, *supra* note 16, at 82.

87. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, 1047-57.

88. *See generally* PATTERSON, *supra* note 83.

89. The White House Staff is comprised of persons working on the payroll of the White House Office, as well as persons working for other agencies such as the Secret Service and National Park Service with permanent attachments to the work of the White House. Employees on the payrolls of other federal agencies are also regularly detailed from the agency to work in the White House. This makes determining the exact number of persons working in the White House at any time difficult. The White House is required annually to send to the House Oversight and Government Reform and Senate Governmental Affairs committees a list of White House employees and detailees. 3 U.S.C. § 113 (2017).

the term “White House” is synonymous with the Executive Office of the President. In other cases, the “White House” means simply the President’s residence, White House Office, or the White House Office plus a few other units in the EOP such as the National Security Council.⁹⁰ For persons working in and around the White House, the organizational distinctions often matter very little and who works where is not entirely clear; distinct offices on an organization chart can be quite blurry in day-to-day operations.

Table 1. Entities in the Executive Office of the President

EOP Component	Staff Size FY 2017	Budget \$Million	Origin	Date
Council of Economic Advisers	28	4	Statute	1946
Council on Environmental Quality	24	3	Statute	1970
Executive Residence	96	13	RO Plan	1939
National Security Council	68	14	RO Plan	1947
Office of Administration	240	101	RO Plan	1977
Office of Management and Budget	465	95	Statute	1921
<i>Office of Federal Procurement Policy</i>			Statute	1974
<i>Office of Information and Regulatory Affairs</i>			Statute	1980
Office of National Drug Control Policy	74	20	Statute	1988
Office of Science and Technology Policy	33	6	Statute	1976
Office of the United States Trade Representative	230	56	Statute	1962
Office of the Vice President	6	25		
President’s Intelligence Advisory Board			Executive Order	2008
White House Office	450	58	RO Plan	1939
<i>Domestic Policy Council</i>			Executive Order	1993
Office of National AIDS Policy				
Office of Faith Based & Neighborhood Partnerships			Executive Order	2001
Office of Social Innovation & Civic Participation				
<i>National Economic Council</i>			Executive Order	1993
<i>Office of Cabinet Affairs</i>				

90. In his accounting of the White House, for example, Bradley Patterson defines the “whole White House” as the White House Office plus the Executive Residence, Office of Policy Development, National Security Council, and Office of the Vice President. He does so based upon the fact that these other units are distinct from other EOP agencies in at least four different ways. First, their employees serve entirely at the pleasure of the President. Second, they have no independent legal authority to take any authoritative action. Third, they are protected clearly by executive privilege. Fourth, their papers are subject to the Presidential Records Act, but they are not subject to the Freedom of Information Act. PATTERSON, *supra* note 83, at 65.

Table 1. Entities in the Executive Office of the President

EOP Component	Staff Size FY 2017	Budget \$Million	Origin	Date
<i>Office of Communications</i>				
<i>Office of Digital Strategy</i>				
<i>Office of the First Lady</i>				
<i>Office of Legislative Affairs</i>				
<i>Office of Management and Administration</i>				
<i>Office of Public Engagement & Intergovernmental Affairs</i>				
Office of Public Engagement				
Office of Intergovernmental Affairs				
Office of Urban Affairs			Executive Order	2009
<i>Office of Scheduling and Advance</i>				
<i>Office of the Staff Secretary</i>				
<i>Oval Office Operations</i>				
<i>Presidential Personnel Office</i>				
<i>White House Counsel</i>				

Note: RO Plan indicates agency originated as part of a Reorganization Plan. Date is the year when the unit became a part of the EOP. While President Bush renamed it in 2008, some form of the President's Intelligence Advisory Board existed in every presidential administration since Eisenhower, except Carter. For information on White House Office structure, see White House, *Executive Office of the President*, www.whitehouse.gov/administration/eop (last visited Oct. 30, 2017); RELYEA, CRS, *supra* note 17; HART, *supra* note 7, at 242-44; see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, 1047-57. There are other components of the Office of Management and Budget. OIRA and OFPP are included as examples because of their prominence in rulemaking and contracting, but these two subunits are not included elsewhere in the *Sourcebook* because they do not fall within the agency subunit classification scheme identified *supra*, Part II, A.

The EOP also includes the Office of Management and Budget (formerly the Bureau of the Budget), which was one of the original agencies included in the EOP in 1939. Notably, the EOP also includes the Council of Economic Advisers (1946), National Security Council (1947), Office of the United States Trade Representative (1962), Council on Environmental Quality (1970), Office of Science and Technology Policy (1976), Office of Administration (1977), and Office of National Drug Control Policy (1988). These agencies became a part of the EOP for a number of reasons. In some cases, agencies were added to provide presidents advice and assistance in carrying out constitutional and statutory responsibilities (e.g., National Security Council—national security policy, Council of Economic Advisers—economic policy responsibilities stemming originally from the Employment Act of 1946). Congress also added some partly as symbolic responses to national policy issues requiring presidential

attention (e.g., Council on Environmental Quality).⁹¹ Other agencies aimed to help presidents control centralized administrative processes such as budgets and legislative clearance (e.g., Office of Management and Budget).⁹² In addition, presidents employ EOP agencies and staff to coordinate federal policies in areas where responsibilities are divided among multiple agencies (e.g., Office of National Drug Control Policy).⁹³

2. Controversies—Growth and “Czars”

Critics of the growth in the EOP charge that bloated White House staffs create management challenges of their own for the President and that the centralization of power in the White House is bad for governance. The former controversy is illustrated in coverage of the Watergate and Iran-Contra scandals, which engendered public pledges to cut the number of White House employees and scholarly analyses noting the management challenges of the burgeoning presidential staff.⁹⁴ For example, the first recommendation of a report of the National Academy of Public Administration in 1980 was that “The trend toward enlargement of the immediate White House staff should be reversed. Rigorous efforts should be made to keep this staff small.”⁹⁵

White House observers also note an increasing presidential tendency to centralize authority in the White House, often by appointing White House or administration officials as policy coordinators.⁹⁶ The officials assuming these roles are often referred to pejoratively as “czars.” The term is shorthand for their position and a comment on the centralization of power in the White House.⁹⁷ The title “czar” has been attached to administration officials at least since the Franklin Delano Roosevelt (FDR) Administration.⁹⁸ Republican and Democratic presidents have designated key officials to direct policymaking in important areas that required substantial time and effort to direct effectively. These policy areas are often substantively and politically complicated, involve administration officials from many different departments, and have political or electoral relevance. Presidents designate single officials to “knock heads” or “cut

91. In a few cases, Congress has placed in the EOP agencies that were not primarily presidential staff agencies such as the Office of Economic Opportunity, the Council on Marine Resources and Engineering Development, and the Council on Environmental Quality. SEIDMAN, *supra* note 16, at 178.

92. MOE REPORT, *supra* note 1, at 24.

93. ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT’S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMATION* (2002).

94. *Id.* at 195.

95. *Id.* at 197 (quoting NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *A PRESIDENCY FOR THE 1980s* 17 (1980)).

96. Other Senate-confirmed officials are also given the same charge by the President, but their status as Senate-confirmed appointees eliminates the concerns about testifying before Congress. José D. Villalobos & Justin S. Vaughn, *Revolt Against the Czars: Why Barack Obama’s Staffing Critics Are (Mostly) Wrong*, 32 *PRESIDENCY RES. GROUP REP.* 8 (2010).

97. BARBARA L. SCHWEMLE, ET AL., *CONG. RESEARCH SERV.*, R40856, *THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT* (2011).

98. *Id.* at 4.

through the red tape” or “ensure coordinated effort.”⁹⁹ For example, in 2014, President Obama named an “Ebola Czar” to coordinate the government’s comprehensive response to the Ebola epidemic.¹⁰⁰ It is hard to imagine a modern President being able to coordinate policymaking in different areas without designating key officials to stand in for the President in those roles at least part of the time.

The use of administration officials to stand in the place of the President to coordinate policy has been controversial since the FDR Administration, when officials were lampooned in a cartoon in the *Evening Star* wearing crowns and robes.¹⁰¹ Critics charge that such officials unduly centralize authority in the White House, lack accountability, and generate management difficulties. Criticisms of these officials can follow partisan patterns. Democrats and Republicans often find such officials objectionable when the President is from the opposite party. For example, Democrats were heavily critical of Tom Ridge when he was a White House official in charge of coordinating homeland security efforts. Critics complained that Ridge was influencing policy but not accountable to Congress in the same way that a Secretary of Homeland Security would be, and Congress ultimately enacted legislation to create a new executive department.¹⁰² In the early years of Barack Obama’s presidency, controversy erupted in the form of criticism of the number and power of such officials named to coordinate policy in different areas.

One objection to persons being named to these roles is that they lack democratic accountability since those in the White House are not officers of the United States.¹⁰³ While some officials named to coordinate policy on the President’s behalf are Senate-confirmed political appointees, a number of such officials are White House aides. As White House aides, presidential assistants are not subject to Senate confirmation and historically have not had to testify before Congress, being shielded by the President’s executive privilege. If, however, so-called “czars” exercise substantial policymaking authority, they plausibly should be nominated and confirmed, and

99. *Id.* at 6.

100. See Tanya Somanader, *President Obama Names Ron Klain to Coordinate the U.S. Response to Ebola*, WHITE HOUSE, Oct. 17, 2014, <https://obamawhitehouse.archives.gov/blog/2014/10/17/president-obama-names-ron-klain-coordinate-us-response-ebola>; Juliet Eilperin & Lena H. Sun, *Ebola Czar Ron Klain to Leave Feb. 15 after Leading U.S. Response to Outbreak*, WASH. POST, Jan. 29, 2015, https://www.washingtonpost.com/national/health-science/ebola-czar-ron-klain-to-leave-feb-15-after-leading-us-response-to-outbreak/2015/01/29/aa9c503c-a0d7-11e4-b146-577832eafcb4_story.html?utm_term=.cf607d691372.

101. SCHWEMLE, *supra* note 97, at 3 (the cartoon, drawn by Clifford Kennedy Berryman and published on September 7, 1942, depicted Leon Henderson, Donald Nelson, and Emory S. Land wearing crowns and ermine-trimmed robes).

102. Elizabeth Becker, *Senator Insists Ridge Testify Before Congress*, N.Y. TIMES, April 5, 2002, <http://www.nytimes.com/2002/04/05/us/senator-insists-ridge-testify-before-congress.html>. Ridge was also criticized for poor performance. Harold C. Relyea, *Organizing for Homeland Security*, 33 PRES. STUD. Q. 602 (2003).

103. James P. Pfiffner, *President Obama’s White House Czars*, 32 PRESIDENCY RES. GROUP REP. 5 (2010) [hereinafter Pfiffner, *Obama Czars*]; Villalobos & Vaughn, *supra* note 96.

critics worry that the naming of White House officials in visible policy coordinating roles is a means of bypassing the Senate confirmation process.¹⁰⁴

Beyond concerns about accountability and transparency, some observers worry about the effectiveness of these officials. They lack formal authority over policy, budgets, or personnel and must rely on other officials in the departments and agencies to act on their behalf. The authority of appointees selected to coordinate policy on behalf of the President derives from their proximity to the President and the extent to which they can credibly claim to speak for the President. Senior presidential appointees legally preside over thousands of employees and billion dollar budgets, and these political appointees rarely have to listen to anyone other than the President or key members of Congress.¹⁰⁵ Many departmental Secretaries complain of a lack of access to the President, and even inside the White House access to the President can be limited.¹⁰⁶ If these officials have uncertain authority, their intervention in federal administration arguably only confuses lines of accountability.

The growth in the White House staff and the increasing use of policy coordinators increases the chances that staff interpose themselves between the President and key officials. In such cases, departmental Secretaries and agency heads, in effect, become middle managers.¹⁰⁷ It becomes harder for presidents to recruit the best talent from the private sector if White House aides repeatedly overrule agency heads. The captains of industry, academia, and government are less likely to leave their existing work or stay in government service to work for a member of the President's staff. In addition, confusion emerges about who is in charge and what the President prefers.

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

B. Executive Departments

While the EOP primarily advises the President, the overwhelming majority of national administration is conducted by federal employees working in the 15 executive or

104. *E.g.*, Mark J. Rozell & Mitchel A. Sollenberger, *Policy Czars already have too much power. Trump would make that worse*, WASH. POST, Mar. 30, 2016, https://www.washingtonpost.com/news/in-theory/wp/2016/03/30/policy-czars-already-have-too-much-power-trump-would-make-that-worse/?utm_term=.2f68891db411.

105. Pfiffner, *Obama Czars*, *supra* note 103, at 5.

106. According to some accounts, even the highest level officials in the White House speak to the President substantively barely once a month. DONALD F. KETTL, *THE POLITICS OF THE ADMINISTRATIVE PROCESS*, 147 (5th Ed. 2011).

107. Pfiffner, *Obama Czars*, *supra* note 103, at 5-7.

“Cabinet” departments. The number of executive departments has varied over time with the creation of new departments and with the reorganization of old departments into new configurations. The first Congress created the first executive departments, Treasury, State, and War, in 1789.¹⁰⁸ These departments performed the essential government functions of managing finances, internal affairs (e.g., patents), foreign relations, and national defense. When Congress created new programs and tasks through statute, Congress usually delegated these responsibilities to existing departments, although some of the tasks delegated did not fit neatly with the primary missions of these departments.¹⁰⁹ In 1849, Congress created the Department of the Interior, colloquially known then as the “Department of Everything Else,” to assume many of these oddly fitting functions.¹¹⁰ In the period from 1860 to 1950, Congress created the clientele-based departments of Agriculture (1889), Commerce (1903), and Labor (1913), as well as numerous agencies outside the executive departments, to manage new government programs.¹¹¹ Congress added the departments of Health, Education, and Welfare (1953), Housing and Urban Development (1965), Transportation (1966), and Energy (1977), in response to large national problems. The Departments of Education (1980), Veterans Affairs (1989), and Homeland Security (2002) joined the Cabinet between 1980 and 2002. Table 2 includes a list of departments, their creation dates, and key bureaus. The Table also includes details about the number of employees and appointees in 2017 and 1960 (or later if the department was created after 1960), for reference.

108. Harold Seidman, *A Typology of Government Agencies*, in *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?*, 34 (Peter Szanton ed., 1981) [hereinafter Seidman, *A Typology*]. It is interesting to note that Congress considered, but ultimately rejected, a proposal to create a fourth executive department—a home department. Instead, they took the programs and responsibilities that would have resided in the home department, and placed them in the other departments.

109. There were a few exceptions to this early pattern. Specifically, Congress created four agencies outside the executive departments prior to the Civil War—the Library of Congress, Botanic Garden, Smithsonian, and Government Publishing Office. *Id.* at 35. Three of these are located in the legislative branch. Other early agencies include the Board of Supervising Inspectors (created in 1852 to regulate steamboat safety) and the U.S. Mint. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION – THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

110. JOHN A. FAIRLIE, *THE NATIONAL ADMINISTRATION OF THE UNITED STATES OF AMERICA* (1922); RICHARD F. FENNO, *THE PRESIDENT’S CABINET: AN ANALYSIS IN THE PERIOD FROM WILSON TO EISENHOWER* 26 (1959); SHORT, *supra* note 24, at 472.

111. See SHORT, *supra* note 24, at 418 (providing a description of the clientele-based departments and agencies created during this period). For example, Short reports that Congress created the Department of Agriculture in response to pressure from the United States Agricultural Society, the Department of Education in response to pressure from the National Association of School Superintendents, and the Department of Labor in response to the Knights of Labor. *Id.* Congress also created other smaller agencies during this period in response to public pressure from clients. *Id.*; see also FENNO, *supra* note 110, at 24.

Table 2. United States Executive Departments and Prominent Subunits

Date	Dept.	Prominent Subunits	Emp. % App.	Political Appointees ^a					1960 Total App. Emp. % App.
				PAS	PA	NA	SC	Total	
1789	STAT	Arms Control and International Security; Civilian Security, Democracy, and Human Rights; Economic Growth, Energy, and Environment; Political Affairs; Public Diplomacy and Public Affairs; United States Agency for International Development	13,126 0.03%	265	4	38	123	430	274 37,972 0.01%
1789	TRS	Alcohol, Tobacco Tax and Trade Bureau; Bureau of Engraving and Printing; Bureau of the Fiscal Service; Community Development Financial Institutions Fund; Financial Crimes Enforcement Network; Internal Revenue Service; Office of the Comptroller of Currency; U.S. Mint	92,109 0.001%	31	3	36	56	126	96 77,318 0.001%
1789, 1947	DOD	Air Force; Army; Combatant Commands; Defense Advanced Research Projects Agency; Defense Commissary Agency; Defense Contract Audit Agency; Defense Contract Management Agency; Defense Field Activities; Defense Finance and Accounting Service; Defense Health Agency; Defense Information Systems Agency; Defense Intelligence Agency; Defense Legal Services Agency; Defense Logistics Agency; Defense POW Agency; Defense Security Cooperation Agency; Defense Security Service; Defense Threat Reduction Agency; Joint Chiefs of Staff; Joint Improvised-Threat Defeat Agency; Missile Defense Agency; National Geospatial-Intelligence Agency; National Reconnaissance Office; National Security Agency; Navy; Pentagon Force Protection Agency	737,855 0.0003%	52	0	77	109	238	159 1,036,754 0.0004%
1870	DOJ	Bureau of Alcohol, Tobacco, Firearms, and Explosives; Bureau of Prisons; Community Oriented Policing Services; Drug Enforcement Administration; Executive Office for U.S. Attorneys; Executive Office for U.S. Trustees; Federal Bureau of Investigation; Foreign Claims Settlement Commission; Interpol; Office for Access to Justice; Office of Justice Programs; Office on Violence Against Women; U.S. Marshals Service; U.S. Parole Commission	117,127 0.003%	209	14	55	55	333	331 31,035 0.01%

Table 2. United States Executive Departments and Prominent Subunits

Date	Dept.	Prominent Subunits	Emp. % App.	Political Appointees ^a					1960 Total App. Emp. % App.
				PAS	PA	NA	SC	Total	
1849	INT	Bureau of Indian Affairs; Bureau of Indian Education; Bureau of Land Management; Bureau of Ocean Energy Management; Bureau of Reclamation; National Park Service; Office of Insular Affairs; Office of Surface Mining Reclamation and Enforcement; Special Trustee for American Indians; U.S. Fish and Wildlife Service; U.S. Geological Survey	71,057 0.001%	17	0	37	52	106	111 53,257 0.002%
1862, 1889	USDA	Agricultural Research Service; Agricultural Marketing Service; Animal and Plant Health Inspection Service; Center for Nutrition Policy and Promotion; Economic Research Service; Farm Service Agency; Food Safety and Inspection Service; Foreign Agricultural Service; Food and Nutrition Service; Forest Service; Grain Inspection, Packers, and Stockyards Administration; National Agricultural Library; National Agricultural Statistics Service; National Institute of Food and Agriculture; Natural Resources Conservation Service; Risk Management Agency; Rural Business Cooperative Service; Rural Housing Service; Rural Utilities Service	96,591 0.002%	14	2	48	165	229	96 94,904 0.001%
1903, 1913	COM	Bureau of Economic Analysis; Bureau of Industry and Security; Bureau of the Census; Economic and Statistics Administration; Economic Development Administration; International Trade Administration; Minority Business Development Agency; National Institute of Standards and Technology; National Telecommunications and Information Administration; National Oceanic and Atmospheric Administration; National Technical Information Service; U.S. Patent and Trademark Office	44,704 0.005%	21	1	39	165	223	116 33,070 0.004%

Table 2. United States Executive Departments and Prominent Subunits

Date	Dept.	Prominent Subunits	Emp. % App.	Political Appointees ^a					1960 Total App. Emp. % App.
				PAS	PA	NA	SC	Total	
1913	DOL	Bureau of International Labor Affairs; Bureau of Labor Statistics; Employee Benefits Security Administration; Employment and Training Administration; Occupational Safety and Health Administration; Mine Safety and Health Administration; Office of Disability Employment Policy; Office of Federal Contract Compliance Programs; Office of Labor-Management Standards; Office of Workers' Compensation Programs; Pension Benefit Guaranty Corporation; Veterans' Employment and Training Service; Wage and Hour Division; Women's Bureau	15,766 0.008%	16	2	26	88	132	46 7,268 0.01%
1965	HUD	Center for Faith-Based and Community Initiatives; Community Planning and Development; Fair Housing and Equal Opportunity; Federal Housing Administration; Federal Housing Finance Board; Field Policy and Management; Government National Mortgage Association; Office of Federal Housing Enterprise Oversight; Office of Healthy Homes and Lead Hazard Control; Public and Indian Housing	8,061 0.01%	13	0	28	41	82	95 14,940 0.01%
1966	DOT	Federal Aviation Administration; Federal Highway Administration; Federal Motor Carrier Safety Administration; Federal Railroad Administration; Federal Transit Administration; Maritime Administration; National Highway Traffic Safety Administration; Pipeline and Hazardous Materials Safety Administration; Saint Lawrence Seaway Development Corporation	55,172 0.002%	22	2	28	39	91	63 59,803 0.001%
1977	DOE	Electricity Delivery and Energy Reliability; Energy Efficiency and Renewable Energy; Environment, Health, Safety, and Security; Environmental Management; Federal Energy Regulatory Commission; Fossil Energy; Indian Energy Programs; National Nuclear Security Administration; Nuclear Energy; Regional Power Administrations; U.S. Energy Information Administration	15,153 0.009%	21	0	33	83	137	150 21,557 0.01%

Table 2. United States Executive Departments and Prominent Subunits

Date	Dept.	Prominent Subunits	Political Appointees ^a						1960
			Emp. % App.	PAS	PA	NA	SC	Total	Total App. Emp. % App.
1979	DOED	Center for Faith-Based Community Initiatives; Federal Student Aid; Institute of Education Sciences; Office of Career, Technical, and Adult Education; Office of Elementary and Secondary Education; Office of English Language Acquisition; Office of Innovation and Improvement; Office of Special Education and Rehabilitative Services; Office of Vocational and Adult Education; Risk Management Service	4,362 0.04%	15	2	20	123	160	92 7,364 0.01%
1953, 1980	HHS	Administration for Children and Families; Administration for Community Living; Agency for Healthcare Research and Quality; Agency for Toxic Substances and Disease Registry; Centers for Disease Control and Prevention; Center for Faith-Based and Neighborhood Partnerships; Centers for Medicare and Medicaid Services; Food and Drug Administration; Health Resources and Services Administration; Indian Health Service; National Institutes of Health; Substance Abuse and Mental Health Services Administration	86,552 0.002%	18	2	80	80	180	196 155,662 0.001%
1988	DVA	Board of Veterans Appeals; National Cemetery Administration; Veterans Benefits Administration; Veterans Health Administration	373,149 0.0001%	11	4	10	11	36	32 259,406 0.0001%
2002	DHS	Citizenship and Immigration Services; Domestic Nuclear Detection Office; Federal Law Enforcement Training Center; Transportation Security Administration; U.S. Coast Guard; U.S. Customs and Border Protection; U.S. Immigration and Customs Enforcement; U.S. Secret Service	191,644 0.001%	17	7	50	82	156	200 152845 0.001%

Note: 2016 Plum Book, *supra* note 19 (providing data on Senate-confirmed political appointees (PAS) and other presidential appointments not requiring Senate confirmation); OPM, *FedScope*, *supra* note 51. Some subunits are legally or traditionally considered “independent” (e.g., Federal Energy Regulatory Commission) yet are statutorily defined as existing within a department. As such, those entities are included as prominent subunits in this table and elsewhere. See *supra* note 52. The final column includes data on the total number of appointees, employees, and percentage appointed in 1960 unless the department was created after 1960, in which case the data come from the next Plum Book published after their creation (i.e., 1968 for HUD and DOT; 1980 for DOE, DOED, and HHS; 1992 for DVA; and 2004 for DHS). Employment data from the earlier period came from U.S. Civil Service Commission/Office of Personnel Management, *Employment and Trends*, various years.

^a Letter codes that denote the type of appointment are as follows: PAS = Presidential Appointment with Senate Confirmation; PA = Presidential Appointment (without Senate confirmation); NA = Noncareer Appointment; SC = Schedule C Excepted Appointment.

These departments were not created out of whole cloth.¹¹² Rather, in creating new departments, Congress combined existing agencies, personnel, programs, and appropriations, along with new responsibilities, into new organizational forms. Many of the central functions of federal government (finance, foreign affairs, national defense) are embodied in executive departments, but so are some less obvious functions (agriculture, education, urban policy). The earliest departments developed out of existing administrative structures carrying over from the government under the Articles of Confederation.¹¹³ Other departments evolved from previously administered federal government programs and agencies. For example, the Department of Agriculture emerged from an existing independent agricultural agency created more than twenty years earlier. In the twentieth century, the pattern remained the same. The Department of Labor superseded the Bureau of Labor (1888). The Department of Health, Education, and Welfare (1953, now the Department of Health and Human Services) was created from the Federal Security Agency. The Department of Veterans Affairs Act of 1988 elevated the Veterans Administration to department status in the form of the Department of Veterans Affairs.¹¹⁴ Most recently, Congress created the Department of Homeland Security by combining 22 separate federal agencies, including the Coast Guard, Federal Emergency Management Agency, and the former Immigration and Naturalization Service, into one new department.¹¹⁵

There is no fundamental constitutional or management principle guiding which agencies are departments and which agencies are sub-department bureaus or agencies located outside of the departments. The status and location of agencies is the subject of political determination. Despite persistent efforts, it is impossible to organize all federal programs and agencies into departments neatly organized by function, primarily because the functions themselves defy compartmentalization. Federal involvement in transportation provides a useful illustrative example. Prior to 1966, federal transportation programs were fragmented, distributed throughout different departments and agencies. Presidents since at least the Truman Administration complained about how this fragmentation of transportation-related responsibilities hindered effective and holistic planning to improve this sector.¹¹⁶ In 1966, Congress enacted legislation creating a new department that was intended to address transportation problems by consolidating existing programs and agencies into one department. Congressional efforts were only partly successful since some transportation programs were not integrated into the new department and others that were included arguably should not have been. For example, do federal programs dealing with urban mass transit belong in the Department of Transportation or the department dealing with urban issues,

112. FENNO, *supra* note 110, at 22.

113. *See* SHORT, *supra* note 24, at 35.

114. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

115. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

116. The first bill proposing the creation of a federal Department of Transportation was introduced in 1890. SEIDMAN, *supra* note 16, at 174.

the Department of Housing and Urban Development? More recently, the Transportation Security Administration, responsible for providing airport security, was integrated into the Department of Homeland Security rather than the Department of Transportation. Concerns for domestic security trumped transportation, illustrating that choices about which functions get grouped together in one department or agency reflect national priorities at the time they were created. In the early 1990s, Congress and the President deliberated about elevating the Environmental Protection Agency to an executive department but ultimately could not come to agreement on structural details.¹¹⁷ More recently, President Obama proposed merging the Small Business Administration, Trade and Development Administration, Export-Import Bank, Overseas Private Investment Corporation, and Office of the United States Trade Representative (EOP) with the Department of Commerce's core business and trade functions into one large department; and in 2018, the Trump Administration announced a government reorganization proposal, which included changes to the Departments of Agriculture, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, State, Treasury, Transportation, and Veterans Affairs.¹¹⁸

1. Executive Departments and Other Executive Agencies Compared

The primary difference between an executive department and a free-standing administration is symbolic. Department status is conferred to confirm the importance of certain constituencies (farmers, business, labor, veterans) or to publicly recognize the priority of dealing with certain key policy problems (cities, transportation, energy, homeland security). Secretaries of the executive departments are traditionally members of the Cabinet. Groups press for Cabinet recognition to receive a symbolic national affirmation that they or their issues are centrally important. Membership in the Cabinet itself, however, is discretionary. The President may designate other executive officials as having Cabinet rank. When presidents name other officials as members of the Cabinet, this does not change agency features. It only provides invitations to Cabinet meetings. Recent presidents have made heads of agencies such as the Environmental Protection Agency and Small Business Administration members of the Cabinet. The Cabinet itself is not generally a decision-making body, and in-

117. LEWIS, AGENCY DESIGN, *supra* note 16.

118. Press Release, White House Office of the Press Secretary, President Obama Announces Proposal to Reform, Reorganize and Consolidate Government (Jan. 13, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov>. The Trump Administration reform proposal also included changes to the structure and/or functions of the Environmental Protection Agency, General Services Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, and Social Security Administration. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, DELIVERING GOVERNMENT SOLUTIONS IN THE 21ST CENTURY: REFORM PLAN AND REORGANIZATION RECOMMENDATIONS (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf>.

clusion in the Cabinet has little direct influence on presidential policymaking.¹¹⁹ The categorization of an agency as a department also provides political justification for a department-like management structure in terms of the number of bureaus, Assistant, Under, and Deputy Secretaries, and other officials. For example, once the Department of Defense added a Deputy Secretary for the first time in 1949, other departments followed suit soon thereafter.¹²⁰

The main structural difference between executive departments and other agencies, where such differences exist, is in placement, pay, and number of political appointees. First, the titles and pay levels for political appointees in executive departments often differ from political appointees in other agencies. For example, while the structure of an agency such as the Environmental Protection Agency (EPA) is very similar to that of an executive department, equivalent officials have different titles and pay levels. A departmental Secretary is paid at executive level I (EX I), and the EPA administrator is paid at executive level II (EX II).¹²¹ Second, executive departments tend to have more political appointees than other agencies, even though many executive departments are significantly smaller than some agencies outside of the departments. One of the smaller executive departments is Education, which employs about 4,300 employees. Two of the larger agencies that are not part of an executive department, the EPA and the National Aeronautics and Space Administration (NASA), each has over 15,000 employees, and the Social Security Administration (SSA) has over 64,000 employees. In contrast to the Department of Education, which has 160 political appointees, the EPA, NASA, and SSA have 64, 16, and 17, respectively.

2. *The Structure of Executive Departments*

From the earliest days of the Republic, a single person has been nominated by the President and confirmed by the Senate to head each of the executive departments. This appears to have been the clear intention of the Founders after their experience with

119. MOE REPORT, *supra* note 1; FENNO, *supra* at 110. Of course, the Presidential Succession Act does include cabinet members in the line of succession. 3 U.S.C. § 19(d)(1) (2017) (“If by reason of death, resignation, removal from office, inability or failure to qualify, [there is no Speaker of the House or President pro tempore of the Senate to act as President], then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security”).

120. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 105 (1995) (hereinafter LIGHT, THICKENING).

121. The pay levels of agency heads are hard to characterize generally. For example, the Commissioner of the Social Security Administration is paid at Executive Level I despite not heading an executive department. While most chairs of independent commissions are paid at Executive Level III, the chairs of the Board of Governors of the Federal Reserve and the Nuclear Regulatory Commission are paid at Executive Level II. The Chairman of the Administrative Conference of the United States is to be paid “at the highest rate established by statute for the chairman of an independent regulatory board or commission.” 5 U.S.C. § 593(b)(1) (2017).

boards during the pre-Constitution period.¹²² Today, a team of presidential appointees requiring Senate confirmation, and their staffs, manage each of the departments. Modern department leadership currently includes from 11 to 52 Senate-confirmed positions,¹²³ including the Secretary, a Deputy Secretary, and a number of Under and Assistant Secretaries. Under these officials are chiefs of staff and special advisors, but also deputies who are a mix of other political appointees and career professionals. The hierarchy of the departments defies overly simple characterization because of the proliferation in the number of titles over the last 40 years.¹²⁴

These members of the president's administration preside over distinct sub-department agencies. The modern executive departments are comprised of anywhere from three to 40 organizationally distinct bureaus, with most housing 10-15.¹²⁵ "Bureau" is a general term that refers to many different sub-units within larger departments, entities such as the Federal Bureau of Investigation, Internal Revenue Service, or National Highway Traffic Safety Administration. Like departments, bureaus vary in size and significance. In many departments, the sub-department bureaus have significant autonomy and authority; many departments are better characterized as holding companies of a number of distinct agencies rather than one large agency.¹²⁶ The autonomy of department subunits derives from a number of sources. Most have legal authority delegated to the bureau chief directly by legislation, rather than to the department Secretary or the President.¹²⁷ Large bureaus are also generally headed by Senate-confirmed political appointees, making bureau chiefs accountable to con-

122. See SHORT, *supra* note 24, at 35-77, 93, 111 (providing a useful administrative history of this period, which describes the national transition from legislatively led boards to single-headed departments).

123. This count includes some PAS positions in the Departments of State and Justice. There are a high number of Senate-confirmed appointees in the State Department (265) due to the requirement that all ambassadors be confirmed by the Senate. The high number of Senate-confirmed appointees in the Department of Justice (209) is due to the requirement that all U.S. Attorneys, as well as U.S. Marshals, must be confirmed by the Senate.

124. LIGHT, THICKENING, *supra* note 120.

125. The Department of Defense is the outlier with 40 distinct sub-department agencies, dramatically more than any other department. These agencies include: the distinct military services (Air Force, Army, Navy); the joint commands (e.g., Joint Chiefs of Staff, U.S. Northern Command); the civilian agencies inside the department, such as the Defense Advanced Research Projects Agency (DARPA); the Defense Contract Management Agency; and, the various military educational institutions (e.g., Joint Forces Staff College, National Defense University, National War College). There is no uniform standard as to how one defines a distinct bureau within a larger department or agency. To a large extent, federal data collection agencies rely on agency self-determinations when reporting the number of bureaus. The estimates in the text derive from a count of the number of sub-department agencies listed in the *Government Manual*, which is significantly different from a count based on the list of USA.gov or FOIA.gov. See, e.g., NARA, GOV'T MANUAL, *supra* note 17.

126. Departments referred to as "holding company" departments include Interior, Defense, Commerce, Health and Human Services, Homeland Security, and Transportation. See MOE REPORT, *supra* note 1, at 11; FENNO, *supra* note 110, at 228-29; J. LEIPER FREEMAN, THE POLITICAL PROCESS—LEGISLATIVE COMMITTEE RELATIONS (1958); Seidman, *A Typology*, *supra* note 108, at 38.

127. JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927); Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 27 (2006); FENNO, *supra* note 110, at 228-29. MOE REPORT, *supra* note 1, at 29.

gressional committees as well as to higher departmental officials.¹²⁸ Some, though a minority, are headed by political appointees who serve for fixed terms of varying lengths but are not protected from removal by for-cause provisions.¹²⁹ Of course, political appointees serving fixed terms may leave their jobs before the end of the term, but fixed terms can serve as a symbolic source of autonomy from political actors.

Older bureaus like the Department of the Navy, the Federal Aviation Administration, and the Food and Drug Administration have some measure of independence, power, and prestige because they have existed longer than the departments that house them. For example, the Census Bureau (in the Department of Commerce) traces its history to the constitutional requirement for a decennial census.¹³⁰ The Public Health Service (in the Department of Health and Human Services) was created in 1798 when Congress provided for the care of merchant seamen.¹³¹ These long histories facilitate the development of networks of political support among clients, groups, and congressional committees. Relationships between bureau officials and Senate and House committees and staffs established through regular interaction over long periods of time facilitate bureau freedom from administration political appointees and other members of Congress.¹³²

When deciding to create new departments or agencies, Congress can specify a few or many of the details of internal agency organization.¹³³ In some cases, Congress leaves it up to the agency head to create the internal offices and divisions of an agency and empowers the Secretary to reorganize older bureaus moving into the new agency or department.¹³⁴ In other cases, Congress specifies in great detail the internal organization of an agency and preserves the integrity of freestanding units being moved into a new department.¹³⁵ This has been true from the earliest days of the Republic when Congress laid out the structure of the Department of the Treasury in great

128. FREEMAN, *supra* note 126.

129. *See infra* Part IV.C.1 (discussing protections against removal). Similarly, although not in the Executive Branch, but nevertheless held to be a Head of a Department for the purposes of the Appointments Clause, because the Librarian of Congress is appointed by the President with the advice and consent of the Senate, the President also has the authority to remove the Librarian at will. *See Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 42-43 (D.D.C. 2010); *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012), *reh'g en banc denied*, 2012 U.S. App. LEXIS 18230 (D.C. Cir. 2012).

130. U.S. CONST. art. I, § 2.

131. *See* U.S. Dep't of Health and Human Serv., U.S. Public Health Service Commissioned Corps, *Public Health Service History at USPHS Commissioned Corps*, <http://www.usphs.gov/aboutus/history.aspx> (last visited May 22, 2018).

132. *See* FREEMAN, *supra* note 126; HERBERT KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 170 (1981); Schick, *supra* note 29, at 522.

133. MOE REPORT, *supra* note 1.

134. *Compare* 6 U.S.C. §§ 101-63 (2017) (referencing 37 bureaus, offices, and agencies to be moved or created within the Department of Homeland Security), *with* 42 U.S.C. §§ 3501-15d (2017) (referencing only five bureaus, offices, and agencies within the Department of Health and Human Services).

135. *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

detail but not the departments of State or War.¹³⁶ Congress now specifies the internal organization of federal agencies in greater detail than in the past.¹³⁷

Statutorily provided details about internal department and agency structures come from both the organic act creating the agency and subsequent legislative action.¹³⁸ Congress regularly creates new agencies and bureaus and adds them to existing departments or agencies. For example, the Dodd-Frank legislation created the Consumer Financial Protection Bureau (2010) and added it to the Federal Reserve System (1913).¹³⁹ The decision to place an entity within a larger department or agency can affect the entity's decision-making structure and performance.¹⁴⁰ In some instances, placing an entity within a larger agency can create layers of accountability, as the new bureau has to obtain approval from those higher up in the agency's hierarchy before making important policy changes. In other instances, the decision can actually insulate the entity from political supervision. For example, critics of the Consumer Financial Protection Bureau argue that the Director of the Bureau enjoys significantly more unilateral power than any other agency, as the structure of the Federal Reserve System may serve as a layer of protection for the bureau from presidential or congressional interference, yet the Federal Reserve Board cannot supervise, direct, or remove the Director.¹⁴¹

Congress also, from time to time, mandates the creation of offices with a particular mission in all federal agencies. A notable example is when Congress mandated the creation of offices of inspector general in all executive departments in the Inspector General Act of 1978.¹⁴² Other government-wide mandates can have a similar effect. Congress has mandated the creation of four "chief officer" positions (financial, information, human capital, acquisition) in major agencies, leading to the creation of new

136. SHORT, *supra* note 24.

137. MOE REPORT, *supra* note 1.

138. Almost all large bureaus in the executive departments have been formally authorized in legislation. Sometimes formal legislative authorization comes after an agency has been created by executive action. For example, President Nixon created the Environmental Protection Agency through reorganization plan. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623, reprinted in 97 Stat. 485 (1970). While Congress has continued to delegate policymaking authority to the EPA through laws such as the Clean Water Act and Clean Air Act Amendments, the agency's structure remains largely unspecified by statute.

139. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (2010); Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013) (discussing newer agency structures in financial regulation agencies).

140. See Selin, *supra* note 2, at 977-78.

141. *E.g.*, PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc), *vacating* 839 F.3d 1, 14 (2016); Consumer Financial Protection Bureau v. RD Legal Funding, 2018 WL 3094916 (S.D.N.Y. June 21, 2018).

142. According to the Council of Inspectors General on Integrity and Efficiency, there are now 73 statutory inspectors general with the additions mandated in amendments to the initial act, notably in 1988, when independent agencies were added. See Council of the Inspectors General on Integrity and Efficiency, Inspectors General Directory, <https://www.ignet.gov/content/inspectors-general-directory> (last visited Oct. 30, 2017).

and similar offices in different agencies across the executive establishment.¹⁴³ Other government-wide managerial mandates, such as the Freedom of Information Act, faith-based and community initiatives, and laws and regulations relating to discrimination in federal employment lead to additional common offices across departments and agencies (e.g., FOIA offices, faith-based initiatives offices, and equal employment opportunity or civil rights offices).¹⁴⁴ Common agency tasks and requirements such as the need for legal advice and review, congressional and public relations, budget, and program evaluation also lead departments and agencies to have common features (e.g., general counsel, office of legislative affairs, office of public affairs, budget office).¹⁴⁵

3. *Variation in the Number of Employees and Political Appointees*

In addition to differences in history, mission, and structure, executive departments differ in size and in the depth and placement of political appointees. By far the largest department is the Department of Defense (DOD), which employs over 700,000 federal civilians, oversees more than one million uniformed military personnel, and utilizes unknown thousands of intelligence personnel and private contractors. The Department includes the military services (Air Force, Army, Navy) which are as large as many departments in their own right, each with over 160,000 civilian employees. The Department of Veterans Affairs and the Department of Homeland Security are also large employers, particularly in comparison to the smaller departments such as Education, Energy, and Housing and Urban Development. The number of political appointees does not correspond to differences in size. Energy and Labor have close to 130 political appointees, while the smaller Department of Education has closer to 160. As a percentage of agency employees, Education and HUD have the most political appointees.¹⁴⁶ These differences in numbers of political appointees influence agency behavior and reputation. Political appointees aid the President in communicating administration priorities, but they also provide an important source of patronage (i.e., jobs to be allocated as a reward for political support) and have an influence on the quality of agency management.¹⁴⁷

143. CLINTON T. BRASS, CONG. RESEARCH SERV., RL32388, GENERAL MANAGEMENT LAWS: MAJOR THEMES AND MANAGEMENT POLICY OPTIONS (2004) [hereinafter BRASS, GEN. MGMT. LAWS].

144. *See id.* (for a compendium of government-wide managerial mandates).

145. MOE REPORT, *supra* note 1, at 28.

146. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 82 (2008) [hereinafter LEWIS, PRESIDENTIAL APPT.].

147. G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (1981); MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR: POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE (1971) [hereinafter TOLCHIN & TOLCHIN, TO THE VICTOR]; MARTIN TOLCHIN & SUSAN TOLCHIN, PINSTRIPE PATRONAGE: POLITICAL FAVORITISM FROM THE CLUBHOUSE TO THE WHITE HOUSE AND BEYOND (2010) [hereinafter TOLCHIN AND TOLCHIN, PINSTRIPE PATRONAGE]; Domonic A. Bearfield, *What Is Patronage? A Critical Reexamination*, 69 PUB. ADMIN. REV. 64 (2009).

C. Agencies Located Outside of the EOP and Executive Departments

From the first Congress, the legislature operated under the assumption that the proper form of administration was a permanent executive department headed by a single Secretary.¹⁴⁸ Starting in the 1880s with the creation of the Interstate Commerce Commission (ICC), Congress began creating permanent agencies as commissions, often outside of the existing executive departments. Up to that point, Congress had episodically created new agencies outside of existing departments. They would do so because these agencies did not fit neatly inside existing departments. Some examples include the precursors to the Departments of Agriculture and Labor. Generally, however, these agencies would have similar structures as executive departments, and they often would be consolidated into new or existing executive departments after a period of time. The creation of the ICC was of a different character.¹⁴⁹ Congress sought to create a form of administration that would be expert and insulated from politics, so that the powers of the agency would not be used in a partisan way.

Since the ICC exercised significant legislative and adjudicative power that would impact the larger economy and key interests, Congress sought to fashion an agency that was bipartisan and expertise-focused. In practice, this meant designing the agency in such a way that the President's appointment and removal powers would be limited.¹⁵⁰ Congress created the ICC as a five-member commission with six-year fixed and staggered terms, and provided that the President could remove commissioners for

148. The nation had employed boards and commissions for executive functions during the struggle for independence and under the Articles of Confederation. A number of the Founders and early members of Congress determined from that experience that permanent agencies with single heads were more efficient and more accountable than boards. See SHORT, *supra* note 24, at 35-77, 93, 111 (providing a useful administrative history of this period which describes the national transition from legislatively led boards to single-headed departments).

149. The ICC was originally within the executive department structure since the original act gave the Secretary of the Interior authority to receive reports and approve the number and remuneration of ICC employees. Congress granted the agency full independence from the Interior Department in 1889. The Civil Service Commission, created in 1883, was a bipartisan commission like the ICC. It operated independently, but was also located for administrative purposes inside the Department of the Interior. It would reside there until 1925. SEIDMAN, *supra* note 16, at 163. PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 103-04 (1958).

150. *E.g.*, MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 23 (1955); BREGER & EDLES, *INDEPENDENT AGENCIES*, *supra* note 2, at 32-36 (2015); Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139 (2015).

“inefficiency, neglect of duty, or malfeasance in office.”¹⁵¹ The Interstate Commerce Act stipulated that no more than three commissioners could be appointed from the same political party.

After the creation of the ICC, Congress created scores of both minor and major agencies outside the executive departments, including multi-member commissions modeled after the ICC, such as the Federal Reserve (1913) and Federal Trade Commission (1914).¹⁵² The creation of independent regulatory commissions continued well into the twentieth and twenty-first centuries, with the New Deal of the 1930s and also the early 1970s being notable for the addition of new commissions.¹⁵³ Congress added the Federal Communications Commission, Securities and Exchange Commission, and National Labor Relations Board in the 1930s and Consumer Product Safety Commission, Federal Election Commission, and Commodity Futures Trading Commission in the early 1970s. Once created, these agencies have proven quite durable relative to agencies in the Executive Office of the President or executive departments.¹⁵⁴ Table 3 provides an overview of agencies that exist outside of the EOP and executive departments.

151. Interstate Commerce Act of 1887, Pub. L. No. 49-41 (1887). The phrase “inefficiency, neglect of duty, or malfeasance in office” is generally interpreted as protecting commissioners from presidential removal except “for-cause.” In the context when it was enacted, however, the Tenure of Office Act was still in effect, which limited the President’s power of removal by requiring Senate assent to a presidential removal. This provision can be read as providing the President greater power than he might otherwise have had in removal. In 1869, Congress revised the Tenure of Office Act, but still protected high-ranking officers from presidential removal. Act to Amend the Tenure of Office Act, ch. 154, § 10, 16 Stat. 6 (1869). Repeal of the Tenure of Office Act occurred in 1887 after President Cleveland challenged it as an unconstitutional limit on the President’s removal power. See Shugerman, *supra* note 150, at 153-64 (providing a historical account of the Tenure of Office Act).

152. As before, some agencies were created outside the executive departments because their functions did not fit neatly with the functions of existing departments. In other cases, however, Congress—influenced by the Progressive belief in science and technical expertise—sought to create court-like agencies of experts to scientifically manage specific policy areas. Breger & Edles, *Established by Practice*, *supra* note 2, at 1130-33.

153. See Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 668-75 (2017) (finding some evidence to support the hypothesis that Congress was more likely to establish agencies with a multi-member structure and specified tenure during the New Deal).

154. David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377 (2003) [hereinafter Lewis, *Adverse Consequences*]. This is not to say that these agencies are never terminated, just that commissions with fixed terms and party-balancing limitations are substantially more durable than other agencies. *Id.* at 396.

Table 3. Overview of Agencies Outside the EOP and Executive Departments

Administrations	Independent Commissions (regulatory)	Boards (non-regulatory)	Government Corporations/Other
Broadcasting Board of Governors	Board of Governors of the Federal Reserve System	Barry Goldwater Scholarship and Excellence in Education Foundation	Administrative Conference of the United States
Central Intelligence Agency	Consumer Financial Protection Bureau	Chemical Safety and Hazard Investigation Board	AMTRAK Corporation for National and Community Service
Environmental Protection Agency	Commodity Futures Trading Commission	Election Assistance Commission	Corporation for Public Broadcasting
Federal Housing Finance Agency	Consumer Product Safety Commission	Federal Hospital Insurance Trust Fund Board	Export-Import Bank of the U.S.
Federal Mediation and Conciliation Service	Defense Nuclear Facilities Safety Board	Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund	Farm Credit System Insurance Corporation
General Services Administration	Equal Employment Opportunity Commission	Federal Retirement Thrift Investment Board	Federal Agricultural Mortgage Corporation
Office of Acquisition Policy	Farm Credit Administration	Federal Supplementary Medication Insurance Trust Fund Board	Federal National Mortgage Association
Institute of Museum and Library Services	Federal Communications Commission	Harry S. Truman Scholarship Foundation	Legal Services Corporation
National Aeronautics and Space Administration	Federal Deposit Insurance Corporation	Inter-American Foundation	Millennium Challenge Corporation
National Archives and Records Administration	Federal Election Commission	James Madison Memorial Fellowship Foundation	National Association of Registered Agents and Brokers
National Endowment for the Arts	Federal Labor Relations Authority	Marine Mammal Commission	National Consumer Cooperative Bank
National Endowment for the Humanities	Federal Maritime Commission	Morris K. Udall and Stewart L. Udall Foundation	National Institute of Building Sciences
Office of Government Ethics	Federal Mine Safety and Health Review Commission	National Mediation Board	Overseas Private Investment Corporation
Office of Personnel Management	Federal Trade Commission	Privacy and Civil Liberties Oversight Board	Protection Corporation
Office of Special Counsel	Merit Systems Protection Board	Puerto Rico Financial Oversight and Management Board	State Justice Institute
Office of the Director of National Intelligence	National Credit Union Administration	Railroad Retirement Board	Tennessee Valley Authority
Peace Corps	National Labor Relations Board	Social Security Advisory Board	United States African Development Foundation
Small Business Administration	National Transportation Safety Board		United States Institute of Peace
Social Security Administration	Nuclear Regulatory Commission		United States Postal Service
Trade and Development Agency	Occupational Safety and Health Review Commission		<i>Regional Agencies</i>
	Postal Regulatory Commission		Appalachian Regional Commission
	Securities and Exchange Commission		Delta Regional Authority
	Surface Transportation Board		Metropolitan Washington Airports Authority
	United States International Trade Commission		Northern Great Plains Regional Authority

Notes: The Consumer Financial Protection Bureau, is not an independent commission. However, because it is a subunit of an agency classified as an independent regulatory commission (the Federal Reserve), the Bureau is listed in column 2. By some definitions, the Federal Deposit Insurance Corporation is also a government corporation, in addition to being a regulatory agency. The Department of Justice's Office of Legal Counsel has opined that the EEOC is not an independent regulatory agency. See President's Authority to Promulgate a Reorganization Plan Involving the Equal Emp't Opportunity Comm'n, 1 Op. O.L.C. 248 (1977). Because the Administrative Conference of the United States (ACUS) is an agency governed by a Chairman and advisory board, ACUS does not fit neatly into any category and is thus classified as "Other."

1. What is an Independent Agency?

The foregoing discussion begs the question of what defines agency independence. There is no general, widely accepted definition of an independent agency across all government officials, practitioners, and scholarly disciplines, but this label or defini-

tion is consequential for both law and politics.¹⁵⁵ For some scholars, primarily those in political science, public administration, and public policy, any agency established outside the EOP or executive departments is an “independent agency.”¹⁵⁶ Thus, under this definition, the class of independent agencies would include all administrations, commissions, and corporations outside the EOP and executive departments, such as the Environmental Protection Agency and Federal Deposit Insurance Corporation. It would not, however, include multi-member bodies inside an executive department such as the Federal Energy Regulatory Commission (within the Department of Energy) or bureaus whose heads have fixed terms such as the Federal Aviation Administration or Commissioner of the Internal Revenue Service.¹⁵⁷

For other scholars, primarily those in law, structural features, particularly fixed terms with for-cause removal protections (i.e., presidentially appointed agency leaders cannot be removed except “for-cause,” “inefficiency, neglect of duty, or malfeasance in office,” or similar language), and not location define independence.¹⁵⁸ Court juris-

155. Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) [hereinafter Gersen, *Designing Agencies*]; Breger & Edles, *Established by Practice*, *supra* note 2; Datla & Revesz, *supra* note 2; Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L. J. 468 (1994).

156. DAVID EPSTEIN AND SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); LEWIS, *AGENCY DESIGN*, *supra* note 16; SEIDMAN, *supra* note 16.

157. *See* 42 U.S.C. § 7171(a) (2017) (“There is established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.”); 49 U.S.C. § 106(b) (2017) (the Federal Aviation Administrator has a fixed, five-year term); 26 U.S.C. § 7803(a)(1) (B) (2017) (the Commissioner of the Internal Revenue Service serves for a fixed, five-year term).

158. Most existing scholarship recognizes some clustering of design characteristics that together signify independence, but the most important characteristic appears to be protections against removal. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349 (2012); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 16, 31 (2010); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent*, 15 CARDOZO L. REV. 273 (1993) [hereinafter Devins, *Political Will*]; Gersen, *Designing Agencies*, *supra* note 155, at 347; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2247 (2001); Saikrishna B. Prakash, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1824 (2012); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257 (1988).

prudence on the issue also focuses overwhelmingly on these structural features.¹⁵⁹ By this definition, the class of independent agencies would include a multitude of single-headed and multi-member agencies inside and outside the executive departments. There are at least 30 agencies and subunits with administrators or directors who serve for a fixed term and are protected from removal by for-cause provisions, including multi-member agencies located within executive departments such as the National Indian Gaming Commission¹⁶⁰ and agencies headed by single individuals located outside of executive departments like the Office of Special Counsel.¹⁶¹

Statutory law and executive materials also vary in their consideration of what constitutes agency independence. For example, Title 5 defines an “independent establishment” as any establishment in the executive branch, other than the Postal Service or Postal Regulatory Commission, which is not an executive department, military department, government corporation, or part thereof.¹⁶² The Paperwork Reduction Act of 1980 lists 19 independent regulatory agencies and, while the majority of agencies listed are commissions for-cause protections, the statute also classifies the Department of the Treasury’s Offices of Financial Research and the Comptroller of the Currency as independent regulatory agencies.¹⁶³ Furthermore, the statute notes that other agencies might be classified as independent by providing that the group includes, “any other similar agency designated by statute as a Federal independent regulatory agency or commission.”¹⁶⁴ Executive Order 12,866, relating to regulatory planning and review, adopts this statutory definition of independent regulatory agency.¹⁶⁵

159. *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (addressing the removal provisions for the Public Company Accounting Oversight Board); *Buckley v. Valeo*, 424 U.S. 1, 135-42 (1976) (discussing agency independence in the context of the President’s removal power); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (federal statutes may limit the removal of officials in certain types of agencies); *Myers v. United States*, 272 U.S. 52 (1926) (any statute by which the unrestricted power of removal is denied to the President is unconstitutional); *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), *vacating* 839 F.3d 1, 14 (D.C. Cir. 2016) (addressing the constitutionality of an independent agency headed by a single director); *In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (recognizing for-cause protections as a primary indicator of an independent agency); *Collins v. Federal Housing Finance Agency*, 254 F. Supp. 3d 841, 847-848 (S.D. Tex. 2017) (recognizing the constitutionality of an “independent agency” headed by a single individual protected from removal but for cause); *Consumer Financial Protection Bureau v. Future Income Payments*, 252 F. Supp. 3d 961, 971 (C.D. Cal. 2017) (providing that there is no textual basis in the Constitution for concluding independent agencies must be led by multi-member commissions).

160. 25 U.S.C. § 2704(b)(6) (2017).

161. 5 U.S.C. § 1211(b) (2017).

162. *Id.* § 104.

163. 44 U.S.C. § 3502(5) (2017).

164. *Id.*

165. Executive Order 12,866, Regulatory Planning and Review §3(b), 58 Fed. Reg. 51735 (Sept. 30, 1993).

Table 4 includes all multi-member bodies whose members have fixed terms.¹⁶⁶ The table lists each such agency and subunit and whether the entity includes other features scholars have generally associated with independent agencies. The table lists 68 such entities, some in executive departments and others created outside the executive departments. The list includes classic independent regulatory commissions such as the Federal Communications Commission and Federal Trade Commission, but also a whole host of other agencies.¹⁶⁷ Interestingly, some of the traditional independent regulatory commissions have all of the features of the ICC such as explicit for-cause protections, explicit staggering of terms, and party balancing limitations on appointments, but others do not. For example, while the Consumer Product Safety Commission has explicit “for-cause” protections against removal, the Commodity Futures Trading Commission and Securities and Exchange Commission do not.¹⁶⁸

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

Agency	Outside Exec. Dept.	Explicit “For-Cause” Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
AMTRAK	X			X	X
Barry Goldwater Scholarship and Excellence in Education Foundation	X		X		
Board of Governors of Federal Reserve	X		X		
Board of Veterans Appeals		X			
Chemical Safety and Hazard Investigation Board	X	X			
Commodity Futures Trading Commission	X		X	X	

166. We classified an agency as a multi-member body if any of the voting members of the board or commission are nominated by the President and confirmed by the Senate. Additionally, if a single individual manages the day-to-day operations of an entity, but reports to a board of governors or other similar body, we classified that entity as a multi-member body.

167. The classic independent regulatory commissions are those that are structured like the ICC and have important economic and regulatory impacts. Most lists generally include the following commissions: Federal Reserve Board of Governors; Federal Trade Commission; Securities and Exchange Commission; Federal Communications Commission; National Labor Relations Board; Consumer Product Safety Commission; Commodity Futures Trading Commission; Federal Energy Regulatory Commission; Nuclear Regulatory Commission; and U.S. International Trade Commission. *See* Moreno, *supra* note 155, at 475-78.

168. However, courts have recognized implicit “for-cause” protections. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Wiener v. United States*, 357 U.S. 349 (1958) (even in the absence of “for-cause” statutory provisions, the President cannot remove a member of an adjudicatory body like the War Claims Commission merely because he wants his own appointees to serve on such a commission); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (“for-cause” provisions are constitutional in predominately quasi-legislative or quasi-judicial agencies); *SEC v. Blinder, Robinson, & Co.*, 855 F.2d 677 (10th Cir. 1988) (recognizing implicit “for-cause” protection in the SEC because the SEC is like the FTC in that both are administrative bodies created by Congress to carry into effect legislative policies).

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

Agency	Outside Exec. Dept.	Explicit "For-Cause" Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
Consumer Product Safety Commission	X	X	X	X	X
Corporation for National and Community Service	X			X	X
Corporation for Public Broadcasting	X			X	
Defense Nuclear Facilities Safety Board	X		X	X	X
Election Assistance Commission	X		X	X	
Equal Employment Opportunity Commission	X			X	X
Export-Import Bank of the U.S.	X		X	X	X
Farm Credit Administration	X		X	X	X
Farm Credit System Insurance Corporation	X		X	X	
Federal Agricultural Mortgage Corporation	X		X	X	X
Federal Communications Commission	X			X	X
Federal Crop Insurance Corporation			X		X
Federal Deposit Insurance Corporation	X			X	
Federal Election Commission	X		X	X	
Federal Energy Regulatory Commission		X	X	X	X
Federal Hospital Insurance Trust Fund Board	X			X	
Federal Labor Relations Authority	X	X		X	
Federal Maritime Commission	X	X		X	X
Federal Mine Safety and Health Review Commission	X	X	X		X
Federal Old-Age and Survivors Insurance Trust Fund	X			X	
Federal Retirement Thrift Investment Board	X		X		X
Federal Supplementary Medical Insurance Trust Fund Board	X			X	
Federal Trade Commission	X	X	X	X	
Financial Stability Oversight Council		X	X		
Foreign Claims Settlement Commission		X	X		X
Harry S. Truman Scholarship Foundation	X		X	X	

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

Agency	Outside Exec. Dept.	Explicit "For-Cause" Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
Inter-American Foundation	X		X	X	X
Internal Revenue Service Oversight Board		X	X		X
James Madison Memorial Fellowship Foundation	X		X	X	
Legal Services Corporation	X	X	X	X	
Marine Mammal Commission	X		X		
Merit Systems Protection Board	X	X		X	
Metropolitan Washington Airport Authority	X	X	X	X	
Millennium Challenge Corporation	X				X
Morris K. Udall Scholarship Foundation	X		X	X	
National Association of Registered Agents and Brokers	X	X	X	X	X
National Consumer Cooperative Bank	X	X			
National Credit Union Administration	X		X	X	X
National Indian Gaming Commission		X	X	X	X
National Institute of Building Sciences	X		X		
National Labor Relations Board	X	X	X		X
National Mediation Board	X	X	X	X	X
National Transportation Safety Board	X	X		X	X
Nuclear Regulatory Commission	X	X	X	X	X
Occupational Safety and Health Review Commission	X	X	X		X
Overseas Private Investment Corporation	X		X		X
Postal Regulatory Commission	X	X		X	
Privacy and Civil Liberties Oversight Board	X			X	X
Puerto Rico Financial Oversight and Management Board	X	X			
Railroad Retirement Board	X				X
Securities and Exchange Commission	X		X	X	
Securities Investor Protection Corporation	X		X		

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

Agency	Outside Exec. Dept.	Explicit "For-Cause" Protections	Explicit Staggering of Terms	Party Balancing	Quorum Rules
Social Security Advisory Board	X		X	X	X
State Justice Institute	X	X	X	X	X
Surface Transportation Board	X	X		X	
Tennessee Valley Authority	X		X		X
United States African Development Foundation	X		X	X	X
United States Institute of Peace	X	X	X	X	X
United States International Trade Commission	X			X	X
United States Parole Commission		X	X		
United States Postal Service	X	X	X	X	X

Note: The EEOC, FCC, and FLRA do not have explicit provisions for staggered terms in their current statute, but previous versions of their authorizing statutes did include provisions for such staggering. See Pub. L. No. 92-261, § 8(d) (1972) (EEOC); Pub. L. No. 97-259, § 103(a) (1982) (FCC); Pub. L. No. 98-224, § 3(b) (1984) (FLRA).

While Table 4 focuses on multi-member bodies, there are also agencies and bureaus located throughout the executive establishment that are led by a single presidentially appointed individual who serves a fixed term. These terms may coincide with presidential terms of office or overlap presidential administrations and, while most of the individuals who serve in these positions may lack for-cause removal protections, four agency statutes provide for fixed terms with for-cause provisions.¹⁶⁹ Table 5 lists those agencies and bureaus that are not multimember bodies and are led by a presidential appointee who serves for a fixed term.

Table 5. Non-Multimember Agencies and Subunits with Statutorily Fixed Terms for Presidential Appointed Leaders

Department/Agency	Bureau	Term Length	For-Cause
Administrative Conference of the United States	Chairman	5	
Board of Governors of the Federal Reserve System	Director, Consumer Financial Protection Bureau	5	X
Broadcasting Board of Governors	Chief Executive Officer	3	
Department of Agriculture	Director, National Institute of Food and Agriculture	6	
Department of Commerce	Director, Bureau of the Census	5	

169. HOGUE & CAREY, CONG. RESEARCH SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW (2015).

Table 5. Non-Multimember Agencies and Subunits with Statutorily Fixed Terms for Presidentially Appointed Leaders

Department/Agency	Bureau	Term Length	For-Cause
Department of Defense	Joint Chiefs of Staff:		
	<i>Chair</i>	2	
	<i>Vice Chair</i>	2	
	<i>Chief of Staff of the Air Force</i>	4	
	<i>Chief of Staff of the Army</i>	4	
	<i>Chief of Naval Operations</i>	4	
	<i>Commandant of the Marine Corps</i>	4	
Department of Education	Director, Institute of Education Sciences	6	
	Commissioner of Education Statistics	6	
Department of Health and Human Services	Director, Indian Health Service	4	
	Surgeon General	4	
Department of Homeland Security	Commandant of the Coast Guard	4	
	Under Secretary of Transportation for Security	5	
Department of Housing and Urban Development	Director, Office of Federal Housing Enterprise Oversight	5	
Department of Justice	Director, Community Relations Service	4	
	Director, Federal Bureau of Investigation	10	
	United States Attorneys	4	
	United States Marshals	4	
Department of Labor	Commissioner of Labor Statistics	4	
Department of the Treasury	Commissioner of Internal Revenue	5	
	Comptroller of the Currency	5	
	Director of the Mint	5	
Department of Transportation	Administrator, Federal Aviation Administration	5	
Federal Housing Finance Agency	Director	5	X
Institute of Museum and Library Services	Director	4	
National Endowment for the Arts	Chairperson	4	
National Endowment for the Humanities	Chairperson	4	
Office of Government Ethics	Director	5	
Office of Personnel Management	Director	4	
Office of Special Counsel	Special Counsel	5	X
Social Security Administration	Commissioner of Social Security	5	X

Note: This list excludes bureaus whose personnel are named by the agency head and have fixed terms. X indicates that agency statutes include explicit “for-cause” protections against removal.

Recently there has been increased attention to the relative insulation of two types of entities featured in Tables 4 and 5: those led by a single presidentially appointed individual who serves a fixed term and is protected from removal except for cause, and those led by one or more individuals who serve a fixed term but are not protected by for-cause removal provisions. First, discussions of independent agencies often revolve around the set of multi-member boards and commissions

patterned after the ICC that have for-cause protections against removal and often have quasi-judicial or quasi-legislative authority. As famously noted by the Supreme Court in *Humphrey's Executor*, these multi-member agencies are a “body of experts appointed by law and informed by experience,” and the agencies’ structure reduces the risk of arbitrary decision-making.¹⁷⁰ However, four agencies and bureaus are led by a single presidentially appointed individual who cannot be removed from office except for-cause (Consumer Financial Protection Bureau, Federal Housing Finance Agency, Office of Special Counsel, and the Social Security Administration). Some in both law and politics question whether this structure unconstitutionally permits these individuals to exercise unilateral power that remains unchecked by the President or other executive officials.¹⁷¹ The U.S. Supreme Court has never struck down any statute conferring traditional for-cause protections, in the commission structure or otherwise,¹⁷² yet recent attention to the for-cause removal restrictions placed on the Director of the Consumer Financial Protection Bureau arose due to the regulatory and enforcement powers of the agency, as well as its relative insulation from traditional mechanisms of political control.¹⁷³

Second, at least 61 agencies and bureaus are led by one or more individuals who serve a fixed term but are not protected by explicit for-cause removal provisions (19 are led by a single individual). Some of these agencies, like the Securities and Exchange Commission, were established at a time when legal jurisprudence cast serious doubt

170. 295 U.S. 602, 624 (1935).

171. *E.g.*, PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 16 (D.C. Cir. 2016); Consumer Financial Protection Bureau v. Future Income Payments, 252 F. Supp. 3d 961, 971-75 (C.D. Cal. 2017); Collins v. Federal Housing Finance Agency, 254 F. Supp. 3d 841, 846 (S.D. Tex. 2017); *The Bureau of Consumer Financial Protection's Unconstitutional Design: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 115th Cong. (2017) (statement of Rep. Wagner, Chairwoman, Subcomm. on Oversight and Investigations, H. Comm. on Financial Services); *Administrative Law – Agency Design – Dodd-Frank Act Creates the Consumer Financial Protection Bureau – Dodd-Frank Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010), 124 HARV. L. REV. 2123, 2125 (2011).

172. *See* PHH Corp. v. Consumer Financial Protection Bureau, 2018 WL 627055, 1 (D.C. Cir. 2018) (en banc), *vacating* 839 F.3d 1 (2016) (the Court has only invalidated unusual restrictions such as the second layer of for-cause protection of the SEC’s Public Accounting Oversight Board and statutes in which Congress assigned removal power to itself).

173. *E.g.*, PHH Corp. v. Consumer Financial Protection Bureau, 839 F.2d 1, 18-22 (2016); *Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. 77 (2011) (statement of Andrew Pincus) (noting that the CFPB’s structure “consolidates more power in the director than in the head of any other agency that regulates private individuals and entities”); *Examining the Consumer Financial Protection Bureau's Semi-Annual Report to Congress, Reviewing the Bureau's Operations and Actions Since the Last Semiannual Report Was Published: Hearing before the S. Comm. on Banking, Housing and Urban Affairs*, 114th Cong. 1 (2016) (statement of Sen. Shelby, Sen. Comm. on Banking, Housing and Urban Affairs) (“I have said many times that regulatory independence should never mean independence from accountability or vigorous congressional oversight.”).

on the constitutionality of for-cause protections.¹⁷⁴ However, most of the agencies and bureaus in this category were created at a time when the legal status of for-cause language was clear. When Congress creates an agency with leadership that serves for a fixed term, but that leader is not protected by explicit for-cause protections, the President legally may remove the individual from office for any reason.¹⁷⁵ Yet any fixed term often establishes an expected tenure of office, and that expectation may influence the susceptibility of the appointee to presidential influence. A fixed term may also mean that an individual serves for more than one presidential administration, as officials are not required to resign upon changes in administrations. Furthermore, the removal of an individual before his or her term expires may impose political costs on the President.¹⁷⁶ President Trump's removal of James Comey as Director of the Federal Bureau of Investigation (FBI) in 2017 is an illustrative case, as the FBI Director serves for a 10-year term, but the position is not protected by statutory for-cause language.¹⁷⁷

174. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 546-57 (Breyer, J. dissenting); Corrigan & Revesz, *supra* note 153, at 672 (2017). It is worth noting that, despite explicit statutory language, commissioners are largely recognized as being protected by for-cause protections. The Supreme Court has never ruled on the issue, and in the recent *Free Enterprise Fund v. Public Co. Accounting Oversight Board* decision, the parties merely stipulated that Commission members could not be removed except under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office. 571 U.S. 477, 487 (2010). Some question whether such a stipulation is appropriate. *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 545-548 (Breyer, J. dissenting); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011); Tuan Samahon, *A Whopper of an Assumption in Free Enterprise Fund v. PCAOB, Concurring Opinions* (Mar. 8, 2010, 5:09 PM), <http://www.concurringopinions.com/archives/2010/03/a-whopper-of-an-assumption-in-free-enterprise-fund-v-pcaob.html>.

175. *E.g.*, *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1232-33 (2015) (citing Office of Legal Counsel memorandum that recognized Amtrak is not an adjudicatory body and thus its Board members, who serve fixed terms, are removable by the President without cause); *Shurtleff v. United States*, 1829 U.S. 311, 315 (1903) (holding that only clear and explicit language can restrict the President's removal power); *Parsons v. United States*, 167 U.S. 324, 343 (1897) (holding that even if statutory law provides for a fixed term of office, the President still has the power of removal); *Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects*, 33 Op. O.L.C., 2009 WL 4325376, at 2 (Oct. 23, 2009) (finding the Coordinator is removable because of lack of explicit for-cause protections); Memorandum Opinion for the General Counsel, Department of the Treasury and the Chief Counsel, Office of Thrift Supervision from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel (Sept. 4, 2001) (suggesting that an individual who serves a fixed term with no for-cause removal protection does so at the pleasure of the President); BREGER & EDLES, *INDEPENDENT AGENCIES*, *supra* note 2, at 146; Corrigan & Revesz, *supra* note 153, at 656; Datla & Revesz, *supra* note 2, at 832 (2013); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1252-53 (2014) [hereinafter Rao, *Removal*]; Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 716 (2007); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1174 (2013).

176. *See generally* HOGUE & CAREY, *supra* note 169; Michael J. Gerhardt, *Constitutional Arrogance*, 165 U. PA. L. REV. 7 (2016); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1 (2007); Vermeule, *supra* note 175, at 1195-96, 1200-03 (2013).

177. *See* Datla & Revesz, *supra* note 2, at 833-35 (arguing that there is no statutory basis for implying for-cause removal protection from a set term of years).

2. Administrations

Administrations located outside of the EOP and executive departments look structurally most like executive departments. A comparison of the organization charts of administrations and executive departments can look very similar except that where executive departments have Assistant, Under, and Deputy Secretaries and Secretaries, administrations have Commissioners or Administrators. As suggested above, lower pay is usually attached to positions in these agencies outside the executive departments, with top officials being paid at executive level II or III rather than level I for a department Secretary. This can influence the pay of subordinate officials as well. If the administrator is paid at executive level III, this implies that lower-level officials will be paid at executive levels IV and V.

The larger single-headed agencies include the Social Security Administration (64,400 employees), Environmental Protection Agency (15,600 employees), and National Aeronautics and Space Administration (17,300 employees). The SSA was formerly part of the Department of Health and Human Services (HHS). Congress removed it from HHS in 1994 in order to alleviate the budgetary and managerial pressures of being inside a department.¹⁷⁸ Among the smaller administrations are the Trade and Development Agency (57 employees) and the Office of Government Ethics (68 employees). While most administrations outside the executive departments look like standard hierarchically structured agencies with single heads, some include features that insulate them from political interference. For example, the head of the Social Security Administration serves for a six-year term and may only be removed for neglect of duty or malfeasance in office.¹⁷⁹

3. Multi-Member Bodies

The majority of agencies created outside the EOP and executive departments are multi-member bodies, many with fixed and staggered terms for members. In general, these agencies tend to be smaller than other federal agencies, varying from as many as 6,300 employees to just a handful.¹⁸⁰ As discussed above, the most recognizable of these are the independent regulatory commissions, designed with the same structural features as the ICC—located outside executive departments, having multi-member body, for-cause protections, staggered terms, and party balancing requirements, and exercising quasi-legislative and/or quasi-judicial power.¹⁸¹ These agencies are involved

178. Social Security Independent and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994).

179. 42 U.S.C. § 902(a)(3) (2017).

180. Among the smallest agencies are the Barry Goldwater Scholarship and Excellence in Education Foundation and the Harry S. Truman Scholarship Foundation with two and five employees, respectively, as of September 2017. *See* OPM, *FedScope*, *supra* note 51 (Employment Cube – Sept. 2017).

181. *See generally* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). Two agencies are purely adjudicatory (OSHRC and FMSHRC).

in significant ways in regulating many aspects of the economy, from antitrust to banking to labor to communications to consumer products.¹⁸²

There are a number of reasons why the independent commission structure was and still is appealing to policymakers. Most notably, the commission structure requires deliberation and may lead to decisions that are more moderate as commissioners compromise to reach agreement.¹⁸³ The creation of independent agencies also helps mitigate concerns with the delegation of policymaking or adjudicatory authority to executive officials who may be tempted to use this authority for partisan benefit.¹⁸⁴ Historically, most policymakers have agreed in principle to the idea of a unified executive establishment organized under the President, but justify the creation of specific independent agencies as a necessary exception to this general principle.¹⁸⁵

Beyond the allure of bipartisan or non-partisan expertise being applied to complicated national problems, creating new agencies as independent commissions also expresses the symbolic importance of specific policy areas or problems. Independent agencies can focus on a narrow task of national importance and not have to compete with other sub-department agencies for attention, budgets, or personnel.¹⁸⁶

Yet the presence of independent commissions has been controversial in the American political system, as commissions can lead to inefficiencies.¹⁸⁷ The Brownlow Committee charged that “they do violence to the basic theory of the American Constitution that there should be three major branches of government and only three.”¹⁸⁸ The Brownlow Committee also complained about commission performance, noting, “For purposes of management, boards and commissions have turned out to be failures.”¹⁸⁹

182. See GARY J. MILLER & ANDREW B. WHITFORD, *ABOVE POLITICS: BUREAUCRATIC DISCRETION AND CREDIBLE COMMITMENT* (2016) (using a series of theoretical models and a case study of financial regulation to explore how federal administrators exercise and protect independence and when and why politicians allow federal agencies to operate autonomously).

183. E.g., Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 *VAND. L. REV.* 1, 12-19 (2002); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 *U. PA. L. REV.* 1639, 1645 (2003); Gersen, *supra* note 139, at 696 (2013); Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 *GEO. WASH. L. REV.* 2049, 2053 (2015); Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 *VA. L. REV.* 947, 963 (1971).

184. LEWIS, *AGENCY DESIGN*, *supra* note 16; Moe, *Bureaucratic Structure*, *supra* note 16; Nolan McCarty, *The Appointments Dilemma*, 48 *AM. J. POL. SCI.* 413 (2014); McCubbins et al., *supra* note 16. *But see* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 *N.Y.U. L. REV.* 1463, 1496-1501 (2015) [hereinafter Rao, *Administrative Collusion*] (arguing that any delegation to the modern administrative state undermines the Congress as an institution).

185. MOE REPORT, *supra* note 1, at 11; KOSAR, *QUASI GOV'T*, *supra* note 49.

186. MOE REPORT, *supra* note 1, at 32.

187. Breger & Edles, *Established by Practice*, *supra* note 2; Datla & Revesz, *supra* note 2, at 794.

188. PRESIDENT'S COMM. ON ADMIN. MGMT., *supra* note 15, at 40.

189. *Id.* at 32.

The Committee's concerns have been echoed throughout the twentieth century.¹⁹⁰ While some scholars suggest that the commission structure guards against undue influence by politically powerful interests,¹⁹¹ others have argued that commissions are easily co-opted by the groups they are supposed to regulate. Inequalities in group pressure, appointment patterns that rotate industry officials into and out of agency management, and regular interaction between the agency and regulated industries ultimately can make the agency sympathetic to, or “captured” by, regulated industries.¹⁹² Many also claim that the promises of expertise and bipartisanship have not been realized, arguing that these agencies no longer attract the very best persons and that the increasing appointment of strong partisans or ideologues has undermined the moderate and bipartisan composition of boards.¹⁹³

The number of commissions of different types and the limited empirical evidence across agencies makes it difficult to generalize about the effectiveness of independent commissions except to say that there are tradeoffs associated with their political independence. Agencies designed to be insulated from political interference are going to be autonomous in ways that are useful to policymakers in some cases and frustrating in others.¹⁹⁴

When agencies are involved in adjudication or making decisions with large consequences for markets and society, most would agree that the agency should make decisions on the basis of evidence and expertise rather than on partisan considerations. The features of agency design that limit partisan influence are precisely those that characterize independent commissions. The alternative to creating independent commissions is allowing less insulated agencies to make these decisions with no particular protection from partisan influence or to use statutory details or political oversight to limit and confine the authority of executive officials. In complex areas of law and policy, however, precise statutes are difficult to craft. Detailed statutes

190. Critics of the independent agencies lament the fragmentation of policy into disparate agencies. For example, President Truman decried his own inability to formulate and implement a comprehensive transportation policy because this policy area was partly the province of the Civil Aeronautics Board, Interstate Commerce Commission, and Federal Maritime Commission. See LEWIS, *AGENCY DESIGN*, *supra* note 16, at 21-22.

191. Barkow, *supra* note 158, at 38; Bressman & Thompson, *supra* note 158, at 611.

192. MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1977); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 114 (1971).

193. E.g., “Symposium on the Quality of Regulatory Appointments,” in Senate Committee on Government Operations, Study on Federal Regulation, Volume I, “The Regulatory Appointments Process,” Appendix I, p. 233, 95th Cong. 1st Sess. (Jan. 1977); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1761-62 (2015). The increasing polarization of board governance is facilitated by the consideration of batches of nominees together, worked out as bargains between the President and the parties in the Senate. Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008); Daniel Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333 (2010); Vermeule, *supra* note 175, at 1179-81.

194. David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015).

can be counterproductive if they limit useful flexibility and prevent agencies from using expertise they have acquired. In some cases, political oversight can help correct wayward agency policymaking, but in other cases it is the source of partisan influence.

Direct accountability to elected officials through appointments, removals, and appropriations is useful for monitoring agency behavior and for correcting agency missteps. The tradeoff for Congress and the President is that the price of insulating agencies from politics is a lack of this type of direct democratic accountability because the barriers Congress and the President put in place to insulate agencies from politics also make it harder for elected officials to monitor day-to-day agency behavior. Congress and the President still govern independent commissions through oversight and can enact new legislation, but the autonomy generated by structure can have desirable and undesirable effects. There has been much work on whether agencies of various types are more responsive to Congress or the President.¹⁹⁵ While some of this work provides evidence that the commission structure makes an agency relatively more responsive to Congress, other scholarship suggests that independent commissions are removed from both congressional and presidential control.¹⁹⁶

Beyond the classic independent regulatory commissions, there are also boards outside of the EOP and executive departments that neither regulate nor adjudicate. These boards give out research grants, provide foreign aid, or manage the retirement accounts of federal employees. Some of these agencies are designed simply to provide advice to federal policymakers (the Administrative Conference of the United States or the Social Security Advisory Board) or to hand out federal scholarships.

The list of agencies with at least one of the features of independent commissions (multiple members, fixed terms, or for-cause protections) includes independent regulatory and non-regulatory agencies, government corporations, scholarship agencies, and agencies created to facilitate regional development. This illustrates the general view that there is no direct or necessary relationship between agency structure and

195. See, e.g., Anthony M. Bertelli & Christian R. Grose, *Secretaries of Pork? Executive Ideology, Multiple Bureaucratic Principals, and Distributive Public Policy*, 71 J. OF POL. 926 (2009); Randall L. Calvert, Mathew D. McCubbins & Barry Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J. L. ECON. & ORG. 1 (1990); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J. L. ECON. & ORG. 119 (1996); Charles Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467 (2004); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Andrew B. Whitford, *The Pursuit of Political Control by Multiple Principals*, 67 J. OF POL. 29 (2005); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. J. POL. SCI. 801 (1991).

196. EPSTEIN & O'HALLORAN, *supra* note 156; LEWIS, AGENCY DESIGN, *supra* note 16; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582-83 (1994); Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387 (2014); Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 283-286 (2017); Selin, *supra* note 2, at 982; Weingast & Moran, *supra* note 195.

function.¹⁹⁷ Regulatory and adjudicative authority is delegated to single-headed executive agencies *and* independent commissions. For example, the Department of Agriculture and the Federal Trade Commission both regulate. The Department of Housing and Urban Development and the National Labor Relations Board both adjudicate. Government corporations exist outside the executive departments and are insulated from political interference, and they are also included in executive departments and headed by single administrators selected by the President. The choice of structure is a political one determined by forces in play at the time that Congress and the President are deliberating over the creation of new agencies.¹⁹⁸

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

The remaining class of agencies outside of the EOP and executive departments often shares many of the structural characteristics of multi-member bodies such as fixed terms, but characterizing them by these aspects of their design would be insufficient. Congress and the President have experimented with different forms of organization that place these agencies on the frontiers of the executive establishment and raise legitimate questions as to whether they are properly designated as federal agencies.¹⁹⁹ Among this class of agencies are government corporations and government-sponsored enterprises, federally empowered non-profits and cooperatives, and federally sponsored regional development agencies whose governance is shared by states.²⁰⁰

In the twentieth century, the federal government became increasingly involved in business-related enterprises such as operating a merchant fleet, building and renting houses, and lending money. Congress was often uncomfortable with executive officials letting out contracts, purchasing property, and selling goods without some form of oversight.²⁰¹ As a result, the legislature reasonably limited executive flexibility to ensure fidelity to the public interest in these behaviors. The lost flexibility, however, made operating a business-like venture difficult. One response Congress developed was to create government corporations, which granted both business-like tractability and insulation from political influence. Congress struggled with how to ensure public accountability and preserve management flexibility at the same time.²⁰² Its answer was

197. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *Place of Agencies*]; Verkuil, *supra* note 157, at 263. Tables 18 and 19, *infra*, respectively list agencies with adjudicatory authority and detail federal agencies' rulemaking activities in the last fifteen years.

198. LEWIS, AGENCY DESIGN, *supra* note 16; AMY BETH ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC (1999); Moe, *Bureaucratic Structure*, *supra* note 16; William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002); McCubbins et al., *supra* note 16; Wood & Bohte, *supra* note 16.

199. For an overview of more non-traditional agency types, see GAO, FEDERALLY CREATED ENTITIES, *supra* note 40.

200. See O'Connell, *Bureaucracy at the Boundary*, *supra* note 2, at 851-52 (identifying agencies that do not easily fit the definitions of "executive agency" or "independent commission").

201. KOSAR, GOV'T CORP., *supra* note 2; SEIDMAN, *supra* note 16, at 188-89.

202. A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 560 (1995).

the Government Corporation Control Act of 1945,²⁰³ which tries to regularize government corporation accountability without impinging on necessary flexibilities.²⁰⁴

While not consistently defined legally,²⁰⁵ a “government corporation” in this report is defined as a wholly or partially owned government instrumentality²⁰⁶ that performs business-like functions and usually does not rely on annual appropriations for funding.²⁰⁷ Government corporations are chartered by acts of Congress and generally are board-governed and exempted from government-wide managerial mandates.²⁰⁸ What distinguishes government corporations from other federal agencies is the grouping of function, structure, and (sometimes) ownership.²⁰⁹ For example, many federal agencies that perform business-like functions are not government cor-

203. Pub. L. No. 248, 59 Stat. 597 (1945).

204. Not long after Congress enacted this statute, it began creating entities designated specifically as neither agencies nor establishments of the United States, and did not subject them to the control of the Government Corporation Control Act of 1945. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995).

205. See O’Connell, *Bureaucracy at the Boundary*, *supra* note 2, at 856. For the purposes of Title 5, “government corporation” means a corporation owned or controlled by the Government of the United States. 5 U.S.C. § 103(1) (2017). This relatively vague definition has resulted in case-by-case determinations of what constitutes a government corporation. See, e.g., *Banks v. Merit Systems Protection Board*, 854 F.3d 1360, 1362 (D.C. Cir. 2017) (the Postal Service is not a government corporation); *Defense Criminal Investigative Service, Dep’t of Defense v. Federal Labor Relations Authority*, 855 F.2d 93, 98 (3rd Cir. 1988) (the definition does not include the Department of Defense or any of its subunits); *Hamilton-Warwick v. U.S. Bancorp*, 2016 WL 740257 (D. Minn. 2016) (the Federal Deposit Insurance Corporation is a government corporation); *Makky v. Chertoff*, 489 F. Supp. 2d 421, 429 (D.N.J. 2007) (the Transportation Security Administration is not a government corporation).

206. The mixed-ownership corporations are: Central Bank for Cooperatives; Federal Deposit Insurance Corporation; Federal Home Loan Banks; Federal Intermediate Credit Banks; Federal Land Banks; National Credit Union Administration Central Liquidity Facility; Regional Banks for Cooperatives; Rural Telephone Bank; Financing Corporation; Resolution Trust Corporation; and Resolution Funding Corporation. 31 U.S.C. § 9101(2) (2017). The wholly-owned government corporations are: the Commodity Credit Corporation; Community Development Financial Institutions Fund; Export-Import Bank of the United States; Federal Crop Insurance Corporation; Federal Prison Industries, Inc.; Corporation for National and Community Service; Government National Mortgage Association; International Clean Energy Foundation; Millennium Challenge Corporation; Overseas Private Investment Corporation; Pension Benefit Guaranty Corporation; Rural Telephone Bank; St. Lawrence Seaway Development Corporation; Federal Housing Administration Fund; and Tennessee Valley Authority. *Id.* § 9101(3).

207. KOSAR, GOV’T CORP., *supra* note 2. There are diverse definitions of government corporations, some encompassing private instrumentalities created by Congress or any agency called a corporation. This report uses the narrower definition in the text. However, agencies themselves and other government agencies employ different definitions. U.S. GEN. ACCOUNTING OFFICE, GAO/GDD-96-14, GOVERNMENT CORPORATIONS: PROFILES OF EXISTING GOVERNMENT CORPORATIONS (1995) [hereinafter GAO, EXISTING GOV’T CORPS.]; GAO, FEDERALLY CREATED ENTITIES; *supra* note 40; Froomkin, *supra* note 202, at 543.

208. Board governance takes different forms with some managed by full-time boards, some by part-time boards that select chief executives, and still others by boards comprised of government officials. There are two government corporations that are not governed by boards—the Government National Mortgage Association and the St. Lawrence Seaway Development Corporation. Both are located inside executive departments. KOSAR, GOV’T CORP., *supra* note 2, at 9.

209. *Id.* at Appendix A.

porations. Similarly, many federal entities have comparable features to government corporations but do not perform business-like functions. Congress also has designated agencies “corporations” even though they do not perform business-like functions and are not self-funding.²¹⁰ For example, the Millennium Challenge Corporation (“a corporation”)²¹¹ and the Legal Services Corporation (“a private membership non-profit corporation”)²¹² are called corporations but do not perform business-related functions and rely on annual appropriations.²¹³

Some government corporations such as the Federal Deposit Insurance Corporation (mixed ownership) and Tennessee Valley Authority (wholly owned by the federal government) are distinct agencies that report directly to the President and Congress. Others, such as the St. Lawrence Seaway Development Corporation (Transportation) and the Commodity Credit Corporation (Agriculture) exist inside executive departments and report to a department Secretary. Structurally, corporations have a legal personality separate from the United States and can therefore sue and be sued.²¹⁴ Corporations generally have limitations on the President’s ability to nominate and remove top officials. Fiscally, these entities have tremendous flexibility to raise and spend funds. This limits the power of OMB in reviewing agency budgets and the ease of congressional oversight of corporation activities.²¹⁵ Rather, the expectation is that government corporations should be self-funding, although Congress will intervene to supplement revenues or to provide resources for capital improvements or new programs.²¹⁶ Government corporations are also frequently exempted from

210. See SEIDMAN, *supra* note 16, at ch. 11 for details. Congress cannot, by designation, determine whether an instrumentality they have created is an agency or instrumentality of the United States government “for the purposes of determining the constitutional rights of citizens affected by its actions.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 375 (1995).

211. 22 U.S.C. § 7703(a) (2017).

212. 42 U.S.C. § 2996b(a) (2017).

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

214. This feature of government corporations means that private firms can take the corporation to court rather than having to go through the arduous contract dispute process. *KOSAR, GOV’T CORP.*, *supra* note 2, at 7; SEIDMAN, *supra* note 16, at 190-91.

215. As many corporations’ statutes explicitly state the entity is not an agency or instrumentality of the United States, these corporations are exempted from OMB’s jurisdiction, which generally covers agencies and instrumentalities of the United States. Agencies with these explicit statutory provisions include: AMTRAK; Corporation for Public Broadcasting; Legal Services Corporation; National Association of Registered Agents and Brokers; National Institute of Building Sciences; Puerto Rico Financial Oversight and Management Board; Securities Investor Protection Corporation; State Justice Institute; and Tennessee Valley Authority.

216. Some exceptions include the Tennessee Valley Authority. In a 1995 survey, the U.S. General Accounting Office found that most government corporations received some federal appropriations in Fiscal Year 1994. GAO, *EXISTING GOV’T CORPS*, *supra* note 207, at 21-22.

many government-wide managerial mandates and have the ability to create their own personnel systems outside traditional civil service laws.²¹⁷

Government-sponsored enterprises (GSEs) perform business-like functions as well, but are *private*, for-profit organizations (yet still government entities) created to make credit more available to certain sectors of the economy.²¹⁸ They are governed by a board, the majority of which is selected by private actors, either investors or borrowers.²¹⁹ There are currently seven GSEs.²²⁰ These entities are not staffed by federal employees and do not have the authority to exercise government powers or commit the federal government to expenditures, but the markets generally perceive that there is an implicit federal guarantee behind these entities.

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

Critics of GSEs note the significant market power of these organizations without direct accountability to the federal government.²²¹ Given the perceived backing of the federal government, these firms have market advantages that can translate into significant economic and political power. For example, the Federal National Mortgage Corporation (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) grew dramatically between 1990 and 2008 and are among the biggest financial institutions in the country.²²² These two GSEs spent heavily on congressional lobbying and numerous journalistic accounts questioned their influence in the

217. *See id.* (finding substantial variation across corporations and providing a thorough review of government corporation adherence to government-wide management laws).

218. KEVIN R. KOSAR, CONG. RESEARCH SERV., RS21663, GOVERNMENT-SPONSORED ENTERPRISES (GSEs): AN INSTITUTIONAL OVERVIEW (2009) [hereinafter KOSAR, GSEs]. *See also* GAO, FEDERALLY CREATED ENTITIES, *supra* note 40, at 18-19; Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. 395 (1991).

219. KOSAR, GSEs, *supra* note 218, at 8.

220. *Id.* at 3. The list of GSEs includes three investor-owned entities (the Federal Agricultural Mortgage Corporation, Federal Home Loan Mortgage Corporation, and Federal National Mortgage Association), two entities owned cooperatively by their borrowers (Farm Credit System and Federal Home Loan Bank System), and two funding shells (Financing Corporation and Resolution Funding Corporation). *Id.*

221. *See, e.g.*, Ronald C. Moe & Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 PUB. ADMIN. REV. 321 (1989).

222. KOSAR, GSEs, *supra* note 218, at 4.

regulatory regime that contributed to the financial crisis.²²³ Both Fannie Mae and Freddie Mac were among the top 20 lobbying spenders between 1998 and 2008.²²⁴ Some scholars have noted that the agencies' structure as GSEs provided them with a unique opportunity to form powerful connections with the financial industry and to exert political influence.²²⁵ They came under congressional scrutiny in 2003 and 2004 because of accounting irregularities, and in 2008 they had to be placed in government conservatorship to stabilize financial markets.²²⁶ However, by 2012, both Fannie Mae and Freddie Mac returned to profitability.²²⁷ The two GSEs remain in conservatorship, a matter of some controversy, as they continue to share their profits with the federal government, despite having paid back the money they received in the 2008 bailout.²²⁸

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

Starting in the 1960s and accelerating in the 1980s, Congress also created other organizational forms that possessed the characteristics of both government agencies and the private sector.²²⁹ Notably, Congress has overseen the creation of non-profit organizations to help pursue public purposes. Non-profit organizations are also used

223. Lisa Lerer, *Fannie, Freddie Spent \$200M to Buy Influence*, POLITICO, July 16, 2008, <http://www.politico.com/news/stories/0708/11781.html> (last visited May 23, 2018); Tom Raum and Jim Drinkard, *Fannie Mae, Freddie Mac Spent Millions on Lobbying*, USA TODAY, July 17, 2008, http://www.usatoday.com/money/companies/2008-07-17-fannie-freddie-lobbying_N.htm (last visited May 23, 2018); Tim Reid, Margaret Chadbourn & Mark Hosenball, *Fannie, Freddie Tentacles Embraced Many in Washington*, REUTERS, Nov. 17, 2011, <http://www.reuters.com/article/2011/11/18/us-usa-campaign-freddie-idUSTRE7AH02A20111118> (last visited May 23, 2018).

224. Raum & Drinkard, *supra* note 223; Tim Reid et al., *supra* note 223.

225. *E.g.*, Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565, 592-93; Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J. L. & PUB. POL'Y 407, 413-17 (2010); Jonathan G.S. Koppell, *Hybrid Organizations and the Alignment of Interests: The Case of Fannie Mae and Freddie Mac*, 61 PUB. ADMIN. REV. 468 (2001).

226. KOSAR, GSEs, *supra* note 218, at 4. For information on the status of Fannie Mae and Freddie Mac and the future of GSEs, see N. ERIC WEISS, CONG. RESEARCH SERV., R40800, GSEs AND THE GOVERNMENT'S ROLE IN HOUSING FINANCE: ISSUES FOR THE 113TH CONGRESS (2013); Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489 (2011); Richard Boyd, *Bringing the GSE's Back In?: Bailouts, U.S. Housing Policy, and the Moral Case for Fannie Mae*, 11 GEO. J. L. & PUB. POL'Y 457 (2013); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009).

227. *Fairholme Funds v. United States*, No. 13-465 (Fed. Cl. filed July 9, 2013); Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 385 (2015).

228. The GSEs have returned \$270.9 billion to the federal government, \$83.4 billion more than they received in the bailout. *E.g.*, Andrew Ackerman & Brent Kendall, *Supreme Court Declines to Wade Into Fight Over Fannie, Freddie Profits*, WALL ST. J., Feb. 20, 2018; Joe Light, *Fannie, Freddie Profit Payments Should Continue, Treasury Says*, BLOOMBERG MKTS, May 2, 2017; Gretchen Morgenson, *U.S. Foresaw Better Return in Seizing Fannie and Freddie Profits*, N.Y. TIMES, July 23, 2017.

229. KOSAR, GOV'T CORP., *supra* note 2, at 1, 4.

as tools for policy implementation in many different federal agencies.²³⁰ For example, Congress established the Public Company Accounting Oversight Board to oversee public company audits and further the public interest by protecting the interests of investors.²³¹ The structure and connection of these non-profits to the federal government varies, but the non-governmental status of these agencies helps insulate them from political direction. They do not employ federal personnel or come under the jurisdiction of general executive branch management powers. For example, the Securities Investor Protection Corporation is a non-profit chartered under District of Columbia law and operates as an adjunct of the Securities and Exchange Commission.²³² It is governed by a board whose members are selected by the Secretary of the Treasury, members of the Board of Governors of the Federal Reserve System, and the President.²³³ Its function is to aid persons in retrieving funds from bankrupt or troubled brokerage firms. Congress created the State Justice Institute in 1984 as a non-profit to distribute federal grants to improve the quality of state courts. The Institute is governed by an 11-member board whose members are nominated by the President and confirmed by the Senate.²³⁴ The United States Institute of Peace was created the same year to aid in the goal of resolving international conflict without violence, largely through research and programming. Like the State Justice Institute, it is funded through federal monies and managed by a board containing presidential appointees.²³⁵

Since the 1800s, Congress has also been interested in facilitating regional development and has created a number of agencies to achieve this goal. The agencies created to accomplish this are distinguished by the fact that their governance is shared between the federal government and representatives of the states or regions concerned. For example, the Appalachian Regional Commission is a grant-giving agency created to foster economic development in the Appalachian Region. It is governed by a board comprised of the governors of 13 states and a federal co-chair.²³⁶ The Delta Regional Authority²³⁷ and the Northern Great Plains Regional Authority²³⁸ follow a similar form. The Metropolitan Washington Airports Authority runs the two Washington, DC airports. Its board includes seven members appointed by the governor of Virginia,

230. 15 U.S.C. § 7211(a) (2017).

231. *Id.* The PCAOB is notable given litigation over its structure. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (holding that the agency's dual for-cause provisions were an unconstitutional limitation on the President's power of removal).

232. 15 U.S.C. § 78ccc(a) (2017).

233. *Id.* § 78ccc(c)(2).

234. 42 U.S.C. § 10704(c)(1) (2017).

235. 22 U.S.C. § 4605(b) (2017).

236. 40 U.S.C. § 14301(b) (2017).

237. 7 U.S.C. § 2009aa-1(a) (2017).

238. *Id.* § 2009bb-1(a).

four by the Mayor of the District of Columbia, three by the Governor of Maryland, and three members nominated by the President and confirmed by the Senate.²³⁹

In summary, there is tremendous variation in the structure and purpose of free standing agencies that exist outside of the EOP and executive departments. Some of these agencies look very much like executive departments, while others are governed by multi-member boards that are statutorily established with non-governmental status. Just as political officials have experimented with various agency designs, the President and Congress have also established a complicated system of employment for federal personnel.

D. Federal Personnel System

The Constitution provides scant detail about federal personnel.²⁴⁰ It includes only a few references to officers, consuls, and ministers, specifies that principal officers of the government departments are to be nominated by the President and confirmed by the Senate, and that the President may request information from them in writing.²⁴¹ The Constitution grants to Congress the power to determine the means of appointing *inferior* officers but specifies that it must be done either by the President, a Court of Law, or Head of a Department.²⁴² There is no constitutional restriction on the appointment of employees below the status of inferior officers. Congress has provided the outlines of the personnel system in statutory law.²⁴³ Presidents and federal agencies have further defined and augmented the system Congress created, through a series of executive orders and agency rules.

1. The Modern Personnel System

The key statute that initiated the modern federal personnel system was the Civil Service Act of 1883.²⁴⁴ Prior to the enactment of this legislation, the federal government had an all-appointee personnel system. The Pendleton Act, as it was known, specified that a small portion of federal civilian jobs (about 10.5% at the time) would be filled on the basis of merit proven through examinations. The Act created for the first time a divided personnel system. From this point forward, some federal jobs

239. 49 U.S.C. § 49106(c)(1) (2017).

240. MOE REPORT, *supra* note 1, at 3; FAIRLIE, *supra* note 110, at 55; SHORT, *supra* note 24, at 15, 22, 26; WILLIAM FRANKLIN WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 242 (1919).

241. The Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2., cl. 2.

242. *Id.* The question of what counts as an inferior officer is the subject of legal debate, but includes the vast majority of federal officers.

243. *E.g.*, 5 U.S.C. §§ 1301-11001 (2017).

244. Civil Service Act of 1883, Pub. L. No. 16, 22 Stat. 403 (1883).

would be filled on the basis of merit and others filled at the discretion of the President, the President's subordinates, or other actors Congress had identified.²⁴⁵ Over the next 70 years, Congress and the President expanded the coverage and scope of the system, often under duress from reformers and federal employee unions.²⁴⁶ By the middle of the twentieth century, close to 90% of federal jobs were covered by civil service laws and regulations.²⁴⁷ These regulations had expanded to include protections against removal without cause, the right to unionize, prohibitions against political activity, and regularized pay grades and job definitions (Figure 1).

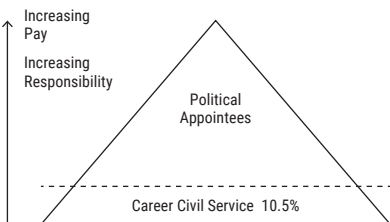
245. In general terms, this is still the structure of the personnel system in every federal agency. Presidents (or their subordinates) select appointees, usually from outside the civil service, to serve at the top of the agency hierarchy. These are known as "political appointees." The other employees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

246. U.S. OFFICE OF PERS. MGMT., *BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE* (2003); RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* (1994); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982); VAN RIPER, *supra* note 149.

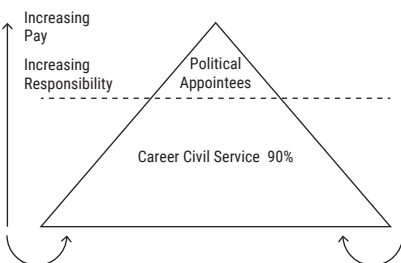
247. Protections against dismissal for partisan reasons were added in the late 1890s, and federal workers gained the right to unionize in 1912 after a decade of pressure. In the 1920s, Congress added pay equity and retirement provisions to the civil service system. The Hatch Act, enacted in 1939, prohibited partisan political activity by civil servants. *See* LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146, at 11-50; Martin West, *Bargaining with Authority: The Political Origins of Public-Sector Collective Bargaining* (2006) (unpublished manuscript, on file with Harvard University). This figure overestimates the number of jobs open to presidential or agency-head selection. Most of the jobs outside the traditional merit system were in agencies like the Tennessee Valley Authority with their own merit systems or were jobs overseas where political selection was unlikely. In fact, by the middle of the twentieth century, some authors were declaring the era of patronage over. Don K. Price, *A Response to Mr. Laski*, 4 *PUB. ADMIN. REV.* 360-63 (1944); Frank J. Sorauf, *The Silent Revolution in Patronage*, 20 *PUB. ADMIN. REV.* 28-34 (1960).

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

1883: Start of the Merit-Based Civil Service System



1953: End of the Truman Administration



Additional features:

1. Protections against removal without cause
2. Right to unionize
3. Prohibitions against political activity
4. Regularized pay grades and job definitions

Today, federal civilian jobs are primarily defined by a *pay system* and *appointment authority*. There are four main pay systems that apply to most federal jobs.²⁴⁸ The Federal Wage System (FWS) covers blue collar work (trade, craft, skilled, and unskilled laborers).²⁴⁹ The General Schedule (GS) is the pay system for administrative, technical, clerical, and professional jobs.²⁵⁰ The Senior Level and Scientific and Professional (SL/ST) system establishes pay for high level non-executive positions above the highest GS pay level.²⁵¹ Senior management positions are defined in the Executive Schedule (EX) and the Senior Executive Service pay schedule (ES).²⁵² The EX pay system is generally reserved for positions requiring presidential nomination and Senate confirmation, and the ES pay system for managers in the Senior Executive Service (SES), right below Senate-confirmed political appointees. Each pay system includes a number of distinct pay categories. For example, the GS system includes fifteen grades. The grades are attached

248. Additionally, there are several miscellaneous systems that apply to a small number of employees. See 5 U.S.C. §§ 5371-5379, 5392 (2017). For example, there are three levels of basic pay for administrative law judges and basic pay rate specifications for certain federal police forces. *Id.* § 5372 (administrative law judges); *id.* § 5375 (National Zoo’s police force); *id.* § 5378 (police officers for the protection of the Bureau of Engraving and Printing and the United States Mint).

249. See 5 U.S.C. §§ 5341-49 (2017).

250. *Id.* §§ 5331-38.

251. *Id.* § 3104.

252. See *id.* §§ 5311-18.

to positions based upon the responsibility, qualifications, or experience required for the position. Each pay grade also includes sub-categories that provide additional flexibility for differentiating among employees who perform similar work but have different qualifications, experience, or performance levels. In the GS system, these are called *steps*.²⁵³

The pay system should not be confused with appointment authority. Appointment authority comes from the laws, executive orders, or rules that authorize a person to join the federal service and govern the terms of the individual's employment. Pay category and appointment authority are distinct but often correlated. Top-level positions, for example, are filled through political appointment rather than through procedures governed by civil service law and regulation (appointment authority), and political appointees tend to receive the highest salaries (pay category).²⁵⁴ In general terms, the federal civil service still is comprised of two types of employees, political appointees and "career" civil servants. The former are selected by the President (directly or indirectly through agency heads), usually from outside the civil service. The President has broad authority to direct the activity of these officials and in most cases, they serve at the President's pleasure, with one main exception of fixed terms described above and elaborated below. The latter work under some type of merit system, and the ways that the President's or agency head's ability to hire, fire, promote, and demote these persons is restricted by law and regulation.

There are four main types of political appointees.²⁵⁵ The most visible political appointments are those nominated by the President and confirmed by the Senate. The Constitution requires that all "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" be appointed

253. Federal law also requires that there be equal pay for substantially equal work within each local pay area and mandates that the federal government work to reduce pay disparities (the extent to which rates of pay under the General Schedule are generally lower than the rates paid for the same work by non-Federal workers). *See id.* §§ 5301-07 (2017). Each year, the Bureau of Labor Statistics (BLS) conducts locality pay surveys to calculate annual wage estimates by occupation for each area. The President's Pay Agent (Secretary of Labor and the Directors of the Office of Management and Budget and Office of Personnel Management) then uses the BLS data to estimate local pay disparities and recommend adjustments to the General Schedule.

254. This is not true across the board. Some civil servants, particularly those with high private sector wages (e.g., doctors, lawyers, engineers), earn more than appointees, and some positions filled by political appointment receive relatively low salaries if they are positions of a policy or confidential nature, but are staff positions (e.g., confidential assistants or chauffeurs of top officials). *Compare, e.g.,* Office of Personnel Management, *2017 Pay Tables for Executive and Senior Level Employees*, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/SLST.pdf> [pay tables for senior-level federal civilian employees] [hereinafter OPM, *2017 Pay Tables*], with 2016 PLUM BOOK, *supra* note 19 (identifying positions in legislative and executive branches subject to noncompetitive appointment and listing applicable federal salary schedule or pay system).

255. For a full description, see 2016 PLUM BOOK, *supra* note 19, at 197-202; LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146, at 22-25; David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 52 (2011) [hereinafter Lewis, *Appt and Personnel*].

in this manner.²⁵⁶ While the definition of “officers of the United States” is relatively vague, federal courts consider factors such as the significance of the official’s duties, the finality of the official’s actions, and the amount of discretion the official has.²⁵⁷ A second set of employees, “inferior officers,” may be appointed in any way Congress establishes by law.²⁵⁸ These inferior officers are appointed in a variety of ways, from nomination by the President and confirmation by the Senate to appointment by agency heads.²⁵⁹

Among the most important positions nominated by the President and confirmed by the Senate are department Secretaries, agency Administrators, and federal Commissioners. In 2016, there were approximately 1,237 positions in the federal executive establishment requiring Senate confirmation.²⁶⁰ Of these, 187 are U.S. attorneys and U.S. Marshals, about 188 are ambassadors, and hundreds are members of small boards or commissions, often serving on a part-time basis.²⁶¹ The Senate-confirmed positions in the executive departments include Deputy, Under, and Assistant Secretaries, as

256. U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (unless provided for elsewhere in the Constitution, all officers of the United States are to be appointed in accordance with this clause).

257. *Buckley*, 424 U.S. at 140-141; *Freytag v. Comm’r Internal Revenue*, 501 U.S. 868, 880 (1991); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 283-289 (D.C. Cir. 2016); *Tucker v. Comm’r Internal Revenue*, 676 F.3d 1129, 1132 (D.C. Cir. 2012); *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443 (2018).

258. U.S. CONST. art. II, § 2, cl. 2.

259. A third and final group of employees perform duties that do not rise to the level of those required for inferior officers. *Buckley*, 424 U.S. at 126 n.162; Mascott, *supra* note 257. Determining whether an employee falls within this second and third group is somewhat difficult. *See generally Freytag*, 501 U.S. at 881 (establishing three characteristics identify an “inferior officer” – a position established by law; the duties, salary, and means of appointments are established by statute; and the officer exercises significant discretion in carrying out important functions); *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (providing a functional test for inferior officers); *Edmund v. United States*, 520 U.S. 651, 663 (1997) (noting that to be an inferior officer, one must have a superior); Mascott, *supra* note 257. There has been recent attention to whether administrative law judges constitute inferior officers, in part due to a circuit split on the issue. *See, e.g., Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. 2016) (holding that ALJs in the SEC are inferior officers); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 283-289 (D.C. Cir. 2016), *rehearing en banc*, 868 F.3d 1021 (2017) (holding that ALJs in the SEC are not inferior officers). In 2018, the Supreme Court held that administrative law judges qualify as “Officers of the United States.” *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018). *See also* Randall Bryer, *The SEC’s Potential Appointments Clause Defect and How It Could Impact the Administrative State*, 19 U. PA. J. CONST. L. 521 (2016); Linda D. Jellum & Moses M. Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities and Exchange Commission’s Administrative Law Judges*, 70 S.M.U. L. REV. 3 (2017).

260. There are also 5 persons in the legislative branch agencies such as the Library of Congress, Government Publishing Office, Architect of the Capitol, and Government Accountability Office nominated by the President and confirmed by the Senate. 2016 PLUM BOOK, *supra* note 19. This does not include Senate-confirmed appointments to judgeships or multilateral organizations such as the United Nations.

261. For example, there are eight Senate-confirmed appointees on the Barry Goldwater Scholarship and Excellence in Education Foundation. All serve in a part-time capacity without pay, but are entitled to reimbursement for travel, subsistence, and other necessary expenses. 20 U.S.C. § 4703 (2017)

well as a general counsel and an inspector general.²⁶² As indicated above, most large sub-department bureaus are headed by Senate-confirmed political appointees. The heads of free-standing executive agencies (e.g., Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration) and the commissioners of all large commissions are positions that require Senate confirmation.²⁶³

Between Senate-confirmed political appointees at the top of federal agencies and the civil service is a middle level of management comprised of a mix of career professionals and a second category of political appointees. The Senior Executive Service (SES) is a corps of managers created by the Civil Service Reform Act of 1978.²⁶⁴ The SES is comprised of over 7,500 managers distributed across the federal executive establishment.²⁶⁵ Career civil servants and other eligible individuals may apply to be members of the SES. The Office of Personnel Management (OPM) allocates a fixed number of SES positions to each agency. The agency leadership determines which jobs in the agency will be filled by members of the SES.²⁶⁶ The president's administration can fill positions designated as SES-eligible general (as opposed to career-reserved) positions, either with an existing career member of the Senior Executive Service or a political appointee selected from outside the SES.²⁶⁷ No more than 10 percent of the Senior Executive Service as a whole or 25 percent of the allocated SES positions in an agency may be filled by political appointees.²⁶⁸ Some examples of SES positions

262. The Department of Defense is something of an outlier since it has 52 positions subject to Senate confirmation. Each of the military services has 7-8 Senate-confirmed positions, as well 30 additional positions in other parts of the Department of Defense. 2016 PLUM BOOK, *supra* note 19.

263. Multi-member bodies that include members not appointed with Senate confirmation include: Appalachian Regional Commission; Barry Goldwater Scholarship and Excellence in Education Foundation; Board of Veterans Appeals; Commodity Credit Corporation; Council of Economic Advisers; Delta Regional Authority; Federal Agricultural Mortgage Corporation; Federal Crop Insurance Corporation; Harry S. Truman Scholarship Foundation; James Madison Memorial Fellowship Foundation; Metropolitan Washington Airports Authority; National Consumer Cooperative Bank; National Indian Gaming Commission; Northern Great Plains Regional Authority; Overseas Private Investment Corporation; Puerto Rico Financial Oversight and Management Board; Securities Investor Protection Corporation; Social Security Advisory Board; United States Postal Service.

264. Pub. L. No. 95-454, 92 Stat. 1191 (1978) (establishing the SES in response to a perceived need to provide flexibility in recruiting and retaining qualified executives).

265. According to data from the Office of Personnel Management, as of September 2017, there were 7,349 career members of the SES and 475 non-career appointee members. See OPM, *FedScope*, *supra* note 51.

266. Some positions are designated by agencies as career-reserved and into these positions agency heads can only place career members of the SES. See 5 U.S.C. §§ 3132-33 (2017).

267. The SES was created partly to give presidents more control over managerial personnel. Presidents have more ability to move members of the SES than other civil servants. For example, presidents can re-assign career members of the SES "provided the president and the new agency head have been in office for at least 120 days and the executive has been given 15 days notice." LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146, at 23; David E. Lewis & Terry M. Moe, *Struggling Over Bureaucracy: The Levers of Control*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* (Michael Nelson ed., 9th ed. 2009).

268. 5 U.S.C. § 3134 (2017).

include the General Counsel of the National Archives and Records Administration, the Chief of Staff at the U.S. Agency for International Development, and a number of Deputy Assistant Secretaries in the executive departments.

The third category of political appointee is a Schedule C appointee. Schedule C positions are those with policy-determining responsibilities or positions that require a confidential relationship with a top agency official. They are usually lower-level agency positions.²⁶⁹ Schedule C appointees serve at the pleasure of the agency head, but modern presidents have become directly involved in the selection of Schedule C appointees.²⁷⁰ Persons appointed to Schedule C positions are generally paid less than Senate-confirmed or SES appointees. Most are paid on the GS scale from GS 15 down, depending upon the qualifications of the job and their experience. As of September 2017, there were 830 Schedule C appointees.²⁷¹ Some examples of higher-level Schedule C positions include the Director for Scheduling and Advance for the Administrator of the Environmental Protection Agency, the Director of the Office of Public Affairs for the Chairman of the Federal Trade Commission, and the Department of the Interior's White House Liaison. The most common positions for Schedule C appointees are special assistants, confidential assistants, speechwriters, press secretaries, and special advisors to higher-level political appointees.

The final category of political appointees is comprised of positions that, like SES appointees and Schedule C appointees, do not require Senate confirmation. In 2006, there were 314 of these persons, the bulk of whom served either in the White House Office or on small advisory commissions such as the Advisory Council on Historic Preservation, American Battle Monuments Commission, or the Christopher Columbus Fellowship Foundation. In 2012, however, Congress enacted the Presidential Appointment Efficiency and Streamlining Act (Pub. L. No. 112-166), which reduced the number of positions requiring Senate confirmation by 170 positions and increased the number of other political appointees. The affected positions

269. Schedule C positions are non-permanent positions. Technically, once a person leaves a Schedule C position, the position no longer exists. In any case, when an agency wants to appoint a person under Schedule C, it must provide a justification to the Office of Personnel Management for the position, its confidential and/or policy determining nature, and the pay level. As a practical matter, new presidents assume office with a map of where the appointed positions were in the previous administration (including SES and Schedule C) and start from that point. During a transition, agency heads may appoint a limited number of Schedule C appointees under authority delegated by OPM. Transitional Schedule C appointees can serve for 120 days and have their tenure extended another 120 days. The agency ultimately must approach OPM about formally converting a temporary transitional appointment to a regular Schedule C appointment. U.S. Office of Personnel Mgmt., *Presidential Transition Guide to Federal Human Resources Management Matters* 12-15 (2016), https://www.google.com/url?sa=t&rcrt=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewi_bCx78bZAhWSxVkkHe-JcBRQQFggsMAA&url=https%3A%2F%2Fourpublicservice.org%2Fpublications%2Fdownload.php%3Fid%3D1339&usg=AOvVaw1KVnU2_hygONH0n522QYzN [hereinafter OPM, *Presidential Transition*].

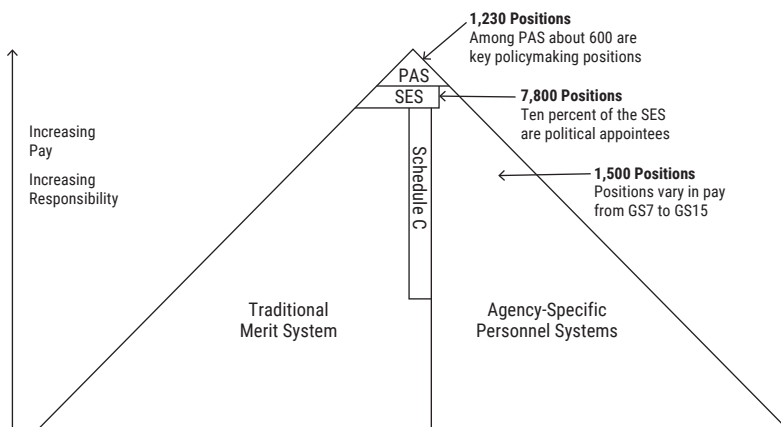
270. OPM, *Presidential Transition*, *supra* note 269, at 12; THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948-1994* (1995).

271. OPM, *FedScope*, *supra* note 51 (Employment Cube - September 2017).

include a number of managerial positions such as chief financial officers and Assistant Secretaries for Administration and a number of appointments to minor boards and commissions. As a result, in 2016, there were 462 presidential appointments without Senate confirmation.²⁷²

The vast majority of civilian employees, however, are included in some form of merit-based civil service system.²⁷³ Federal civilian work is defined by a series of statutes and regulations governing how persons are to be hired, fired, promoted, and demoted. The overriding principle is that a person’s treatment in the civil service be governed by merit. Persons establish their merit through appropriate background qualifications or competitive examination. Employees are granted a series of rights, most notably rights to notification and appeal in cases of adverse personnel actions such as demotion or removal. While a majority of the public attention federal agencies receive focuses on Washington, DC, where most key policymaking employees work, only about 20 percent of federal employees work in the Washington, DC metropolitan area.²⁷⁴ The remainder work in a network of regional and field offices, from military bases to local Social Security offices.

Figure 2. Simplified Depiction of Current Federal Civilian Personnel System



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

272. 2016 PLUM BOOK, *supra* note 19.

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

274. OPM, *FedScope*, *supra* note 51.

Figure 2 provides a simplified graphical representation of the modern personnel system.²⁷⁵ The triangle reflects the structure of the federal hierarchy with positions at the top higher in both pay and responsibility. At the top of the federal hierarchy are presidential appointees requiring Senate confirmation. Of the close to 1,200 of these positions, about 600 are key policymaking positions such as department Secretaries, Commissioners, and Deputy, Under, and Assistant Secretaries. Below this class of political appointees in most federal agencies is a middle-level of management comprised of the Senior Executive Service. Not all agencies have SES employees, particularly if an agency has its own personnel system. This is why SES managers do not extend all the way across the hierarchy in the figure. In agencies with their own personnel system, personnel rules specific to those agencies govern managers. In agencies such as the Department of Defense or the Department of State, uniformed military personnel or foreign service officers also fill positions at this level. The vertical bar that extends down into the personnel system represents Schedule C appointees that take policy and confidential jobs from the GS 7 level to the GS 15 level.

The extent of political appointee penetration varies across the federal executive establishment. Some agencies have many political appointees that penetrate deeply into their organizations and others have few political appointees. The extent of political appointee infiltration influences the “politicization” of different agencies. Agencies with more political appointees are more likely to be responsive to the White House, have their day-to-day business infused with partisan politics, and make promotion decisions in the agency on the basis of partisan or political views.²⁷⁶ As a general matter, agencies in the EOP and executive departments or agencies structured like executive departments tend to have the highest percentage of political appointees. Among the agencies with the highest percentage of political appointees are the Office of Management and Budget (EOP agency, 7.8%), Department of Education (executive department, 3.7%), and Federal Election Commission (independent agency, 6.7%). Independent commissions can have high percentages of political appointees since commissioners are usually political appointees and commissioners often each have an appointed staff member. While the presence of political appointees can politicize agencies, the additional political appointees in these agencies are not usually a conduit for White House influence since the statutes establishing commissions typically place limitations on presidential control.

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

276. David E. Lewis, *Presidential Politicization of the Executive Branch in the United States*, in EXECUTIVE POLITICS IN TIMES OF CRISIS (Martin Lodge and Kai Wegrich eds., 2012).

2. Trends in Personnel Management

Since the mid-twentieth century, four trends have shaped the federal personnel system: an increase in the number of agency managers, a growth in the number of political appointees who serve in executive agencies, the development of agency-specific personnel systems, and the federal government's increased reliance on private contract workers.

a) Thickening Government

First, there has been an increase in layers of management between top agency officials and front-line employees. There has been proliferation of both top-level executives and middle-level managers and supervisors, increasing the ratio of managers to front-line employees. The number of agency executives such as Deputy Secretaries, Under Secretaries, and Assistant Secretaries has multiplied, and with them has come an increase in deputies, chiefs of staff, assistants, and advisors.²⁷⁷ Paul Light refers to these as “title riding” positions—positions whose title depends upon the status of another position. Whereas there were an average of 1.4 title-riding positions attached to Assistant Secretaries in 1960, by 1992 the number had increased to 5.8 positions. Departments that once had Under and Assistant Secretaries now have Deputy Under Secretaries and Deputy Assistant Secretaries. They also have *Principal* Deputy Under Secretaries and *Principal* Deputy Assistant Secretaries. Each of these new titled officials also frequently have chiefs of staff, special assistants, advisors, or counselors.

A number of factors contribute to the thickening. First, promotions and titles are a tool used by agency executives to help recruit and retain executives in a competitive labor market in which talented employees have viable private sector options. Since federal executives have limited flexibility to use pay to counter private sector options, agency officials use promotions and titles as a means of securing their best talent. Second, the nature of federal work and employment is changing from mostly clerical and administrative work to professional work (e.g., law, accounting, engineering, science) and the administration of contracts and grants. Professionals enter public service at the middle to top levels of the federal hierarchy, making it thicker. The federal government has also increased the use of grants and contracts to achieve its public policy goals. For example, from 2008 to 2017, there was an over \$327 billion increase in the amount of federal grant awards.²⁷⁸ This means that more federal work is done by state and local employees who receive grants and by contractors that are awarded federal contracts. This change in the nature of how the federal government does its work means that there will be more managers and fewer front-line workers. Finally, as will be discussed in more detail below, federal agencies have added management layers as a result of political efforts to secure control over federal agencies. Government work has grown in scope, volume, and complexity, and Congress and the President

277. LIGHT, THICKENING, *supra* note 120.

278. Federal grant spending was \$391,655,880,500 in 2008 and \$718,947,628,456 in 2017. USAspending.gov, <https://www.usaspending.gov/#/search/2701fa2f11adce328244048670780bd0>.

have responded by adding layers of political appointees to help direct federal agencies. They have also added officials that monitor agency compliance with government-wide management laws and ensure ethical behavior. The number of employees in offices of inspectors general and general counsels' offices has increased. Together, these efforts have led to a personnel system with fewer persons at the lower levels, a thicker middle, and a taller hierarchy.

b) Increase in Political Appointees

A second trend in the federal personnel system is that the number and percentage of political appointees have both almost doubled since 1960 (Figure 3).²⁷⁹ Part of the expansion in political appointees comes naturally from an increase in the number of federal programs and agencies.²⁸⁰ Political actors also have driven the increase in political appointees in an effort to gain control over federal policymaking. Presidents have sought to increase the number of political appointees to enhance their control over federal agencies. Congress has at times sought to increase the number of officials subject to Senate confirmation to influence key policymaking positions, but these incidents reflect only a small fraction of the new positions created since mid-twentieth century.²⁸¹ The benefits of increased political appointees are greater for presidents now than in the past, since presidents currently assert more control over the selection of political appointees. Presidents have dramatically expanded White House capacity to vet potential nominees by building up staffs dedicated to personnel.²⁸²

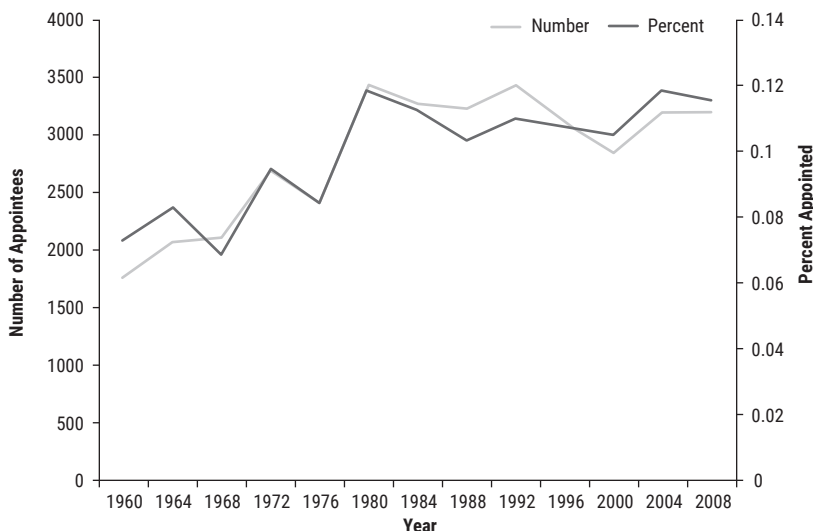
279. Lewis, *Appt and Personnel*, *supra* note 255, at 47-66.

280. LIGHT, THICKENING, *supra* note 120.

281. It is worth noting that in 2012, Congress actually decreased the number of appointments subject to Senate approval. See Presidential Appointment Efficiency and Streamlining Act, Pub. L. No. 112-166, 126 Stat. 1283 (2012).

282. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, AMERICA'S UNELECTED GOVERNMENT: APPOINTING THE PRESIDENT'S TEAM 21-44 (1983); MACKENZIE, *supra* note 147; JAMES P. PFIFFNER, THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING (2d ed. 1996) [hereinafter PFIFFNER, STRATEGIC PRESIDENCY]; WEKO, *supra* note 270; Dom Bonafede, *The White House Personnel Office from Roosevelt to Reagan*, in THE IN-AND-OUTERS: PRESIDENTIAL APPOINTMENTS AND TRANSIENT GOVERNMENT (G. Calvin Mackenzie ed., 1987). President Truman was the first President to have a staff person assigned full time to handle personnel issues. In the Kennedy Administration this number increased to three persons. There was a big jump to 30 persons in the Nixon Administration, and now the personnel operation can swell to over 100 persons during the period around the transition.

Figure 3. Total Number of Federal Government Appointees and Percentage Appointed, 1960-2008



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

Increased presidential control over personnel, coupled with increased White House capacity, has led presidents since Ronald Reagan to assert control of appointees down to the lowest levels.²⁸³ The Presidential Personnel Office plays a role in the selection of all four types of appointees (PAS, PA, NA, and SC).²⁸⁴ The Office does so in cooperation with top-level agency officials, facilitated by an expansion of liaison positions in the departments and agencies designed to enhance coordination between agencies and the White House.²⁸⁵

The number of political appointees has increased most after party changes in the White House and during periods when the same party has controlled the White House and Congress. In the former case, presidents feel the need to get control of agencies directed by the other party for years. Congress is more willing to go along with these efforts when the President is from their party, since increasing political appointees allows presidents a greater ability to get agencies to do what the President and the

283. LEWIS, PRESIDENTIAL APPT., *supra* note 146; PFIFFNER, STRATEGIC PRESIDENCY, *supra* note 282; WEKO, *supra* note 270.

284. Presidential Appointment with Senate Confirmation, Presidential Appointment (without Senate confirmation), Noncareer Appointment, and Schedule C Excepted Appointment.

285. PFIFFNER, STRATEGIC PRESIDENCY, *supra* note 282; WEKO, *supra* note 270.

congressional majority both prefer. Increases in political appointees also provide patronage opportunities that benefit the majority party.

The increase in political appointees has not been even across the executive establishment. Some positions and agencies have been targeted more than others. Most of the increase within agencies has been in policy-related positions in Washington rather than in regional posts.²⁸⁶ Political appointees have increased in offices that control policy but management directorates, budget offices, and general counsels' offices have seen an increase in political appointees as well.²⁸⁷ Across the executive establishment, presidents notably have added political appointees to agencies that play a role in presidential management such as the Office of Management and Budget (budgets, regulatory review), the Office of Personnel Management (personnel), and the General Services Administration (procurement, administrative services).²⁸⁸ Presidents also have targeted agencies with policy views dissimilar to their own.²⁸⁹ This is particularly the case if these agencies implement a policy central to the President's political agenda.²⁹⁰

The presence of a significant number of political appointees can influence agencies differently under different circumstances depending upon the types of persons selected to fill positions as well as the ability of the agency itself to accommodate large numbers of political appointees. In some agencies, political appointees are chosen on the basis of competence and fidelity to the President's program in order to advance the President's agenda. In other agencies, political appointees are selected as a form of patronage to reward campaign or political supporters. Appointed positions can be distributed as a form of political capital to build support for the President's program,

286. The number of appointed regional posts has actually declined. WEKO, *supra* note 270, at 25. This contrasts with career employment, which tends to be located outside of the Washington metropolitan area.

287. HUGH HECLIO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* (1977). Heclio describes how Assistant Secretaries for management shifted from career professionals to political appointees.

288. For details of the increase in appointees in the Bureau of the Budget/Office of Management and Budget, see LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146; Hugh Heclio, *OMB and the Presidency—The Problem of "Neutral Competence"*, 38 *PUB. INT.* 80 (1975). See also Lewis and Moe, *supra* note 267.

289. There is a significant amount of work that details how Republican presidents have targeted social welfare and regulatory agencies. ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED: PUBLIC LANDS, THE BLM, AND THE REAGAN REVOLUTION* (1992); Edie N. Goldenberg, *The Permanent Government in an Era of Retrenchment and Redirection*, in *THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA* (Lester M. Salamon & Michael S. Lund eds., 1984); RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983); Bernard Rosen, *Effective Continuity of U.S. Government Operations in Jeopardy*, 43 *PUB. ADMIN. REV.* 383 (1983).

290. Historically, Democratic presidents have targeted more traditionally conservative agencies, and Republican presidents have targeted traditionally liberal agencies. LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146.

tie party factions together, or engender future good will. The difference in types of political appointees can be consequential for management.²⁹¹

A number of scholars and commissions have noted with alarm the increasing number of political appointees in the federal executive establishment and have argued that having too many political appointees hurts federal management performance.²⁹² Scholars generally point to the significantly larger number of political appointees in the U.S. government relative to other developed democracies and the lack of expertise and short tenures of political appointees relative to their careerist counterparts. Observers also worry that increases in political appointees decrease morale in the civil service, since the jobs with the highest pay and greatest influence are progressively taken by political appointees, who often know little about the agencies or their work. This makes it difficult to recruit the best and brightest to stay in government service.²⁹³ Presidents have been among those defending the large number of political appointees as necessary to bring responsiveness and energy to the federal bureaucracy.²⁹⁴

c) Increase in Agency-Specific Personnel Systems

A third trend that characterizes the federal personnel system since the mid-twentieth century is the move away from one central personnel system, created by the Pendleton Act and defined by Title 5 of the U.S. Code, to a more diverse system defined by multiple distinct personnel systems specific to single agencies or classes of employees. The increased reliance on government corporations explains part of the change since corporations are usually not subject to the requirements of Title 5. In other cases, Congress has explicitly excluded particular agencies from the requirements of Title 5. The largest change came in 1970 when the Postal Service (736,000 employees at the time) was given authority to create its own personnel system. Other agencies followed, such as the Federal Deposit Insurance Corporation (1989), Office of the Comptroller of the Currency (1989), the former Office of Thrift Supervision (1989), Federal Aviation Administration (1996), and Internal Revenue Service (1998). Table 6 includes a list of all agencies and bureaus that are authorized to have their own personnel systems, as well as those where caps have been placed on the number of persons that can be hired with special hiring authorities.

291. MACKENZIE, *supra* note 147; TOLCHIN & TOLCHIN, TO THE VICTOR, *supra* note 147; TOLCHIN & TOLCHIN, PINSTRIPE PATRONAGE, *supra* note 147; Bearfield, *supra* note 147; Gary E. Hallibaugh, Jr., Gabriel Horton & David E. Lewis, *Presidents and Patronage*, 58 AM. J. POL. SCI. 1024 (2014).

292. NATIONAL COMMISSION ON THE PUBLIC SERVICE, *LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE* (1989) [hereinafter 1989 VOLCKER REPORT]; NATIONAL COMMISSION ON THE PUBLIC SERVICE, *URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY* (2003). *But see* Robert Maranto, *Why the President Should Ignore Calls to Reduce the Number of Political Appointees*, in THE HERITAGE FOUNDATION BACKGROUNDER 1413 (2001).

293. HECLO, *supra* note 287; LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146; EZRA SULEIMAN, *DISMANTLING DEMOCRATIC STATES* (2003); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007);

294. American Enterprise Institute, *A Discussion with Gerald R. Ford: The American Presidency*, March 25, 1977, Transcript of Interview at 11.

Table 6. Agency-Specific Personnel Systems Authorized by Statute

Allowing Agency-Specific Personnel Authority		Restricting Agency Authority	
Entities not considered agencies or establishments of the United States Government or whose employees are excluded from the definition of “employee” for the purposes of Title 5. ^a	Agencies whose statutes permit the agency to use an agency-specific employment system. ^b	Agencies with statutory limitations on the number of employees compensated without regard to civil service provisions. ^c	
AMTRAK CIA CPB DRA DIA LSC NARAB NGIA NIBS NIST NSA OSNI PRFOMB SIPC SJI TVA	ANGTP CFPB CFTC CNCS EAC FAA FAMC FBI FCA FCSIC FDIC FEC FED FHFA JMMFF MCC MUSUF NCCB NCUA NIGC OMB PCLOB PRC SEC SSAB TSA USPS	ARC BBG CEA CEN DHS DNDO DOC DOD DOE DOJ DOL DOT DVA FCC FCIC FDA FMCS FRTIB FTC HHS IHS	IMLS IRS MMC NARA NASA NAVY NNSA NTSB OPIC PBGC PC SBA SSA TSA TRS USDA USIP USPTO USTR VHA

Note: Inclusion or exclusion of agencies or bureaus is based upon agency authorizing statutes. The table only includes information about agencies rather than classes of employees, such as Foreign Service Officers.

^a 5 U.S.C. § 5101 (2017). Some agency statutes specify that the agency is not considered an agency or establishment of the U.S. Government. By implication, these agencies do not have to follow the civil service provisions that apply to government agencies.

^b Typically, these provisions are characterized in the statute by language such as “members, officers, and employees of the agency are not federal employees for any purpose” or “rates of basic pay for all employees may be set and adjusted by the agency without regard to civil service provisions.”

^c While agencies have general or agency-specific authority to take personnel actions outside the normal personnel process to account for specific agency needs or circumstances, some agencies’ flexibility under such provisions is limited by specific statutory provisions. For example, some statutes place limitations on the number of employees compensated without regard to civil service provisions. Other limitations relate to specific job descriptions. For example, technical and professional employees, employees performing a specific service, or certain managerial employees may be compensated under agency-designated salary systems. Often these statutes place limitations on the number of exempt (i.e., appointed outside Title 5) employees, whether those limitations are in absolute terms (e.g., “no more than 200 employees”) or in percentages (e.g., “no more than 20 percent of all agency employees”).

During the George W. Bush Administration, the President worked aggressively, but unsuccessfully, to ensure that the new Department of Homeland Security had its own personnel system.²⁹⁵ The President argued that a new, more flexible personnel system was necessary for managers to fulfill the department's mission and to deliver the results elected officials and the public demanded. The Administration also sought to transition the Department of Defense to a new National Security Personnel System.²⁹⁶ These moves were contentious, and in 2008 the Department of Defense announced that it had scrapped plans for the new personnel system after Congress refused funding for the new system.²⁹⁷ If President Bush had been successful at moving defense personnel to a new personnel system, fewer than 30 percent of federal employees would have remained under the traditional merit system, down from 90 percent at the end of the Truman Administration.

Agency executives have increasingly asked Congress for authority to create their own human resources policies to allow more flexibility in pay and management. Rigid pay restrictions can prevent federal managers from being able to recruit and retain the workers essential for program management.²⁹⁸ While there is an ongoing debate about pay differential generally, there is general agreement that federal pay does not keep up with private sector pay for some key occupations, particularly at the top levels.²⁹⁹ Furthermore, cumbersome hiring processes make it hard to attract interested employees. As stated by the Government Accountability Office in 2008:

In short, the federal hiring process is often an impediment to the very customers it is designed to serve in that it makes it difficult for agencies and managers to obtain the right people with the right skills, and appli-

295. See David E. Lewis, *The Presidency and the Bureaucracy: Management Imperatives in a Separation of Powers System*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* (Michael Nelson ed., 8th ed. 2005) (providing a full discussion of the politics surrounding the creation of the Department of Homeland Security); Douglas A. Brook & Cynthia L. King, *Civil Service Reform as National Security: The Homeland Security Act of 2002*, 67 *PUB. ADMIN. REV.* 299 (2007) (describing the role of civil service reform in the Homeland Security Act).

296. Christopher Lee & Vernon Loeb, *Pentagon Assails Work Rules: Senate Panel to Hear Rumsfeld Request for Freedom from Civil Service Laws*, *WASH. POST*, June 4, 2003, at A25.

297. Brittany R. Ballenstedt, *Homeland Security Scraps Plans for Personnel System*, *GOV'T EXECUTIVE*, Oct. 2, 2008, <http://www.govexec.com/dailyfed/1008/100208b1.htm> (last visited June 28, 2018).

298. Steve Nelson, *The State of Civil Service Today: Aching for Reform*, 24 *REV. PUB. PERSONNEL ADMIN.* 202 (2004); 1989 *VOLCKER REPORT*, *supra* note 292. Retention of federal employees is increasingly important, as bureaucratic expertise is developed on the job. SEAN GAILMARD AND JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* (2013).

299. U. S. GOV'T ACCOUNTABILITY OFFICE, *GAO-12-564, FEDERAL WORKERS: RESULTS OF STUDIES ON FEDERAL PAY VARIED DUE TO DIFFERING METHODOLOGIES* (2012). See also The President's Pay Agent, "Report on Locality-Based Comparability Payments for the General Schedule." *Annual Report of the President's Pay Agent* (providing pay disparities for pay localities for each year).

cants can be dissuaded from public service because of the complex and lengthy procedures.³⁰⁰

Additionally, rules that protect federal workers from adverse actions or job changes make it difficult for managers to nimbly restructure or reorganize. These difficulties make more flexible personnel systems attractive to federal managers.³⁰¹

Yet when employees work under numerous different personnel systems and rules, it is difficult to monitor employment practices centrally to ensure fairness, fidelity to merit system principles, and equal pay for equal work.³⁰² Some managers use increased flexibility to accomplish more easily agency goals. Others use the flexibility to do precisely what the rules of the Title 5 system were created to prevent. Furthermore, reform of any kind cannot be effective if agencies, and those who manage them, are incapable of setting priorities and implementing personnel policies.³⁰³ There is some evidence that many agencies simply do not have the capacity for the type of human capital management that a decentralized system contemplates.³⁰⁴

The proliferation of distinct personnel systems also makes centralized human resource management difficult. When one set of rules governed federal employment, it was easier not only to monitor agency work but also to centrally manage. It is now more difficult for the President or Congress to direct agency policy in multiple agencies at the same time through changes in personnel or personnel policy because expertise about personnel systems has devolved to the agencies themselves rather than in one central human resources agency like the Office of Personnel Management. In the past, there were a number of persons with sufficient expertise in civil service laws and regulations to work on behalf of the President or Congress, to explain what was working well or working poorly and how to improve performance. Now, with

300. *Transforming Federal Recruiting and Hiring Efforts: Hearing before the Subcomm. on Regulatory Affairs and Federal Management of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. (2008) (statement of Robert N. Goldenhoff, Director, Strategic Issues, U.S. Gov't Accountability Office).

301. See DONALD KETTL, DORIS HAUSSER, JOZEF RAADSCHELDERS, RONALD SANDERS & STAN SOLOWAY, *NO TIME TO WAIT: BUILDING A PUBLIC SERVICE FOR THE 21ST CENTURY* (2017) (discussing human capital challenges facing the federal government and arguing for the need to move away from a “one-size-fits-all” strategy).

302. Some question whether the core principle of merit embedded in civil service laws and regulations can survive a more flexible system. See Larry M. Lane & Colleen A. Woodward, *Merit without the System: An Emergency Model for Public Sector HRM, in RADICAL REFORM OF THE CIVIL SERVICE* (Stephen E. Condrey & Robert Maranto, eds., 2001); James R. Thompson, *The Federal Civil Service: The Demise of an Institution*, 66 PUB. ADMIN. REV. 496 (2006).

303. See, e.g., Mark Considine & Jenny M. Lewis, *Governance at Ground Level: The Frontline Bureaucrat in the Age of Markets and Networks*, 59 PUB. ADMIN. REV. 467 (1999); James L. Perry, Trent A. Engbers & So Yun Jun, *Back to the Future? Performance-Related Pay, Empirical Research, and the Perils of Persistence*, 69 PUB. ADMIN. REV. 39 (2009); Norma M. Ricucci & Frank J. Thompson, *The New Public Management, Homeland Security, and the Politics of Civil Service Reform*, 68 PUB. ADMIN. REV. 877 (2008).

304. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-168, *HUMAN CAPITAL: STRATEGIES TO HELP AGENCIES MEET THEIR MISSIONS IN AN ERA OF HIGHLY CONSTRAINED RESOURCES* (2014).

multiple different systems, no single person knows enough about federal personnel policy to fill the same role. The decentralization of the federal personnel system has allowed agencies to move productively toward modern personnel systems that are more responsive to managers and market pressures, but it has also led to confusion. Specific congressional committees and their staffs, or private or not-for-profit groups, may be familiar with individual systems, but few people have expertise on the entire federal personnel system.

d) Increased Role of Government Contractors

To characterize the employment needs of the federal government simply by reference to persons on the federal payroll misses another dramatic shift in the federal workforce over the last 30 years: the increasing reliance on private sector contract workers. While federal civilian employment has stayed relatively stable, between 2.7 and 3.0 million over the last 60 years, the number of contractors working for the federal government relative to civil servants has increased dramatically.³⁰⁵ The federal government relies on contract employees to perform a variety of government jobs, from janitorial or clerical work to writing regulations and providing security in combat zones. Estimates suggest that a significant proportion of the increase has come in service jobs. Although no exact count of contract employees exists,³⁰⁶ recent estimates suggest that between 7.5 million and 10 million contract employees perform work for the federal government, up from 4.5 million in 1999.³⁰⁷ By most accounts, the number of contract employees is increasing.³⁰⁸

There are a number of reasons for the increased reliance on contracting. First, the virtues of privatization were consistent with the dominant managerial philosophy of the past few decades, the New Public Management (NPM). Developed in the 1980s in an effort to make public agencies more efficient, NPM was famously the basis of

305. PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED* 193 (2008) [hereinafter LIGHT, *ILL EXECUTED*].

306. Two recent statutes require federal agencies to count the number of contract employees working for the agency and report such figures to the Office of Management and Budget (OMB). The Omnibus Appropriations Act of 2009 required that agencies report to OMB the size of their workforce as of December 31, 2008, including contract employees. *See* Pub. L. No. 111-8, 123 Stat. 524 (2009). The Consolidated Appropriations Act of 2010 similarly requires that each executive agency (except DOD) provide a report to OMB that includes “the number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract.” *See* Pub. L. No. 111-117, 123 Stat. 3034 (2009); CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34685, *THE FEDERAL WORKFORCE: CHARACTERISTICS AND TRENDS* 4 (2011) [hereinafter COPELAND, *FEDERAL WORKFORCE*].

307. Light, *True Size of Gov't*, *supra* note 37; COPELAND, *FEDERAL WORKFORCE*, *supra* note 306. The lower estimate comes from Copeland, and the higher estimate was cited by Rep. Stephen Lynch (D-Mass.) in a recent hearing of the House Oversight and Government Reform Committee. *See* Alyah Khan, *Include Contract Workers in Federal Workforce Debates, Lawmakers Urged*, FED. COMPUTER WK., May 26, 2011, <http://fcw.com/articles/2011/05/26/house-hearing-debate-size-of-federal-workforce.aspx>.

308. LIGHT, *ILL EXECUTED*, *supra* note 305, at 197; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-235R, *SUGGESTED AREAS FOR OVERSIGHT IN THE 110TH CONGRESS* 8 (2006) (report issued by Comptroller General, based on GAO work, offered three sets of recommendations to “Congressional Leadership”) [hereinafter GAO, *AREAS FOR OVERSIGHT*].

Vice President Gore's National Performance Review, which sought to provide "a government that works better and costs less."³⁰⁹ The NPM emphasized the benefits of competition in order to provide managerial flexibility, purchase expertise, and reduce costs.³¹⁰ In practice, competition could be encouraged inside government or between government actors and the private sector. A second reason for the increase in contracting was that it allowed federal managers to work around limitations in their own agency environment. Hiring contract employees was attractive in some cases because it allowed federal managers to circumvent cumbersome hiring practices in the civil service and to buy capacity and expertise that agencies lacked. This effort was supported by the general belief that the federal government should rely on the market where it could for the provision of government services.³¹¹ Proponents of contracting hoped that the private sector would compete for government contracts and that this competition would make private sector contractors and government employees more effective and cheaper. Third, both Republican and Democratic elected officials in the last 20 years have preferred to keep federal employment small. The hiring of contract employees allows federal workforce numbers to decrease or remain steady yet provides the necessary capacity to carry out federal programs.³¹²

The federal government's increasing propensity to use contract employees is not without its critics. Critics charge that the increased role of federal contractors is due in part to the political power of the firms themselves and that contract employees do not necessarily improve performance or reduce costs.³¹³ Supporters of the civil service system argue that the increased reliance on contract employees undermines federal executive capacity by turning attention away from the need to recruit and retain the best and the brightest in the civil service. The Government Accountability Office has regularly named contract management one of its high priority issues, citing no-bid contracts, understaffed contract management offices, lax oversight, poor contracting practices, and cost overruns.³¹⁴ Federal contracts can be large and complicated, with only one or a few bidders having the capacity to carry out the contract. This can lead to higher prices, poor oversight, and little accountability. Finally, some critics charge that some functions are inherently governmental and should not be delegated to private actors, particularly since contract employees operate with a profit motive rather than

309. KOSAR, QUASI GOV'T, *supra* note 49, at 5.

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

311. This general policy dates back to the 1950s when the Bureau of the Budget laid out this view in a series of bulletins. L. ELAINE HALCHIN, CONG. RESEARCH SERV., R42342, SOURCING POLICY: DEFLECTED DEVELOPMENTS AND ISSUES (2012).

312. LIGHT, ILL EXECUTED, *supra* note 305, at 190, 192.

313. KETTL, *supra* note 106.

314. GAO, AREAS FOR OVERSIGHT, *supra* note 308, at 8; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-883, OPPORTUNITIES EXIST TO INCREASE COMPETITION AND ASSESS REASONS WHEN ONLY ONE OFFER IS RECEIVED (2010).

a public service ethic.³¹⁵ This issue captured the public's attention during the war in Iraq. Contractors provided essential services including logistics, transportation, and private security. They trained Iraqi police and staffed prisons and conducted interrogations in military prisons such as Abu Ghraib.³¹⁶

In summary, a complex collection of statutes, executive orders, regulations, and administrative practices govern the modern personnel system. While there is variation in terms pay system and appointment authority across the executive establishment, one can identify four common trends across most federal agencies. Since the mid-twentieth century, government has thickened with layers of management, the number of political appointees in the executive establishment has grown, more agencies are authorized to operate outside of traditional civil service laws, and the federal government has increased its reliance on private contracting.

315. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); James P. Pfiffner, *The Public Service Ethic in the New Public Personnel Systems*, 29 *PUB. PERSONNEL MGMT.* 54 (1999). OMB Circular A-76 establishes the standards for determining whether commercial activities should be performed under contract with commercial sources or using federal government facilities and personnel. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76 (1999).

316. KETTL, *supra* note 106, at 421.

Part IV

The Creation and Design of Federal Agencies

The number of federal agencies has changed over time because new agencies get added to the federal establishment and existing agencies get reorganized or eliminated. New agencies are usually created to carry out new or substantially reconfigured government responsibilities. Agencies are created by statute or some form of executive action—executive order, departmental order, or reorganization plan.³¹⁷ In some cases, statutes delegate new tasks or responsibilities to agencies, and administration officials respond, generally with congressional support, by creating bureaus, divisions, or offices to implement these new assignments. However, in some cases the President or administration officials create new agencies through an executive or departmental order that takes Congress by surprise or could not have been enacted in statute. Some prominent examples include the Peace Corps and the series of civil rights agencies

317. Agencies historically have been created by statute, reorganization plan, executive order, or departmental order. Starting in the 1930s, Congress routinely granted reorganization authority to the President. Under such authority, the President was empowered to submit reorganization plans to Congress. These plans for reorganizing the government (i.e., creation, reorganization, and elimination of agencies) would go into effect after a certain period of time unless Congress explicitly disapproved. *See, e.g.*, ARNOLD, *supra* note 16; LEWIS, AGENCY DESIGN, *supra* note 16. This form of reorganization authority lapsed in the 1970s and was not renewed, partly because the Supreme Court ruled the legislative veto unconstitutional in 1983 and this was the vehicle of congressional involvement. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

created by presidents from Franklin Roosevelt to Kennedy.³¹⁸ These decisions are consequential because agencies created by executive action are significantly more likely to have features that allow presidents more influence over agency activities.³¹⁹

Instances where administration officials have created agencies Congress would not have created are not the norm. New agencies created by executive action must not contravene existing law, and their creation must be traceable to constitutional or statutory authority as the legal basis for the new agency. Of course, the meaning of constitutional provisions and statutes is not always clear, and presidents and Congress spar over what the law allows. While administration officials must secure appropriations for the new agencies after they have been created, agencies do not have to be formally authorized or given a line of their own in the budget.³²⁰ The administration can satisfy the requirement for authorization by describing the new units in budget documents.³²¹

From the President's perspective, executive action occasionally can be an effective form of agency creation when presidents can secure appropriations but not authorization for an agency. The nature of the budget process allows for the packaging of policies into one piece of legislation and funds for new agencies can be buried in the large appropriations bills.³²² Presidents can also create agencies and present them to Congress as a *fait accompli*. For example, President Kennedy created the Peace

318. HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS, 1960-1972* (1992); WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); LEWIS, *AGENCY DESIGN*, *supra* note 16; Howell & Lewis, *supra* note 198.

319. Howell & Lewis, *supra* note 198.

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

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

31 U.S.C. § 1347 (2017). See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-463SP, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* (4th ed. 2016) (describing existing authorities and interpretations of federal appropriations law).

321. The Comptroller General testified in hearings before the House of Representatives in 1970 that "as a practical matter, if the expenses of the groups are justified in the budget presentations, this is regarded as being adequate for this purpose. When they say specific authorization by Congress, authorization is usually meant to be approved through the appropriations process if not through the regular legislative authorization process. In other words, it does not have to be specifically authorized by separate statute." LEWIS, *AGENCY DESIGN*, *supra* note 16, at 192, n.8 (quoting the 1970 hearings).

322. See, e.g., BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESS IN THE U.S. CONGRESS 196-264* (3d ed. 2007).

Corps by executive order in 1961,³²³ an action decried by Republicans in Congress. By the time Congress had a chance to pass appropriations for the agency, however, the agency had 362 Washington employees and hundreds of volunteers working in eight different countries overseas, and the Democratic majority in Congress defeated Republican efforts to defund the agency.³²⁴

A. Why a New Agency Rather Than Existing Agencies?

A political decision to create a new agency begs the question of why Congress does not delegate new federal responsibilities to existing agencies. Generally, Congress creates new agencies to carry out federal responsibilities when it does not believe existing agencies will effectively implement new policies. Existing agencies may not have the expertise to carry out new policies. Alternatively, existing agencies may resist the delegation of authority because the new policy deviates from what the agency perceives as its primary mission.³²⁵

Of course, agencies themselves have ideological leanings on the basis of their mission, history, and the ideology of their employees. These leanings influence delegation decisions.³²⁶ There is substantial variation across the government in the ideology of federal employees, and federal employees self-select into agencies whose missions they support.³²⁷ For example, Democrats are more likely to work in the Department of Labor or the Environmental Protection Agency, and Republicans are more likely to work in the Department of Defense or the Federal Bureau of Investigation.³²⁸ This fact influences the choices of whether to delegate new authority to existing agencies or create a new agency to carry out new programs.³²⁹ For instance, President Roos-

323. Exec. Order No. 10,924, 3 C.F.R. 85-86 (Supp. 1961).

324. *Id.* at 84; GOVERNMENT AGENCIES (Donald Robert Whitnah ed., 1983).

325. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

326. Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3 (2008); EPSTEIN & O'HALLORAN, *supra* note 156; George Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359 (2005).

327. JOEL D. ABERBACH, ROBERT D. PUTNAM & B. A. ROCKMAN, BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES (1981); JOEL D. ABERBACH & BERT A. ROCKMAN, IN THE WEB OF POLITICS: THREE DECADES OF THE U.S. FEDERAL EXECUTIVE (2000); Joel D. Aberbach & Bert A. Rockman, *The Political Views of U.S. Senior Federal Executives, 1970-1992*, 57 J. POL. 838 (1995); Joel D. Aberbach & Bert A. Rockman, *Clashing Beliefs Within the Executive Branch: The Nixon Administration Bureaucracy*, 70 AM. POL. SCI. REV. 456 (1976); Joshua D. Clinton, Anthony Bertelli, Christian Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States*, 56 AM. J. POL. SCI. 341 (2012); Robert Maranto, *Still Clashing after All These Years: Ideological Conflict in the Reagan Executive*, 37 AM. J. POL. SCI. 681 (1993); Robert Maranto & Karen M. Hult, *Right Turn? Political Ideology in the Higher Civil Service, 1987-1994*, 34 AM. REV. PUB. ADMIN. 199 (2004); Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303 (2018).

328. Clinton et al., *supra* note 327.

329. EPSTEIN & O'HALLORAN, *supra* note 156; Clinton et al., *supra* note 327.

evlt created scores of new agencies during the New Deal rather than delegate this responsibility to existing agencies because he feared the conservative bureaucracy he inherited from his Republican predecessors would not successfully and wholeheartedly implement his programs.³³⁰ He was also aware of the patronage benefits of creating new agencies that he could staff.

In other cases, new agencies are the result of the larger struggle over the new policy. Proponents or opponents of new policies demand that new policies will be carried out by agencies with specific structural features in exchange for their support. The structural features they demand shape the ability of political actors to get access to agency decision-making. For example, some structures insulate the agency from the influence of the President or Congress. Others provide privileged access to agency decision-making for some groups and interests. In many cases, there would be no agency created at all unless the new agency included certain features that allow broad representation and regular review by Congress.³³¹

B. Agency Reorganization and Termination

Once created, federal agencies are durable but not immortal. In one study of agencies created since 1946, 62 percent had been terminated or substantially reorganized by 1997.³³² Historically, periods of national upheaval such as wars, economic crises, and public scandals have also been periods of agency reorganization and termination. National leaders restructure the administration to mobilize for war or respond to crises. When agencies are held responsible for visible blunders, agency reorganization and termination is a natural result. For example, both the savings and loan scandal of the late 1980s and the economic crisis of 2008 led to significant changes in the financial regulatory agencies.³³³ After the Gulf Oil Spill, agencies in the Department

330. Seidman, *A Typology*, *supra* note 108, at 43.

331. Moe, *Bureaucratic Structure*, *supra* note 16; McCubbins et al., *supra* note 16.

332. David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. POL. 89 (2002); *see also* HERBERT KAUFMAN, *ARE GOVERNMENT ORGANIZATIONS IMMORTAL?* (1976); Daniel P. Carpenter, *Stochastic Prediction and Estimation of Nonlinear Political Durations: An Application to the Lifetime of Bureaus*, in *POLITICAL COMPLEXITY: NONLINEAR MODELS OF POLITICS* (Diana Richards ed., 2000).

333. In response to the savings and loan crisis, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act, which, inter alia, eliminated the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation and created the Federal Housing Finance Board, the Office of Thrift Supervision, and the Resolution Trust Corporation. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989). In response to the economic crisis of 2008, Congress then eliminated the Office of Thrift Supervision and created agencies such as the Consumer Financial Protection Bureau and the Financial Stability Oversight Council. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

of the Interior were reorganized.³³⁴ Notably, after 9/11, the National Commission on Terrorist Attacks Upon the United States called for extensive reorganization of the intelligence community.³³⁵ The creation of the new Department of Homeland Security during the Bush Administration led to the fundamental restructuring of a number of departments and agencies.³³⁶ In addition, the Intelligence Reform and Terrorism Prevention Act made significant changes to the structure of intelligence agencies, including creating a Director of National Intelligence to serve as the head of the intelligence community.³³⁷

Political turnover also leads to agency reorganization and termination. When new administrations enter office, agency termination and reorganization are not uncommon. This can reflect a general desire to economize or restructure government. For example, President Carter ran for office pledging to reduce the number of government agencies to 200.³³⁸ President Reagan sought to shrink government and proposed the abolition of several executive departments. New administrations also naturally reshuffle and reorganize existing agencies in order to accomplish their priorities. President Clinton's successful push for the creation of the Corporation for National and Community Service moved a number of existing volunteer service programs into this new unit along with the newly established AmeriCorps program.

Political turnover can also generate agency reorganization and termination when longstanding opponents of existing programs and agencies assume power and seek to eliminate the agencies and programs the opposite party previously created. For example, when Republicans gained control of the House of Representatives in 1995, the House Budget Committee listed 372 agencies, programs, and authorities for termination.³³⁹ They succeeded in defunding or eliminating the Administrative Conference of the United States, the National Biological Service, the Office of Technology Assessment, and the Interstate Commerce Commission. Mitt Romney, the Republican nominee for the 2012 election, pledged to eliminate the Department of

334. After the Deepwater Horizon oil spill, Interior Secretary Salazar divided the Minerals Management Service into three separate organizations: the Office of Natural Resources Revenue, the Bureau of Safety and Environmental Enforcement, and the Bureau of Ocean Energy Management. Secretary Order No. 3299 (May 19, 2010). Almost a decade later, the Trump Administration is considering reorganizing the Department of the Interior again to improve collaboration across agencies and empower regional officials. *E.g.*, Jennifer A. Dlouhy, *Trump Weighing Combining Agencies Separated After Gulf Spill*, *Sources Say*, BLOOMBERG POL. (June 8, 2017), <https://www.bloomberg.com/news/articles/2017-06-08/trump-said-to-mull-combining-agencies-separated-after-gulf-spill>.

335. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT*, 403 (2004).

336. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). *See also* U.S. Dep't of Homeland Security, *Who Joined DHS*, <https://www.dhs.gov/who-joined-dhs> (last visited May 18, 2018).

337. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

338. MOE REPORT, *supra* note 1, at 15.

339. Guy Gugliotta, *On the List: Survivors and Newcomers, At Agencies Slated for Termination, Officials Remain Hopeful but Mindful of Pressure*, WASH. POST, May 11, 1995, at A6.

Housing and Urban Development and to shrink the Department of Education.³⁴⁰ In 2017, President Trump issued an executive order directing the Director of the Office of Management and Budget to develop a proposal to eliminate unnecessary agencies, components of agencies, and agency programs.³⁴¹ Previous efforts to eliminate large departments or agencies have been difficult, however, since agencies targeted for elimination were created because they garnered the support of majorities at one point in time and continue to receive substantial support from affected interests and often significant numbers of Congress members.

Among the most durable agencies are those multi-member bodies located outside the executive departments with features such as party-balancing limitations and fixed terms. They seem to be able to withstand periods of upheaval and political turnover more effectively than other agencies. There are a number of reasons why this might be the case. More insulated multi-member agencies may produce more moderate policies than executive departments since the median voter on a board hews more closely to the middle of the political spectrum. There are also fewer opportunities to eliminate these agencies since they often bypass Office of Management and Budget review and they historically were often excluded from the President's reorganization authority.³⁴²

While agencies themselves as distinct entities are vulnerable, the programs and laws they implement are significantly more durable. Congress has been reluctant to give up a task or program once it has been created. For example, Congress eliminated the Interstate Commerce Commission in 1995, but some of its functions persisted in the Surface Transportation Board.³⁴³

C. Why Do Federal Agency Designs Differ?

Part of what distinguishes the agencies in the categories described above—EOP, executive departments, administrations, multi-member bodies, government corporations/other—are specific structural features that determine agency responsiveness to elected officials and agency powers. The previous section of this report described general differences across agencies based upon their position in the federal executive establishment. This section examines more closely the structural features that differentiate federal agencies, focusing on features that make agencies more or less responsive to elected officials.

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

340. Ryan Lizza, *Why Romney's No Reagan*, NEW YORKER, April 17, 2012, <http://www.newyorker.com/online/blogs/newsdesk/2012/04/why-romneys-no-reagan.html>.

341. Exec. Order No. 13,781, 82 Fed. Reg. 13,959 (Mar. 16, 2017).

342. Lewis, *Adverse Consequences*, *supra* note 154.

343. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995); Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (2015).

are made separately, subject to the interests and politics of the moment, and not by some grand notion of efficiency or effectiveness.³⁴⁴ As noted by Professor (and former FCC commissioner) Glen Robinson, “[T]he history of important institutions and government programs is often more one of eclectic confusion than of single-minded purpose.”³⁴⁵ Common, but episodic, concerns about the President or Congress having too much power have shaped agency design. So, too, have concerns about due process, representation, and too much concentration of power.

The default structure in the federal government (i.e., what is created if Congress or the President does not specify its structure in more detail) is the hierarchically organized agency located somewhere within an executive department. This type of agency is subject to the control and direction of the President and Congress. At times, Congress and the President have chosen to deviate from this design and insulate agencies from the President and/or Congress. Sometimes one or the other branch will agree to give up some influence over the agency after creation, in exchange for a concession in another part of the authorizing legislation.³⁴⁶ In other cases, one branch, backed by public pressure, will more or less force the other branch to accept the creation of an agency insulated from presidential or congressional interference.³⁴⁷ On occasion, both branches realize the wisdom of limiting their own influence over agencies. For example, with the creation of the Federal Reserve, the President and Congress admitted the necessity of an independent central bank that would manage monetary policy without regard to electoral or political pressures.³⁴⁸ Their belief was that a central bank immune from political pressures to inflate or deflate the currency would lead to better economic policymaking.

1. Insulating Agencies from the President

Beyond the Constitution’s vesting of executive power in the President, the President’s primary means of influence over government agencies are through the nomination and removal of political appointees, and the President’s assertion of control (via the Office of Management and Budget) over agency budget submissions, the regulatory process, and agency legislative proposals and testimony. Presidents also have claimed control over agencies through centralized control over litigation.³⁴⁹ The primary means by which agencies are insulated from presidential or congressional control is to include features in agency statutes that mitigate one or more of these means of

344. Moe, *Bureaucratic Structure*, *supra* note 16.

345. GLEN ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 12 (1991).

346. McCarty, *supra* note 184; McCubbins et al., *supra* note 16.

347. LEWIS, *AGENCY DESIGN*, *supra* note 16; Moe, *Bureaucratic Structure*, *supra* note 16. Additionally, there is some evidence that Congress is less likely to establish agencies with removal protections when the President is popular. Corrigan & Revesz, *supra* note 153, at 644.

348. See Federal Reserve Act, Pub. L. No. 63-43 (1913).

349. Presidents can also influence agencies in less direct ways such as controlling office space, procurement, civil service and personnel rules, and assistance in dealing with other agencies. Moreno, *supra* note 155, at 500; Strauss, *Place of Agencies*, *supra* note 197, at 573.

presidential influence. Of course, presidents themselves are also constrained by their constitutional duty to see the laws faithfully executed and by the content of statutes.

a) Multi-member Bodies

Limiting presidential influence over personnel can be done in a number of ways. First, agencies can be created as multi-member bodies rather than administrations. Governance by multiple members limits the President's influence by increasing the number of actors the President (or Congress) must influence to direct agency policy. The creation of the Federal Reserve in 1913 is a good example. Congressional architects of the new agency purposefully chose a board, reasoning that it would be easier to protect a board from political pressure than a single individual.³⁵⁰ Statutes provide different amounts of detail concerning the functioning of commissions with regard to quorums, vacancies, and dealing with ties.³⁵¹

b) Limitations on Appointments

Congress can also provide for few or many political appointees within an agency or can influence the types of persons the President may select. As discussed above, there is substantial variation across the executive establishment in the depth and penetration of political appointees. Statutory features of an agency, such as limitations on the types of persons eligible to serve, limit White House influence by shrinking the President's pool of potential nominees and decreasing the chances that the President will be able to select exactly the person of his choice for a position. Yet many agency statutes do place limitations on presidential discretion. As an extreme example, consider the following language from a bill in 1916:

Provided further, That of the vacancies created in the Judge Advocate's Department by this act, one such vacancy, not below the rank of Major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have

350. ROBERT EUGENE CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1972); LEWIS, *AGENCY DESIGN*, *supra* note 16.

351. Agencies whose statutes do not include quorum provisions determine such rules in by-laws or by administrative rules and practice. A list of agencies with quorum provisions is included in Table 4. Two recent cases drew national attention to the effect of quorum requirements on agency governance. In *NLRB v. Noel Canning*, the Supreme Court held that the National Labor Relations Board lacked the authority to conduct business due to the fact that three of its five members held invalid appointments, meaning the Board did not have a quorum under statutory law. 134 S. Ct. 2550 (2014). In *UC Health v. National Labor Relations Board*, the D.C. Circuit Court clarified that a Regional Director had authority to certify representation election results when the Board lacked a quorum. 803 F.3d 669 (D.C. Cir. 2015).

served for two years as a Captain in the regular or volunteer army, and shall be proficient in the Spanish language and laws.³⁵²

According to the *New York Times*, there was only one person that fit this description, and he lived in the district of James Hay, the Chairman of the House Committee on Military Affairs, who also served on the conference committee reconciling House and Senate differences on the bill.³⁵³ The statute more or less selects the person for the post for the President. While this example is of dubious constitutionality, it illustrates how limitations on political appointees can limit the President's power.³⁵⁴ Of course, Congress may impose any qualification requirements it prefers on nominees informally through the confirmation process even if the legislature did not write them into law.

Limitations on who can be nominated or named to appointed positions come in a variety of forms. Some of the qualification requirements are quite general. For example, appointments to be the Archivist of the United States are to be made "without regard to political affiliations and solely on the basis of professional qualifications required to perform the duties and responsibilities of the office of the Archivist,"³⁵⁵ and the Solicitor General must be "learned in the law."³⁵⁶ On the other hand, the Director of the Federal Housing Finance Agency must have extensive understanding of financial management, capital markets, mortgage securities, and housing finance and "may not ... have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment."³⁵⁷ The Secretary of Defense must be appointed from civilian life and

352. An Act For making further and more effectual provision for the national defense, and for other purposes. Pub. L. No. 85, 39 Stat. 166, 169 (1916).

353. *Army Bill Joker Aims to Rob Wood of Honor Medal*, N.Y. TIMES, May 19, 1916.

354. At some point, Congress's delineation of qualifications is effectively a selection that would infringe on the President's power to nominate persons to the principal offices of government. In *Myers v. United States*, the majority opinion stated:

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

272 U.S. 52, 128 (1926). In 1976, the Supreme Court invalidated a 1974 statute creating the Federal Election Commission that included a provision specifying that Congress appoint four members of the Commission. *Buckley v. Valeo*, 424 U.S. 1, 141 (1976) (the Commission's members are "Officers of the United States" and must be appointed in a manner consistent with their constitutional position). Congress and the President sometimes disagree about when congressional prescription of qualifications unduly interferes with legitimate executive choice. These disagreements have been articulated in signing statements by Presidents George H.W. Bush, Bill Clinton, and George W. Bush. HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS (2010) [hereinafter HOGUE, STATUTORY QUALIFICATIONS].

355. 44 U.S.C. § 2103(a) (2017).

356. 28 U.S.C. § 505 (2017).

357. 12 U.S.C. § 4512(b)(1), (g)(3) (2017).

be at least seven years removed from active duty.³⁵⁸ However, in 2017, Congress waived that restriction to allow retired General James Mattis to become Secretary after retiring in 2013.³⁵⁹ Specifically, Congress passed a law that stipulated:

[T]he first person appointed, by and with the advice and consent of the Senate, as Secretary of Defense after the date of the enactment of this Act may be a person who is, on the date of appointment, within seven years after relief, but not within three years after relief, from active duty as a commissioned officer of a regular component of the armed forces.³⁶⁰

The best-known limitation is the requirement for party-balancing on some multi-member bodies. Statutes creating these agencies state that “no more than x members of the commission can be from one political party.”³⁶¹ Other limitations require specific backgrounds, expertise, or demographic characteristics. Table 7 includes a list of agencies whose authorizing statutes include explicit provisions detailing the background or qualifications of agency heads.³⁶²

Few of these qualifications are specific enough to limit substantially the President’s discretion. For example, in the aftermath of Hurricane Katrina, Congress amended the qualifications requirements for the Federal Emergency Management Agency (FEMA) Administrator to read: “The Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emer-

358. 10 U.S.C. § 113(a) (2012).

359. Pub. L. No. 115-12, 131 Stat. 6 (2017) (to provide for an exception to a limitation against appointment of persons as Secretary of Defense within seven years of relief from active duty as a regular commissioned officer of the Armed Forces). See, e.g., Jeremy Herb & Connor O’Brien, *Mattis Waiver Narrowly Passes House Panel After Full Senate Approval*, POLITICO, Jan. 12, 2017, <https://www.politico.com/story/2017/01/james-mattis-defense-secretary-waiver-senate-233555>. For further discussion of exceptions to statutory qualifications and limitations, see HOGUE, STATUTORY QUALIFICATIONS, *supra* note 354, at 9-11.

360. Pub. L. No. 115-12, § 1(a), 131 Stat. 6 (2017).

361. See Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941 (2015) (discussing the history and constitutionality of party-balancing requirements). On at least one occasion, Congress has attached party-balancing requirements to non-commissions. In 1968, Congress created the Law Enforcement Assistance Administration and stipulated in the legislation that the agency would be headed by an administrator and two associate administrators, but that no more than two of these three officials could be from the same political party. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

362. In addition, Congress often places limitations on other key officials within agencies. For example, the total number of positions in the Social Security Administration which are held by noncareer appointees in the Senior Executive Service or have been determined by the President or the Office of Personnel Management to be excepted from the competitive service may not exceed the equivalent of 20 full-time positions. 42 U.S.C. § 904(c) (2017). One relatively common restriction on the appointments of officials who are not agency heads or board members is to attach expertise requirements to a position. For example, the staff of the Office of Pediatric Therapeutics in the Food and Drug Administration must include one individual with expertise concerning the ethics of pediatric research. 21 U.S.C. § 393a(c) (2017). There are 47 agencies and bureaus with these types of expertise qualifications.

gency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.³⁶³ Even by this standard, Michael Brown, the FEMA Administrator at the helm of FEMA at the time of Katrina, arguably would have qualified. In the case of party-balancing requirements, presidents have been able to find members of the opposite party or independents who share the President’s ideology to serve on commissions.³⁶⁴

Table 7. Statutory Limitations on the Types of Persons Who Can Be Nominated Agency Heads or Board Members

(1) Citizen of the United States	(2) Civilian	(3) Geographic	(4) Demographic	(5) Expertise			(6) Conflict of Interest	(7) Congress Input	(8) Party Balancing		
AMTRAK	ARMY	AMTRAK	CNCS	ACUS	FHFA	NTSB	AMTRAK	NAVY	CPB	AMTRAK	HSTSV
CEN	DNFSB	ARC	NIIG	AMTRAK	FMCSA	ODNI	ARMY	NCCB	EAC	CFTC	JMMFF
CFPB	DOD	CPB	NGPRA	ARMY	FMSHRC	OPIC	BVA	NCUA	FRTIB	CNCS	LSC
CPB	DODATL	DRA	WB	BLM	FRA	OSC	CFPB	NIBS	MCC	CPB	MSPB
DNFSB	DODEA	FCIC		BVA	FRTIB	OSHR	CPSC	NIGC	MUSUF	CPSC	MUSUF
FAA	DODPR	FED		CEA	FSOC	PCLOB	DNFSB	OCC	PCLOB	DNFSB	MWAA
FCA	FAA	MWAA		CEN	HSTSF	PHMSA	DOD	ODNI		EAC	NARAB
FCC	IAF	NIBS		CEQ	IAF	PRC	EXIM	OSMR		EEOC	NCUA
FCSIC	NAVY	NGPRA		CFTC	ICE	PRFOMB	FAA	PRC		EXIM	NIGC
FDIC	SBA	PRFOMB		CIS	IMLS	RRB	FAMC	PRFOMB		FAMC	NMB
FHFA	USADF	SIPC		CNCS	IRS	SBA	FCA	SEC		FCA	NRC
NRC	USAF	TVA		CPB	IRSOB	SIPC	FCC	SIPC		FCC	NTSB
NTSB				COSC	JMMFF	SJI	FCSIC	STB		FCSIC	PCLOB
TSA				CSHIN	LSC	SSAB	FDIC	TRS		FDIC	PRC
TVA				DHA	MCC	STB	FEC	TSR		FEC	SEC
USPTO				DNFSB	MMC	TRMC	FED	USAF		FERC	SJI
				FOFATL	MSPB	TSR	FMC	USIP		FHITF	SSAB
				EAC	MUSUF	TVA	MMC	USPS		FLRA	STB
				EXIM	NARAB	USADF	MSPB	USPTO		FMC	USADF
				FAA	NAVY	USAF	MWAA	USTR		FODSITF	USIP
				FAMC	NCCB	USCG				FMSITF	USITC
				FCA	NCUA	USFWS				FTC	USPS
				FCIC	NGPRA	USIP					
				FCSIC	NIBS	USITC					
				FDIC	NIFA	USPS					
				FEC	NIGC	USPTO					
				FED	NNSA	VBA					
				FEMA	NPS	VHA					

Note: (1) Statute mandates that board members or commissioners of the agency head must be citizens of the United States. (2) Statute mandates that board members or commissioners or the agency head must be civilians. (3) Statute places a geographic limitation on the nomination/selection of board members or commissioners of the agency head. (4) Statute places a demographic limitation on the nomination/selection of board members or commissioners of the agency head. For example, some statutes require the President to appoint members so that a board will be diverse according to race, ethnicity, age, gender, or other characteristics “to the maximum extent possible” or “as nearly as practicable.” (5) Statute places an expertise or experience limitation on the nomination/selection of members or commissioners of the agency head. (6) Statute places a conflict of interest limitation on the nomination/selection of members. (7) Statute provides some mechanism for congressional input in the nomination process aside from confirmation. For example, a statute may require that a person be “appointed by the President after taking into consideration the recommendation made by the Speaker of the House.” (8) If the agency is a commission or has a board of directors, the statute limits the number of members who may serve from the same party.

363. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 503(c)(2) (A)-(B), 120 Stat. 1355, 1397 (2006) (codified at 6 U.S.C. § 313).

364. See, e.g., STAFF OF THE S. COMM. ON COMMERCE, 94TH CONG. APPOINTMENTS TO THE REGULATORY AGENCIES: THE FEDERAL COMMUNICATIONS COMMISSION AND THE FEDERAL TRADE COMMISSION (1949-1974) 357 (Comm. Print 1976); Lawrence W. Lichty, *Members of the Federal Radio Commission and the Federal Communications Commission 1927-1961*, 6 J. BROADCASTING 23, 25-26 (1961); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L. J. 252, 253-54 (1988); Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J. THEORETICAL POL. 91, 95 (2000). But see Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (finding that partisan balance requirements have an effect on the ideological composition of multi-member agencies).

Among the most binding of restrictions on appointments are cases where the statute either specifies that specific government officials serve on the board or that other actors such as a state governor may select a portion of the members. For example, the board of the Millennium Challenge Corporation (MCC) includes the Secretary of State, Secretary of the Treasury, U.S. Trade Representative, Administrator of the U.S. Agency for International Development, the CEO of the MCC, and four members selected by the President and confirmed by the Senate from lists provided by congressional leaders.³⁶⁵ The Mississippi River Commission is governed by a board that includes three persons from the Army Corps of Engineers, one from the National Oceanic and Atmospheric Administration, and three other persons, two of whom must be civil engineers.³⁶⁶ Mixed ownership corporations have persons selected by investors or shareholders, and presidential appointees are a minority of board members. Table 8 includes a list of agencies with these types of restrictions.

365. 22 U.S.C. § 7703(c)(3)(A) (2017).

366. 33 U.S.C. § 642 (2017).

Table 8. Boards or Commissions Whose Membership the President Does Not Fully Select

Board Includes Specific Government Officials		Other Actors Get to Select Some Board Members	
ARC	Governor of each participating state	BGSEEF	Congressional selection of some members
DRA	Governor of each participating state	FAMC	Holders of common stock select some members
FCIC	Under Secretary of Agriculture responsible for federal crop insurance program; an additional Under Secretary of Agriculture designated by the Secretary of Agriculture; Chief Economist of the Department of Agriculture	FCIC	Secretary of Agriculture appoints six members
FDIC	Comptroller of the Currency, Director of CFPB	MWAA	Some members appointed by the Governors of Maryland and Virginia, some members appointed by the Mayor of the District of Columbia
FSISC	Members of the FCA	NCCB	Some members elected by stockholders
FSOC	Chairmen of the CFTC, FED, FDIC, NCUA, SEC; Comptroller of the Currency; Director of the CFPB, FHFA; Secretary of the Treasury	NIGC	Secretary of Interior appoints two associate members
HSTSF	Two members of the House (appointed by the Speaker); two members of the judiciary; two members of the Senate (appointed by the President of the Senate)	SSAB	Two members appointed by the President pro tempore of the Senate; two members appointed by the Speaker of the House
IRSOB	Commissioner of the IRS; Secretary of the Treasury or designee	USPS	Board of Governors of the Postal Service appoint Postmaster General and Deputy Postmaster General (both voting members of the Board)
JMMFF	Two members of the House; two members of the Senate		
MCC	Administrator of USAID; Secretaries of State and the Treasury		
NGPRA	Governor of each participating state		
OPIC	Administrator of USAID; United States Trade Representative or designee		
PBGC	Secretaries of Commerce, Labor, and the Treasury		
SIPC	Officers and employees of the Department of the Treasury and the Federal Reserve Board (appointed by the Secretary of the Treasury and the Fed respectively)		
USIP	President of National Defense University or designee; Secretaries of Defense and State or designees		

Note: Does not include ex officio members.

While originally contemplated as a mechanism to ensure continued governance, the President's ability to use his recess appointment power to unilaterally staff positions that usually require consent of the Senate has been used to circumvent qualification requirements in cases where a nominee's qualifications have been called into question.³⁶⁷ Indeed, one study estimates that, on average, presidents have made 12 percent of all appointments to major independent regulatory commissions using recess appointments.³⁶⁸ The President's ability to fill vacancies during Senate recess received renewed attention in the Supreme Court's decision in *National Labor Relations Board v. Noel Canning*.³⁶⁹ That case involved a claim that three of the NLRB's five members had been invalidly appointed, leaving the Board without a quorum to conduct business. The Court held that, *inter alia*, because the members in question were appointed during a recess too brief to fall within the scope of the Constitution's Recess Appointments Clause, the President lacked the authority to make those appointments.³⁷⁰ The decision has received praise by some, who claimed that it recognized the power of the legislature to check the executive branch, and others have

367. The President has the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST., Art. II § 2, cl. 3. Increasingly, this power is seen as a type of unilateral action that can advance the President's political and policy agenda. *E.g.*, LOUIS FISHER, CONG. RESEARCH SERV., RL31112, RECESS APPOINTMENTS OF FEDERAL JUDGES (2001); Ryan C. Black, Anthony J. Madonna, Ryan J. Owens, & Michael S. Lynch, *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, 60 POL. RES. Q. 645 (2007). Additionally, there is some evidence that programs administered by those recess appointees are associated with lower performance scores than those programs administered by non-recess appointments and careerists. Susan M. Miller, *The Relationship Between Short-Term Political Appointments and Bureaucratic Performance: The Case of Recess Appointments in the United States*, 25 J. PUB. ADMIN. RES. & THEORY 777 (2014).

368. Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, PRESIDENTIAL STUD. Q. 670, 679 (2006). However, there is evidence that recess appointments are on the decline. Ian Ostrander, *Powering Down the Presidency: The Rise and Fall of Recess Appointments*, 45 PRESIDENTIAL STUD. Q. 558, 562 (2015).

369. 134 S. Ct. 2550 (2014). Attention to the Recess Appointments Clause also arose due to the Obama Administration's use of the Clause to appoint Richard Cordray to serve as the Director of the Consumer Financial Protection Bureau. *E.g.*, Amelia Frenkel, *Defining Recess Appointments Clause "Vacancies"*, 88 N.Y.U. L. REV. 729 (2013); Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012; Edwin Meese III & Todd Gaziano, *Obama's Abuse of Power*, WASH. POST, Jan 6, 2012.

370. According to the Court, the recess of the Senate contemplated by the Clause includes any recess of substantial length. If the Senate recess is so short that it does not require the consent of the House or lasts less than 10 days, the recess is too short to trigger the Clause. 134 S. Ct. at 2567. Additionally, the Court held that the Clause applies to all vacancies that initially occur before the recess and those that occur during the recess and that, for the purposes of recess appointments, the Senate is in session when it retains the capacity to transact Senate business (including *pro forma* sessions). *Id.* at 2567, 2574.

criticized the decision, predicting a larger number of vacancies due the increased use of confirmation delays by the Senate to extract policy concessions.³⁷¹

c) Protections Against Removal

Arguably the most important limitations on the President's personnel powers are restrictions on the President's ability to remove agency officials (Table 9).³⁷² As discussed above, many statutes provide agency officials with fixed-term appointments and indicate that the President cannot remove the official except "for-cause."³⁷³ The act creating the ICC, for example, prohibited removal except for "inefficiency, neglect of duty, or malfeasance in office."³⁷⁴ Term lengths vary from as short as one year to as long as 14 years (members of the Board of Governors of the Federal Reserve).³⁷⁵ In some multi-member agencies, the terms of members are staggered so that positions do not all come open at once, preventing a President from dramatically changing commission policy quickly through appointment. Provisions creating staggered terms include language that fixes the original terms of board or commission members so that nominations in future years will be staggered. Often one member can be nominated for term ending after one year, another for a term ending after two years, etc. All subsequent nominees to those positions can serve full terms.

371. E.g., Robert Barnes, *Supreme Court Rebukes Obama on Recess Appointments*, WASH. POST., June 26, 2014; Adam Liptak, *Supreme Court Rebukes Obama on Right of Appointment*, N.Y. TIMES, June 26, 2014; Norman J. Ornstein, *Disarming the White House*, N.Y. TIMES, Jan. 21, 2014. See also Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L. J. 1607, 1625-26 (2015) (explaining that delays in staffing agencies may be the result of the expansion of senators' hold on nominees, pro forma sessions, and the technique of not attending hearings in order to deprive the commission of the necessary quorum for business).

372. In some cases, Congress has vested authority for removal in themselves or other executive officials. For example, the statute creating the Tennessee Valley Authority provides that members of the board can be "removed from office at any time by concurrent resolution of the Senate and House of Representatives." This provision has not been challenged, but is of dubious constitutionality. Tennessee Valley Authority Act of 1933, 48 Stat. 58 (1933) (codified as amended at 16 U.S.C. § 831). Board members of the Legal Services Corporation may be removed "by a vote of seven members" for certain reasons. 42 U.S.C. § 299c(e) (2017).

373. More generally, throughout the nation's history, Congress has attempted to reserve the right to weigh in on removals of Senate-confirmed appointees. The specific language communicating "for-cause" protection varies. Some statutes prohibit removal except for "good cause" or "cause." Others prohibit removal except for cases of "inefficiency, neglect of duty, or malfeasance in office." Barnett, *supra* note 158, at 1372, 1383.

374. An Act to Regulate Commerce, Pub. L. No. 49-104, § 11, 24 Stat. 379 (1887) (renamed the Interstate Commerce Act in 1920, 41 Stat. 456, 457 (1920)). Interestingly, some scholars argue that this provision actually made it easier for the President to remove a commissioner under the laws in place at the time the Act was enacted. While The Tenure of Office Act of 1867 prohibited the President from removing Senate-confirmed officials without Senate approval, the 1887 Act to Regulate Commerce allowed the President removal power without Senate involvement. See *id.*, March 2, 1867, c. 154, 14 Stat. 431 (1867). SEIDMAN, *supra* note 16, at 184. In 1926, the Supreme Court held that the provision of an 1876 law that denied the president the power of removal of first-class postmasters was unconstitutional. *Myers v. United States*, 272 U.S. 52 (1926).

375. The head of the Government Accountability Office, an agency in the legislative branch, serves a term of 15 years. 31 U.S.C. § 703(b) (2017).

Table 9. Statutory Limitations on the President’s Removal Power

(1) Explicit “For-cause” Protections		(2) Explicit Provisions for Staggered Terms		(3) Provisions for Continuation of Service	
BVA	NCCB	BGSEEF	LSC	ACUS	IAF
CFPB	NIGC	CFTC	MMC	AMTRAK	JMMFF
CPSC	NLRB	CPSC	MUSUF	BBG	LSC
CSHIB	NMB	DNFSB	MWAA	BGSEEF	MMC
FCSC	NRC	EAC	NARAB	BVA	MSPB
FERC	NTSB	EXIM	NCUA	CEN	MUSUF
FHFA	OSC	FAMC	NIBS	CFPB	NARAB
FLRA	OSHRC	FCA	NIGC	CFTC	NCCB
FMC	PRC	FCIC	NLRB	CNCS	NCUA
FMSHRC	PRFOMB	FCSC	NMB	CPB	NEA
FTC	SJI	FCSIC	NRC	CPSC	NEH
LSC	SSAB	FEC	OPIC	DNFSB	NIBS
MSPB	STB	FED	OSHRC	EAC	NIGC
MWAA	USIP	FERC	SEC	EEOC	NTSB
NARAB	USPS	FMSHRC	SIPC	EXIM	OPIC
		FRTIB	SJI	FAMC	PCLOB
		FTC	SSAB	FCC	PRC
		HSTSF	TVA	FCSC	PRFOMB
		IAF	USADF	FDIC	RRB
		IRSOB	USIP	FEC	SEC
		JMMFF	USPS	FED	SIPC
				FERC	SJI
				FHFA	SSAB
				FHITF	STB
				FLRA	TVA
				FMC	USADF
				FODSITF	USIP
				FRTIB	USITC
				FSMIF	USPC
				FTC	USPS

Note: (1) Statute states that members of the commission or board or the agency head may only be removed for “neglect of duty,” “malfeasance in office,” “inefficiency,” or similar language. (2) Some statutes for commissions have provisions specifying the initial original term lengths so that terms will be staggered. (3) Statute provides that, in the case of a fixed term, when such person’s term has expired, he or she may serve until a successor has been appointed and qualified or some other time.

The Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* highlighted the issue of fixed terms for political appointees and for-cause protections.³⁷⁶ In that case, the structure of the Public Company Accounting Oversight Board (PCAOB) was challenged as an unconstitutional restriction on the President's removal power because the PCAOB's members could be removed only for-cause by the members of the Securities and Exchange Commission, who themselves were removable only for-cause.³⁷⁷ The Court's ruling made clear that Congress cannot create two such levels of independence within the same agency.³⁷⁸ However, as noted by Justice Breyer in his dissent, the Court's ruling was ambiguous regarding the constitutionality of officials such as administrative law judges and high ranking career executives within agencies whose leadership is protected by for-cause protections.³⁷⁹ Table 10 includes a list of such agencies and positions.

376. 561 U.S. 477 (2010).

377. *Id.*

378. *Id.* at 491. See Rao, *Removal*, *supra* note 175, at 1244-47 (discussing the constitutionality of removal restrictions on inferior officers).

379. *Free Enter. Fund*, 561 U.S. at 540-41.

Table 10. Agencies with Explicit Double “For-Cause” Protections

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

Source: *Free Enter. Fund*, 561 U.S. at 3184-215 (Appendix A) (Breyer, J., dissenting); Office of Personnel Management, Federal Administrative Law Judges by agency and level, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Feb. 5, 2018). Agencies in the second column are Foreign Service Labor Relations Board (FSLRB), Civilian Board of Contract Appeals (CBCA), Office of the Chief Actuary (OCA), and Inspector General (IG). These agencies do not fall within the *Sourcebook’s* definition of agency or politically important subunit.

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

^b Refers to the Performance-Based Organization (PBO) for delivery of student financial assistance, a “discrete management unit” within the Department of Education. See 20 U.S.C. § 1018(a) (2017).

^c So listed in Appendix A to Justice Breyer’s dissent, see *Free Enter. Fund*, 561 U.S. at 3184-215 (Appendix A) (Breyer, J., dissenting), though the U. S. Commission on Civil Rights (USCCR) has no political appointees requiring Senate confirmation.

Table 11. Statutory Chair Selection and Retention Rules for Multi-Member Bodies

Selection				Retention	
(1) Chair selected by President with Senate confirmation	(2) Chair selected by President without Senate confirmation	(3) Chair elected by members	(4) Chair designated as official who serves in another position in the administration	(5) Fixed term for chair	(6) Statute explicitly states that chair serves at pleasure of President
ARC ^a BVA CEA CFTC CPSC CSHIB DRA ^a EEOC EXIM FCSC FDIC FED MSPB NGPRA ^a NIGC NTSB PCLOB	CEQ NDFSB FAMC FCA FCC FERC FLRA FMC FMSHRC FRTIB FTC IAF MMC NCUA NLRB NRC OPIC OSHR PRC RRB SIPC SSAB STB USADF USITC USPC	AMTRAK ARC ^a CNCS CPB DRA ^a EAC ^b FCIC ^b FEC IRSOB JMMFF LSC MWAA NARAB NCCB NGPRA ^a NIBS NMB ^b PRFOMB ^b SJI TVA ^b USIP USPS	CCC FHITF FODSITF FSMITF FSOC MCC PBGC	ARC BVA EAC EXIM FDIC FED MSPB NGPRA NIBS NIGC NMB NTSB PCLOB SJI SSAB USIP USITC	CFTC IRSOB NRC PRC SSAB

Note: (1) Statute specifies that the President, with advice and consent of Senate, appoints the agency head and the agency head is not an official from another agency. The Appalachian Regional Commission and Delta Regional Authority have co-chairs, one appointed by the President and confirmed by the Senate and one elected by the state members of the board. (2) Statute specifies that President designates the agency head but does not provide for Senate advice and consent. (3) Statute provides that the head of the agency is elected from among members or commissioners of the agency. (4) Statute specifies that the head of the agency is an official who also serves in a position in the administration that is outside of the agency. For example, the Secretary of the Treasury is the Managing Trustee of the Federal Supplementary Medication Insurance Trust Fund Board. (5) Statute specifies a term of office for the chair of the agency. (6) Statute specifies that the chair serves at the pleasure of the President, may be replaced at any time by the President, or other similar language. If a commission is not listed, its statute did not include the provisions above for the selection or removal of chairs.

^a Agency has co-chairs that are selected in different ways.

^b Agency statute specifies the board or commission shall do something other than “elect,” such as “designate” or “select.” These agencies are: National Mediation Board (“designate”); Tennessee Valley Authority (“select”); and U.S. Election Assistance Commission (“select”).

Statutes specify different rules regarding the selection of commission chairs and whether fixed-term political appointees may stay in their positions after their terms have expired. In some agencies, the President is empowered to select the chair, either with or without Senate confirmation. In other agencies, the chair is designated by the board itself (often by election) or designated by statute to be a specific government

official. Once a chair is selected, the rules for removal are the subject of some debate.³⁸⁰ In some cases, the statute provides that the chair serves for a fixed term, although only two agencies' statutes explicitly provide for-cause provisions for the chair.³⁸¹ In a handful of other agencies, the statute explicitly provides that the chair may be removed at the President's discretion. Table 11 lists the different agencies whose statutes have different rules for chair selection and removal.

In addition to specifying fixed terms, the statutes creating many agencies provide rules concerning what to do in the case of a vacancy. In some agencies, political appointees whose terms have expired may continue to serve until a successor has been appointed and qualified.³⁸² For example, the statute governing the Social Security Administration states: "In any case in which a successor does not take office at the end of a Commissioner's term of office, such Commissioner may continue in office until the entry upon office of such a successor."³⁸³ Similarly, while some statutes are silent about who assumes responsibility in the case of a vacancy, other statutes stipulate how vacancies are to be filled, either by giving discretion to the agency head or identifying a specific official to fill the position in the event of a vacancy.³⁸⁴ In the Department of Labor, the Deputy Secretary "shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate."³⁸⁵ In the case

380. Statutory provisions governing continuation of service generally refer only to commissioners or members, and most say "all" commissioners or members. This suggests that chairs are included in continuation provisions. The FDIC's authorizing statute explicitly provides for chairs to continue serving until a successor has been appointed.

381. The statute for the Board of Veterans Appeals provides that the Chairman may only be removed for misconduct, inefficiency, neglect of duty, or engaging in the practice of law, or for physical or mental disability which prevents proper execution of the Chairman's duties. Such removal may only be made after notice and opportunity for hearing. 38 U.S.C. § 7101(b)(2) (2017). The Chemical Safety and Hazard Investigation Board's statute states that the Chairperson, like every other member of the Board, may be removed for inefficiency, neglect of duty, or malfeasance in office. 42 U.S.C. § 7412(f) (6)(B) (2017).

382. See Table 9 for a list of boards and commissions with continuation provisions.

383. 42 U.S.C. § 902(a)(3) (2017). Some statutes put a more definite limit on the continuation of service. For example, one provision in the Federal Communications Commission's underlying statute states: "Commissioners shall . . . [serve] until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." 47 U.S.C. § 154(c) (2017).

384. Sixty-four agencies in our dataset have statutes that specify rules for acting service. For more information regarding vacancies, see, for example, Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009*, 39 *PRESIDENTIAL STUD. Q.* 432 (2009); Matthew Dull, Patrick S. Roberts, Michael S. Keeney & San Ok Choi, *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees, 1989-2009*, 72 *PUB. ADMIN. R.* 902; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 *S. CAL. L. REV.* 913 (2008); Anne Joseph O'Connell, *Staffing Federal Agencies: Lessons from 1981-2016*, Brookings, <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016/>.

385. 29 U.S.C. § 552 (2017).

where the statute is silent, agency vacancies are governed by general government-wide laws such as the Vacancies Act³⁸⁶ and, in some cases, agency succession rules.

The application of the Vacancies Act in the presence of other statutory agency succession rules came into question in 2017 when the Consumer Financial Protection Bureau's (CFPB) Director Richard Cordray resigned. Before resigning, Cordray named Leandra English, then Cordray's chief of staff, as Deputy Director with the understanding that the CFPB's authorizing statute stipulated that the Deputy Director serves as the Acting Director in the absence or unavailability of the Director.³⁸⁷ Yet upon Cordray's resignation, President Trump, citing the Vacancies Act, installed Mick Mulvaney, Director of the Office of Management and Budget, as Acting Director of the CFPB. In a recent decision on the issue, the U. S. District Court for the District of Columbia found that, in part because there is no statutory language in the CFPB's authorizing statute that expressly makes the Vacancies Act inapplicable, President Trump was justified in appointing Mulvaney.³⁸⁸

d) OMB Review of Budgets, Regulations, and Communications

Another device modern presidents use to direct administrative agencies is centralized review of budgets, regulatory activity, and agency communications with Congress. Congress has delegated, and presidents have assumed, substantial control over the formation of agency budgets. The Budget and Accounting Act of 1921 first gave the President responsibility for collecting agency estimates and formulating a unified national budget.³⁸⁹ Presidents use this power to control agencies through budget proposals to Congress. While Congress is responsible for enacting appropriations, the President's proposals carry weight because of presidential knowledge of agency programs and activities and the President's veto power, which can be used as leverage in negotiating over contents of appropriations bills. Additionally, the President's responsibility for formulating a national budget gives him further control over agencies, as OMB works with agencies throughout the budget process to make decisions about how to prioritize resources and to oversee budget execution.³⁹⁰

In 1981, President Reagan issued Executive Order 12,291, which established centralized OMB review of proposed agency rules.³⁹¹ Agencies are required to subject proposed rules to cost-benefit analysis and to submit rules to OMB for review before

386. Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 5 U.S.C. §§ 3345-3349d (2017)).

387. 12 U.S.C. § 5491(b)(5)(B) (2017).

388. *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018). The court also rejected the argument that the CFPB is an independent agency contemplated to be exempt from the Vacancies Act.

389. Pub. L. No. 67-13, 42 Stat. 20 (1921).

390. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-11 (2017). Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L. J. 2182 (2016) (providing a comprehensive overview of the President's use of OMB budget coordination to exert political control over agencies)

391. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981); 3 C.F.R., 1981 Comp., pt. 127.

promulgation.³⁹² While this executive order has been amended to limit this requirement to significant regulations, all subsequent presidents have maintained review.³⁹³

Finally, OMB Circular A-19 requires agencies to submit proposed legislation and their views on legislation to OMB for review prior to communicating these views to Congress.³⁹⁴ This review process serves to help the White House develop the President's legislative program and furthers coordination across the executive branch.³⁹⁵

Table 12 lists the agencies that are able to bypass OMB review of budget submissions, regulatory actions, and communications with Congress. Budgetary bypass comes in two forms.³⁹⁶ In one form, the President must submit to Congress the agency's budget request without revision along with the President's own proposals. In the other form, the agency submits its budget request directly to Congress without

392. In 1985, President Reagan issued Executive Order 12,498, which required each agency to submit a regulatory plan to OMB for review each year. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985). In 2012, President Obama issued Executive Order 13,609, which requires agencies to include in their regulatory plans a summary of their international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations. Exec. Order 13,609, 77 Fed. Reg. 26,413 (May 4, 2012).

393. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (establishing additional policies and procedures for regulatory planning and review). In January 2007, President Bush issued Executive Order 13,422, which made five changes to the regulatory review process. 72 Fed. Reg. 2763 (Jan. 23, 2007). These changes imposed several requirements on agencies (i.e., identifying a market failure or problem that justifies the regulation, identifying an appointee who will serve as regulatory policy officer in the agency to control rulemaking, and providing estimates of the cumulative costs and benefits of rules they expect to promulgate in each calendar year), expanded OIRA review of guidance documents, and urged agencies to consider more formal rulemaking procedures. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13,422 (Feb. 5, 2007). President Obama revoked this executive order on January 30, 2009. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009). In 2017, President Trump issued Executive Order 13,771, which (a) specified that, for fiscal year 2017, whenever an executive department or agency proposes or promulgates a new regulation, it must identify at least two existing regulations to be repealed and (b) beginning with fiscal year 2018, required additional regulatory cost and saving submissions to be included in regulatory plans required under Executive Order 12,866. Exec. Order No. 13,771, 82 Fed. Reg. 9,889 (Jan. 30, 2017). It is worth noting that, historically, agency participation in the regulatory planning process has been sporadic at best. Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733 (2016) (finding that agencies only report about 28 percent of their proposed rules in the Unified Agenda).

394. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19 (1979); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, on Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf>. Presidents also possess significant residual authority to instruct agencies to fill in details omitted in statutes. This authority has existed from the earliest Congresses. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1 (Spring 1994).

395. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19 § 6(b) (1979). There is some question as to the strength of this control mechanism. See Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 488-89 (2017) (suggesting that the expertise of agencies exceeds that of OMB staff involved in legislative review and that sustained review is usually limited to politically sensitive legislation).

396. However, even if an agency is exempt from OMB budget review, the agency is still required to submit information for inclusion in budget documents (which OMB incorporates without revision). OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-11 § 25.1 (2017).

OMB review. An agency's ability to bypass OMB review of budgets, regulations, and communications is determined partly in statute, but also importantly by informal agreement, with certain agencies claiming exceptions based upon their structure and legal status.

Table 12. Agencies Excluded from OMB Review of Budgets, Rulemaking, and Legislation

Budget	Rulemaking	Legislation and Testimony		
(1) Statute exempts agency from submitting its budget to OMB prior to transmittal to Congress	(2) Agency exempted from submitting proposed and final rules to OIRA	(3) Statute exempts agency from submitting its communications to OMB for coordination & clearance prior to transmittal to Congress	(4) The agency asserts "informal" legislative bypass authority without any explicit statutory authority even though OMB Circular A-19 covers the agency	(5) Agency is not a department, agency, or instrumentality of the United States Government
CFPB CFTC CPSC CSHIB FAA FCA FEC FED FERC FRTIB IRS MSPB NTSB RRB SEC SSAB STB USITC USPS	CFPB CFTC CPSC FCC FDIC FEC FED FERC FHFA FMC FTC NLRB NRC OCC OSHRC PRC SEC	CFPB CFTC CPSC CSHIB DNFSB FAA FCC FDIC FEC FED FERC FHFA FRTIB MSPB NCUA NTSB OCC OSC RRC SEC STB	FCA FMC FTC MMC NRC OSHRC STB USIP USITC USPS	AMTRAK CPB LSC NARAB NIBS PRFOMB SIPC SJI TVA

Note: Table includes list of agencies that are generally recognized either by statute, executive order, or longstanding practice as excluded from centralized budgetary, regulatory, and legislative review by OMB.

OMB Budget Review: (1) Statutory law exempts agency from submitting its budget to OMB prior to transmittal to Congress. See generally Appendix of statutory provisions (on file with authors and the Administrative Conference); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11 (2017); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf>.

OMB Rule Review: (2) The agency is exempted from submitting all regulatory actions to the administrator of the Office of Information and Regulatory Affairs (OIRA). See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); 44 U.S.C. § 3502 (2017) (definition of agency and independent regulatory agency recognized by Executive Order 12,866).

OMB Legislation and Communications Review: (3) Statutory law exempts the agency from submitting its congressional communications to OMB for coordination and clearance prior to transmittal to Congress. The Office of Advocacy within the SBA is exempted, but other parts of the agency are not. (4) The agency asserts "informal" legislative bypass authority without any explicit authority, statutory or otherwise, even though OMB Circular A-19 does cover the agency. See generally 12 U.S.C. § 250 (2017); Appendix of statutory provisions (on file with author and the Administrative Conference); OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-19 (1979); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf>. Note that Breger and Edles suggest that the NRC does not acknowledge legislative clearance authority by OMB. However, because the authors do not provide a source citation, and OMB Circular No. A-19 and the OMB memo do not suggest bypass authority, the NRC was not considered for coding purposes to have an exemption from OMB legislation and communications review (merely an informal bypass). See Breger and Edles, *supra* note 9.

Not United States Instrumentality: (5) Some agency statutes specify that the agency is not a department, agency, or instrumentality of the United States Government. Strictly speaking, statutory law and executive guidance regarding OMB review applies exclusively to agencies or instrumentalities of the United States Government. Thus, these agencies may be exempt from OMB review. See Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf> (suggesting these agencies have "informal" bypasses).

e) Control Over Agency Litigation

Another source of centralized presidential control over the executive establishment is the President's control over agency litigation.³⁹⁷ Congress has granted control of federal litigation to the Department of Justice in order to promote coherence and consistency in the enforcement of federal law. The relevant statute stipulates that: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."³⁹⁸ However, some agencies are authorized to litigate on their own. For example, some agency statutes include language such as the agency "shall have the power to sue and be sued, complain and defend, in its. . . name and through its own counsel, in any State, Federal, or other court"³⁹⁹ or the agency "may act in its own name and through its own attorneys. . . in any action, suit, or proceeding to which" the agency is a party.⁴⁰⁰

The extent of litigating authority varies by level of court and by issue; the extent of control over specific issues and courts varies across and even within agencies. Some agencies have authority to litigate on all agency issues and some have authority to litigate on only some issues. Thirty agency statutes contain language granting at least

397. Devins, *Political Will*, *supra* note 158; Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080 (2009); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 J. CONST. L. 558 (2003).

398. 28 U.S.C. § 516 (2017). In addition, the law provides that:

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

28 U.S.C. § 518(a) (2017).

399. 15 U.S.C. § 78ccc(b)(1) (2017) (granting the Securities Investor Protection Corporation independent litigating authority).

400. For example, the statute authorizing the Board of Governors of the Federal Reserve empowers the Board to "act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party and which involves the Board's regulation or supervision of any bank, bank holding company (as defined in section 1841 of this title), or other entity, or the administration of its operations." 12 U.S.C. § 248(p) (2017).

some independent litigating authority.⁴⁰¹ Whether or not Congress has granted an agency litigating authority, and how much, is an important determinant of agency insulation since it determines how much influence the White House has to determine agency actions, statements, and policies and whether these are consistent with those of the President.⁴⁰²

2. *Insulating Agencies from Congress*

Congress exerts influence on the bureaucracy through its power to create, reorganize, and eliminate programs and agencies. Congress determines how inferior officers will be appointed, and the Senate confirms nominees.⁴⁰³ Article I of the Constitution provides Congress the power to give and withhold appropriations to set national priorities and to compel agency action.⁴⁰⁴ Congress has other means of agency influence as well, including hearings and oversight.⁴⁰⁵ The fear of public exposure and the

401. Agencies whose current authorizing statutes contain provisions concerning independent litigating authority include: Board of Governors of the Federal Reserve System; Commodity Futures Trading Commission; Consumer Financial Protection Bureau; Consumer Product Safety Commission; Departments of Energy, Justice, and Labor; Export-Import Bank of the United States; Farm Credit System Insurance Corporation; Federal Agricultural Mortgage Corporation; Federal Deposit Insurance Corporation; Federal Election Commission; Federal Energy Regulatory Commission; Federal Housing Finance Agency; Federal Labor Relations Authority; Federal Trade Commission; Government National Mortgage Association; Inter-American Foundation; Legal Services Corporation; Merit Systems Protection Board; National Consumer Cooperative Bank; National Credit Union Administration; National Transportation Safety Board; Overseas Private Investment Corporation; Pension Benefit Guaranty Corporation; Puerto Rico Financial Oversight and Management Board; Securities Investor Protection Corporation; Surface Transportation Board; United States African Development Foundation; United States Institute of Peace; United States International Trade Commission. For discussion of potential problems arising from independent litigating authority, see Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1465-1468 (2017) [hereinafter Farber and O’Connell, *Agencies as Adversaries*]; George F. Fraley III, *Is the Fox Watching the Henhouse: The Administration’s Control of FEC Litigation through the Solicitor General*, 9 ADMIN. L.J. 1215 (1996).

402. Indeed, along with OMB bypass authority, the authority to litigate separately from the Department of Justice is among the statutory features most highly correlated with agency policy independence. See Selin, *supra* note 2, at 978.

403. Article II, sec. 2 provides that “but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.” U.S. CONST., art. 2, § 2. See generally Kate Stith, *Congress’s Power of the Purse*, 97 YALE L.J. 1343 (1987).

404. U.S. CONST., art. I, § 9, cl. 7.

405. See, e.g., MORTON ROSENBERG, *WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY* (2017) (providing an excellent account of congressional oversight, including the resources at Congress’s disposal and descriptions of how oversight works in practice); Feinstein, *supra* note 196, at 283-286 (2017) (finding that agencies with leaders that are subject to Senate confirmation are subject to more oversight hearings); Robert J. McGrath, *Congressional Oversight Hearings and Policy Control*, 38 LEGIS. STUD. Q. 349 (2013) (demonstrating that oversight activity in the form of hearings depends upon the ideological relationship between committees and the executive branch and the policymaking expertise of each committee).

implied threat of legislative or budgetary change behind oversight is a powerful tool that compels agencies to heed congressional directions.⁴⁰⁶

a) Appropriations and Agency Self-funding

Arguably, the most important vehicle by which Congress controls administrative agencies is appropriations. Article I, section 9 of the Constitution provides that: “No money shall be drawn from the Treasury, but in Consequence of appropriations made by Law.”⁴⁰⁷ As a result, no federal agency may spend federal revenues or funds except if Congress has appropriated them.⁴⁰⁸ For example, ordinarily, when an agency receives fees for services, whether an application fee or a fee to enter a national park or an assessment on a financial institution, the agency must return those funds to the Treasury. Agencies cannot spend these revenues unless explicitly allowed to do so by Congress in statute. Congress uses funding levels to set priorities and as an instrument to reward and punish agencies in order to induce agencies to do what Congress wants. Congress historically has directed agency spending through earmarks (congressionally directed spending), which were communicated informally, in legislative reports accompanying appropriations bills, or the text of bills themselves. However, since the beginning of the 112th Congress, the House and Senate have observed a ban on earmarks.⁴⁰⁹ Congress increasingly relies on limitation riders in appropriations bills to direct agency activity.⁴¹⁰ These limitations take the form of “none of the funds appropriated under this act may be used to pay for action X” and

406. See, e.g., Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. (2018) (finding that oversight hearings are successful in shaping future agency behavior); Rao, *Administrative Collusion*, *supra* note 184, 1483-84 (2015) (explaining that influential congressmen and committee chairmen often exercise substantial influence and control over the agencies they oversee).

407. Rao, *Removal*, *supra* note 175, at 1483-84.

408. *But see* Paul F. Figley, *The Judgment Fund: America's Deepest Pocket and Its Susceptibility to Executive Branch Misuse*, 18 J. CONST. L. 145 (2015) (detailing how executive branch officials may use payments from the Judgment Fund (31 U.S.C. § 1304 (2017)) to supplement appropriations).

409. In 2018, members from both parties spoke in a public debate over whether or not to reinstate earmarks. *House Members' Day Hearing on Article I: Effective Oversight and the Power of the Purse Before the H. Comm. on Rules*, 115th Cong. (2018); Susan Davis, *House GOP to Debate Bringing Earmarks Back*, NAT'L PUB. RADIO, Jan. 14, 2018. *See also* Mariano-Florentino Cuellar, *Earmarking Earmarking*, 49 HARV. J. ON LEG. 249 (2012) (providing a comprehensive overview of earmarking as a practice, including the arguments for and against earmarks); Joseph White, *Jimmy Carter's and James Miller's Revenge: The Reasons and the Consequences for Presidential and Congressional Power of Measures to Ban Congressional Earmarks*, 65 CASE W. RES. L. REV. 1175 (2015) (detailing the history and development of earmarks and calls for reform).

410. Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (2010); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 36 DUKE L.J. 456 (1987).

provide an effective means of limiting agency discretion.⁴¹¹ More generally, Congress's statutory or non-statutory instructions to agencies are made credible by an implied threat to withhold appropriations if the agency does not follow congressional wishes.

At times, Congress and the President have limited their own influence over agencies by allowing agencies to collect and spend revenues outside the appropriations process. This does not limit Congress's ability to set spending caps, and few agencies are entirely self-funding, but the greater the degree of self-funding, the more autonomous the agency is from Congress.⁴¹² Table 13 lists the agencies that have been authorized by Congress to collect and spend funds outside the appropriations process. These exceptions come in a variety of forms that are grouped into distinct categories. Many agencies have been authorized to receive gifts and donations. Some have been given the ability to charge reasonable fees and use the revenue for specific purposes. A smaller set of agencies may become involved in banking activities. The last column includes agencies whose external funding represents a notable portion of their yearly outlays, and Table 14 includes a list of completely self-funded agencies and bureaus. This list is comprised mainly of financial regulatory agencies that receive fees and assessments and government corporations.

411. For example, the FY 2006 appropriations bill for the Department of Health and Human Services specifies that "none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used, in whole or in part, to advocate or promote gun control." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 109-149, title II, 119 Stat. 2833, 2846 (2006).

412. Prakash, *supra* note 158, at 1824; Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733 (2013).

Table 13. Agency Statutes Providing Sources of Funding Other than Appropriations

(1) Gifts and Donations		(2) Reasonable Payment for Administrative Services			(3) Authorizes Working Capital Fund		(4) Business or banking activities	(5) Fees & charges cover substantial portion of operating expenses	
ACUS	MSPB	ACUS	FHFA	PRFOMB	BEP	HSTFS	CCC	AMTRAK	HSTSF
AOA	MUSUF	AHRQ	FLETC	SBA	BGSEEF	HUD	EXIM	ARC	IAF
ARC	NARA	AMTRAK	FTC	SEC	BLM	INT	FAMC	CCC	JMMFF
ARMY	NASA	ANGTP	GNMA	SIPC	BOR	MINT	FCA	CFPB	MWAA
BGSEEF	NAVY	ARMY	GSA	SLSDC	CFPB	MUSUF	FCIC	CPB	NARAB
BIA	NEA	BLM	HHS	STAT	CFTC	NCA	FCSIC	DRA	NCCB
BOP	NEH	BOR	HUD	TRS	CIA	NCUA	FDIC	EXIM	NCUA
CFTC	NCA	CBP	IHS	TVA	CNCS	NIH	FED	FAMC	NGPRA
CIA	NCUA	CFTC	INT	USAF	DHS	NIST	FHFA	FCC	NIGC
CNCS	NGPRA	CIA	LSC	USCG	DOC	NPS	FRTIB	FCIC	OCC
CPSC	NPS	CNCS	MWAA	USDA	DOD	OPIC	GNMA	FDA	OPIC
DHS	NTSB	CPB	NARA	USFS	DOE	OSMR	NCCB	FDIC	PBGC
DOC	ODNCP	DHS	NARAB	USFWS	DOED	PBGC	NCUA	FED	PRFMOB
DOD	OGE	DNDO	NASA	USGS	DOJ	RRB	OPIC	FERC	SEC
DOE	PBGC	DOC	NAVY	USIP	DOL	SBA	SBA	FHFA	SIPC
DOED	PRFOMB	DOD	NCUA	USPS	DOT	SEC	SIPC	FHITF	SLSDC
DOJ	RRB	DODEA	NGPRA	USPTO	EEOC	SIPC	STAT	FODSITF	TVA
DOL	SBA	DOE	NIGC	VHA	FAMC	STAT	FCA	GNMA	USIP
DOT	SEC	DOED	NIH		FCA	TRS	FCIC		USPS
DRA	SIPC	DOJ	NIST		FCIC	USCG	FCSC		
FDA	STAT	DOT	NOAA		FCSC	USDA	FCSIC		
FEMA	TRS	EEOC	NPS		FCSIC	USFS	FDIC		
FHITF	TVA	EXIM	NRC		FDIC	USGS	USIP		
FLETC	USADF	FAMC	NSA		FHITF	USIP	GSA		
FODSITF	USAF	FCA	NTIS		GSA	USPC	HHS		
FSMITF	USCG	FCC	NTSB		HHS	USPS	HIS		
GSA	USDA	FCIC	OCC			USPTO			
HSTSF	USFWS	FCSIC	OPIC						
HUD	USGS	FDA	OSMR						
IAF	USIP	FDIC							
IMLS	USITC	FEC							
INT	USPC	FERC							
JMMFF	USPS								
LSC	USTR								
MCC									

Note: Federal statutes include a number of different types of provisions that allow agencies freedom from the requirement that their funding come directly from appropriations. This table lists the departments and agencies whose establishment provisions in the U.S. Code include language allowing them funding outside the appropriations process. (1) Statute authorizes the agency to accept, use, and dispose of gifts, donations, or property (real, personal, or mixed) in furtherance of the agency's purposes. (2) Statute authorizes the agency to charge and collect reasonable administrative charges for, among other things, products, services, and access to data. (3) Statute establishes a working capital fund or other similar fund to be available to the agency without fiscal year limitation for one or more purposes. (4) Statute authorizes the agency to participate in activities generally associated with the business of banking, such as the authority to receive deposits, to insure credit risks of loss, to borrow and lend money, to purchase, sell, and guarantee securities, or other similar functions. (5) Statute authorizes agency to assess and collect fees or charges for the purpose of covering a substantial portion of the cost of operating expenses incurred by the agency.

Table 14. Agencies and Bureaus Completely Exempt from Appropriations

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

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

b) Agency Reporting Relationships

The relationship between Congress and federal agencies is influenced importantly by the committee and reporting relationships of each agency. The number of committees and subcommittees actively involved in confirming agency political appointees and in monitoring agencies varies from one or two committees to scores of committees. In theory, every agency is overseen by at least four committees, two authorizing committees (one in the House and one in the Senate) and two appropriations committees. Of course, the extent of active oversight varies depending upon the agenda of the committees themselves and the politics of the day. Despite the prohibitions against legislative vetoes, committees and agencies continue to operate under agreements by which agency officials seek approval of committees prior to taking action.⁴¹³ The amount of oversight also varies depending upon the character of the agency's work. Some agencies implement laws in a specific limited policy area, and the work of other agencies involves numerous policy areas.⁴¹⁴

The structure of congressional oversight matters for agency behavior. In some cases, having more committees involved in active oversight is helpful since committees have expertise in different policy areas and redundancy in oversight can ensure that agencies comply with congressional intent. In other cases, however, having too many committees hurts agency performance. In the *Final Report of the National Commission on Terrorist Attacks Upon the United States*, the 9/11 Commission urged: "Congress should create a single, principal point of oversight and review for homeland security . . . [We] believe that Congress does have the obligation to choose one in the

413. For details, see LOUIS FISHER, CONG. RESEARCH SERV., RL33151, COMMITTEE CONTROLS OF AGENCY DECISIONS (2005).

414. For information on agencies with multiple policy missions, see, for example, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunction of Multiple Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009); Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551 (2016).

House and one in the Senate, and that this committee should be a permanent standing committee with a nonpartisan staff.⁴¹⁵ At the time of the Commission's report there were 108 different committees and subcommittees responsible for overseeing the Department of Homeland Security.⁴¹⁶ While the decision to merge a collection of agencies and bureaus into one department was grounded in the need for coordinated defense against terrorism, it also exacerbated committee conflict and jurisdictional turf wars.⁴¹⁷ The concern with too many committees is that an agency may be pulled in different directions and any efforts to direct or reform the agency must be agreed upon by scores of committees. Additionally, empirical research on the question suggests that Congress has less influence over agencies overseen by a greater number of committees relative to the President.⁴¹⁸

Congress has also written into agency statutes rules and requirements that help facilitate oversight. Congress frequently asks agencies to provide regular reports to specific committees or to the chambers as a whole.⁴¹⁹ Congress also empowers advisory commissions to work with agencies to provide advice to agencies and help Congress monitor the agency.⁴²⁰ This can come in the form of specific mandates creating such commissions or simply authorization to create such commissions. For example, the statute authorizing the Commodity Futures Trading Commission mandates the creation of the Energy and Environmental Markets Advisory Committee.⁴²¹ On the other hand, some agencies have flexibility regarding the establishment of committees.

415. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9-11 COMMISSION REPORT 421 (2004), <http://www.911commission.gov/report/911Report.pdf>.

416. See *Who Oversees Homeland Security? Um, Who Doesn't?*, NAT'L PUB. RADIO, July 10, 2010, <http://www.npr.org/templates/story/story.php?storyId=128642876> (last visited Jan. 31, 2011).

417. E.g., H.R. 5005, *The Homeland Security Act of 2002, Days 1 and 2 Before the H. Comm. on Homeland Security*, 107th Cong. (July 15-16, 2002) (statement of Rep. Jane Harman: "I have been saying that the War on Terrorism has expanded to the War on Turf. That may be the tougher war. . ."); Dara Kay Cohen, Mariano-Florentino Cuellar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 719 (2006) ("[T]hough all members may have wanted to achieve improved homeland security coordination, they also sought to control a piece of the bureaucracy.").

418. Clinton, Lewis & Selin, *supra* note 196.

419. Rules of the U.S. House of Representatives require the Clerk of the House of Representatives to submit a list of reports which it is the duty of any officer or department to make to Congress. H. Res. 5, 115th Cong. (2017) (enacted); Constitution, Jefferson's Manual and the Rules of the House of Representatives of the United States, H.R. Doc. No. 114-192, Rule 2, Clause 2(b) (2017); CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 115TH CONG., REPORTS TO BE MADE TO CONGRESS (H.R. Doc. No. 115-4) (2017). For a discussion of issues arising from reporting and access requirements, see Farber & O'Connell, *Agencies as Adversaries*, *supra* note 401, at 1446-47.

420. See, e.g., MOFFITT, *supra* note 57; Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 299 (2001); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997); Stephane Lavertu & David L. Weimer, *Federal Advisory Committees, Policy Expertise, and the Approval of Drugs and Medical Devices at the FDA*, 21 J. PUB. ADMIN. RES. & THEORY 211 (2010); Susan L. Moffitt, *Promoting Agency Reputation through Public Advice: Advisory Committee Use in the FDA*, 72 J. POL. 880 (2010).

421. 7 U.S.C. § 2(a)(15) (2017).

The Secretary of Energy “is authorized to establish in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate to assist in the performance of his functions.”⁴²² As with other aspects of design, these reporting and commission requirements vary from agency to agency, with some agencies having few such requirements and others having many.

3. Other Key Structural Features

Of course, how responsive an agency is to presidential or congressional direction also depends on adherence to government-wide mandates and the features of departments and agencies themselves, including history, details of their statutes, internal organization, personnel, and rules of operation. Congress has enacted a number of government-wide management and transparency laws to facilitate political control of federal agencies, to improve performance, and to root out waste, fraud, and abuse (Table 15).⁴²³ The Chief Financial Officers Act of 1990 was intended to improve the financial management practices of federal entities.⁴²⁴ It required the designation of a chief financial officer (CFO), appointed by the President and confirmed by the Senate, with an appropriate managerial and financial management background in all large agencies.⁴²⁵ The statute also mandates that a CFO be installed in other, smaller agencies, but in these agencies CFOs are appointed by the agency head and are career political appointees either from the competitive service or the Senior Executive Service.⁴²⁶

The Information Technology Management Reform Act, mandated the designation of a chief information officer (CIO) in federal agencies.⁴²⁷ The CIO is responsible for: (1) providing advice to ensure that each agency acquires information technology and manages information resources effectively; (2) developing, maintaining, and facilitating an information technology architecture for each agency; and (3) promoting effective and efficient design and operation of all major information resources management processes for each agency.⁴²⁸ The statute’s information technology requirements apply broadly to “executive agencies” as defined in 41 U.S.C. § 133: any

422. 42 U.S.C. § 7234 (2017).

423. BRASS, GEN. MGMT. LAWS, *supra* note 143. See also FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (William F. Funk & Jeffrey S. Lubbers, eds., 5th ed. 2016) (containing text and commentary on 22 cross-cutting government-wide procedural statutes) [hereinafter PROCEDURE SOURCEBOOK].

424. Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (1990).

425. 31 U.S.C. § 901 (2017).

426. *Id.* § 901(b)(2). There are 90 other agencies that also have Chief Information Officers and are part of the Small Agency CIO Council. There is no statutory mandate requiring these positions in small agencies.

427. Pub. L. No. 104-106, 110 Stat. 203, 680-89 (1996) (commonly referred to as the Clinger-Cohen Act).

428. 40 U.S.C. § 11315 (2017).

executive department, military department, independent establishment, or wholly owned Government corporation.⁴²⁹

Finally, Congress enacted the Inspector General Act of 1978 to help root out waste, fraud, and abuse in federal management.⁴³⁰ The Act and its amendments mandated the creation of Offices of Inspector General in various large agencies, designated “establishments,” across the executive branch.⁴³¹ Each establishment’s Inspector General (IG) is appointed by the President and confirmed by the Senate solely on the basis of “integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”⁴³² An IG may be removed from office by the President. If the President removes or transfers an IG, the President must send a written notice to both houses of Congress not later than 30 days before such removal or transfer explaining the reasons.⁴³³ The Act adds a layer of agency accountability to elected officials, as each IG must prepare semiannual reports summarizing the activities of his office. These reports are sent to the head of the agency, which then sends the IG report, together with the agency head’s response, to the appropriate committees or subcommittees of Congress.

While the statute specifically creates an Office of Inspector General in each agency designated as an “establishment,” the statute also mandates that the Director of OMB publish in the *Federal Register* a list of other federal “entities” that fall under the jurisdiction of the Inspector General Act.⁴³⁴ OMB’s “designated federal entities” are required to establish Offices of Inspector General headed by an Inspector General appointed by the head of the agency. Finally, an agency that is named a “federal entity” must have an audit office that conducts annual agency audits and reports the results and any other investigative activities to both chambers of Congress and the Director of OMB. The most recent list published in the *Federal Register* was in 2014.⁴³⁵

429. The statute expressly applies to those agencies requiring CFOs under the Chief Financial Officers Act of 1990. *See* 40 U.S.C. § 1425 (specifying duties and qualifications of CIOs by cross-reference to agencies with CFOs as mandated by 31 U.S.C. § 901(b)). However, there are 90 other agencies that also have Chief Information Officers and are part of the Small Agency CIO Council.

430. There are several exceptions made with respect to IG audits or investigations in agencies dealing with national security. In the Departments of Defense, Homeland Security, Justice, and Treasury, the head of the agency may prohibit the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena if such prohibition is necessary to preserve national security. Should an agency head exercise this power, he and the IG must submit a statement to appropriate congressional committees. *See* 5 U.S.C. app. 3 §§ 8-8F (2017). Similar provisions are made for elements of the intelligence community: Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency. *See id.* app. 3 § 8G(d).

431. *Id.* app. 3 § 3(b).

432. *Id.* app. 3 § 3(a).

433. *Id.* app. 3 § 3(b).

434. *Id.* app. 3 §§ 2, 8G.

435. *See* Office of Management and Budget, Fiscal Year (FY) 2013 and 2014 List of Designated Federal Entities and Federal Entities, 79 Fed. Reg. 1896 (Jan. 10, 2014) (providing updated list of designated federal entities and federal entities); *see also* 5 U.S.C. app. 3 § 8G(a)(2) (1978) (original statute defining “designated Federal entity” to mean 36 specified agencies).

Table 15. Government-Wide Position Mandates (CFO, CIO, IG)

Chief Financial Officer		Chief Information Officer				Inspector General		
The Chief Financial Officers Act of 1990 sought to enhance the financial management practices of the federal government. One of the Act's stated purposes was to designate a Chief Financial Officer (CFO) in each executive department and major executive agency.		The Clinger-Cohen Act, designed to reform information technology management in the federal government, established agency Chief Information Officers (40 U.S.C. § 11315). ⁴³⁶				The Inspector General Act of 1978 established Offices of Inspector General in various agencies across the executive branch. These offices were to provide a means for keeping the head of the agency and Congress fully informed about problems relating to the administration of agency programs and operations. (5 U.S.C. app. 3 § 3(a)).		
Appointed by the President by and with the advice and consent of the Senate	Appointed by the head of the agency					"Establishment" Appointed by the President by and with the advice and consent of the Senate	"Designated Federal Entity" Appointed by the head of the agency	"Federal Entity" Has an audit office
DHS DOC DOD DOE DOED DOJ DOL DOT DVA HHS HUD INT NASA STAT TRS USDA	CNCS ^a GSA NRC OPM SBA SSA USAID	ANGTP ARC ARMY ATF BBG BGSEEF CCC CFTC CIA CNCS CPSC CSHIB DHS DNFSB DOC DOD DOE DOED DOJ DOL DOT DRA DVA EAC EEOC EPA EXIM FAMC FCA FCC FCIC	FCSIC FDIC FEC FED FHFA FHITF FLRA FMC FMCS FMSHRC FODSITF FRTIB FSMITF FTC GNMA GSA HHS HSTSF IAF INT JMMFF MCC MMC MSPB MUSUF MWAA NARA NASA NAVY NCCB NCUA	NGPRA NLRB NMB NRC NTSB OAP ODNI OGE OPIC OPM OSC OSHRC PBGC PC PCLOB RRB SBA SEC SSA SSAB STAT STB STLSDC TDA TRS TVA USADF USAF USDA USIP USITC	CIA ^b CNCS DHS NMB NRC DOD DOE DOED DOJ DOL DOT DVA EPA EXIM FDIC FEMA FHFA GSA HUD INT NASA NRC NRO ^c NSA ^c ODNI ^b OPM RRB SBA SSA STAT TRS TVA USAID USDA	AMTRAK ARC ARMY ^d BBG CFPB CFTC CPB CPSC DIA EAC EEOC FCA FCC FEC FED FLRA FMC LSC NARA NAVY ^d NCUA NEA NEH NGIA NLRB NRO ^c NSA ^c PBGC PC PRC SEC USAF ^d USITC USPS	ACUS ANGTP BGSEEF CSHIB DNFSB DRA FCSIC FMCS FMSHRC FRTIB FSOC HSTSF IAF IMLS JMMFF MCC MMC MSPB MUSUF NMB NTSB OGE OPIC OSC OSHRC TDA USADF USIP	

^a The Corporation for National and Community Service does not qualify as an agency subject to the Chief Financial Officers Act, but the agency's authorizing statute requires that CNCS comply with the auditing and reporting requirements in the CFO Act. 42 U.S.C. § 12645e (2017).

^b While not explicitly included in the Inspector General Act, the Central Intelligence Agency and the Office of the Director of National Intelligence have statutorily mandated Inspectors General who are appointed by the President by and with the advice and consent of the Senate. See 50 U.S.C. § 3517(a) (2017) (CIA); 50 U.S.C. § 3033(c)(1) (2017) (ODNI).

^c The National Reconnaissance Office and the National Security Agency are both listed as an establishment in 5 U.S.C. app. 3 § 12(2) (2017) and as a designated federal entity by the Office of Management and Budget. As such, they are listed in both columns.

^d While not explicitly recognized by the Office of Management and Budget as designated federal entities, the Air Force, Army, and Navy have Inspectors General who are appointed by the head of the agency. See 10 U.S.C. § 3020(a) (2017) (Army); 10 U.S.C. § 5020(a) (2017) (Navy); 10 U.S.C. § 8020(a) (2017) (Air Force).

Relatedly, in 1976, Congress enacted the Government in the Sunshine Act (Sunshine Act), which requires most multi-member bodies to conduct their business in a manner that facilitates public scrutiny and involvement.⁴³⁶ Specifically, it requires that agencies provide advance notice of meetings and make those meetings accessible. Table 16 includes the list of agencies subject to the law. Of course, there are numerous other cross-cutting statutes governing agency behavior, such as the Administrative Procedure Act, Freedom of Information Act, Federal Tort Claims Act, National Environmental Policy Act, and many more.⁴³⁷

Table 16. Agencies Subject to the Sunshine Act

AMTRAK	DNFSB	FED	FTC	NCUA	RRB
BGSEEF	EAC	FERC	HSTSF	NLRB	SEC
CEQ	EEOC	FHITF	IAF	NMB	STB
CFTC	EXIM	FLRA	IRSOB	NRC	USADF
CNCS	FCA	FMC	JMMFF	NTSB	USITC
CPB	FCC	FMSHRC	LSC	OPIC	USPC
CPSC	FCSC	FODSITF	MMC	OSHRC	USPS
CSHIB	FDIC	FRTIB	MSPB	PCLOB	
	FEC	FMITF	MUSUF	PRC	

Note: There has been significant debate over the entities that are subject to the Sunshine Act. This table lists all agencies that are either explicitly contemplated by the statutory language in § 552b or are legally subject to the Sunshine Act as a result of litigation or other government determinations. See 5 U.S.C. § 552b(a) (2017); 42 U.S.C. § 2996c(g) (2017) (Legal Services Corporation subject to § 552b); 47 U.S.C. § 396(g)(4) (2017) (Corporation for Public Broadcasting meetings shall be open to the public); *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581, 584-85 (D.C. Cir. 1990) (Defense Nuclear Facilities Safety Board is an agency under § 552b); *Main Street Legal Services, Inc. v. National Security Council*, 881 F.3d 542, 547-58 (2d Cir. 2016) (National Security Agency is not an agency subject to § 552b, as its sole function is to advise and assist the President); *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259, 1264-65 (D.C. Cir. 1980) (Council on Environmental Quality is an agency subject to § 552b); *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (Council of Economic Advisers is not an agency subject to § 552b, as its sole function is to advise and assist the President); *Nat'l Railroad Passenger Corp. – Applicability of Freedom of Information, Privacy and Sunshine Acts*, 57 Comp. Gen. 773 (1979) (AMTRAK subject to the Sunshine Act).

The design of administrative procedures can influence agencies' responsiveness. While elected officials may want quick and decisive action, an agency may not be able to do what elected officials ask. For example, commissions can take longer to make determinations as a feature of being a collective body. One way Congress restricts agency freedom is to require that agencies get approval from outside bodies before taking authoritative action (Table 17).⁴³⁸ For example, if the Secretary of Defense concludes that action by the National Aeronautics and Space Administration is adverse to the policies of the Department of Defense, the two agencies must reach an agreement or

436. The Sunshine Act applies to multi-member bodies that have more than half their members nominated by the President and confirmed by the Senate. See 5 U.S.C. § 552b(a) (2017).

437. See PROCEDURE SOURCEBOOK, *supra* note 423.

438. The list of agencies in Table 17 is based on information from their respective current authorizing statutes.

refer the matter to the President for final decision.⁴³⁹ Similarly, no grants may be made from the National Institutes of Health without the approval of a technical review board attached to the agency.⁴⁴⁰ The Chief Executive Officer of the Corporation for National and Community Service cannot issue regulations establishing a selection and compensation system for the Corporation’s employees without first obtaining the approval of the Director of the Office of Personnel Management.⁴⁴¹ Some statutes still require legislative approval despite the Supreme Court’s invalidation of this tool in *INS v. Chadba*.⁴⁴² For example, the Commodity Futures Trading Commission cannot implement any plan to charge and collect fees until that plan is approved by the House Agriculture Committee and the Senate Agriculture, Nutrition, and Forestry Committee.⁴⁴³ Furthermore, as discussed above, presidents since Reagan have required executive agencies to send their proposed and final regulations (not significant regulations) to OMB’s Office of Information and Regulatory Affairs for approval before they can be issued.

Table 17. Agencies with Authorizing Statutes That Require Prior Approval by Other Agency or Congress for Certain Actions

ACUS	DOD	IHS	SIPC
AMTRAK	DOE	IRS	STAT
ARMY	DOED	NASA	TRS
ATSDR	DOJ	NAVY	TSA
BIA	DOT	NEA	TVA
BOR	EXIM	NIGC	USAF
CCC	FAA	NIH	ISCG
CFPB	FCA	NIST	USDA
CFTC	FCIC	NNSA	USFS
CIA	FEC	NTIA	USGS
CNCA	FED	ODNCP	USITC
CPSC	FSA	ODNI	USPS
DHS	FTC	RRB	USPTO
DNDO	GNMA	SBA	VHA
DOC	HHA	SEC	

The internal process of agency decision-making also varies. In some agencies, key decisions are made primarily through the adjudication of cases and in others through rulemaking, and this can influence agency responsiveness. A large number of agencies set policy through both. Table 18 includes a list of all agencies engaged in adjudication. The first column includes lists of agencies whose authorizing statutes give the agency or a subpart of the agency authority to conduct or hold hearings or adjudications. The second column lists agencies that the Office of Personnel Management recognized as employing administrative law judges in 2017.

439. 51 U.S.C. § 20114(b) (2017).

440. 42 U.S.C. § 283k(b) (2017); SEIDMAN, *supra* note 16, at 182-83.

441. 42 U.S.C. § 12651f(b)(3)(A) (2017).

442. 462 U.S. 919, 956-59 (1983).

443. 7 U.S.C. § 16a(a) (2017).

Table 18. Agencies with Statutory Adjudicatory Authority

Agency	Main Authorizing Statute Includes Provisions Authorizing Adjudication^a	Agency Employs Administrative Law Judges^b
CFPB	X	X
CFTC	X	
CPSC	X	
CSHIB	X	
DEA		X
DOC	X	
DOE	X	
DOED		X
DOL		X
DOT		X
EOIR		X
EPA		X
FCA	X	
FCC		X
FDA	X	X
FDIC	X	
FED	X	
FERC	X	X
FLRA	X	X
FMC		X
FMSHRC	X	X
FTC	X	X
GNMA	X	
HHS		X
HUD	X	X
INT		X
MSPB	X	
NCUA	X	
NEA	X	
NLRB	X	X
NTSB		X
OSHRC	X	X
OSMR	X	
PRC	X	
SBA	X	X
SEC	X	X

Table 18. Agencies with Statutory Adjudicatory Authority

Agency	Main Authorizing Statute Includes Provisions Authorizing Adjudication ^a	Agency Employs Administrative Law Judges ^b
SSA		X
USCG		X
USDA		X
USITC	X	X
USPC	X	
USPS	X	X

Note: This information is available with statutory citations in the dataset accompanying this report. See Appendix of statutory provisions (on file with authors and the Administrative Conference).

^a Agencies included in this list have authorizing statutes that give the agency or a subpart of the agency authority to conduct or hold hearings or adjudications. This list relies exclusively on primary authorizing statutes.

^b The list in this column was created by referring to the Office of Personnel Management's list of federal administrative law judges by agency and level (as of March 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. Other agencies occasionally use ALJs, borrowed from agencies that employ them (with the permission of the ALJ and OPM). See 5 U.S.C. § 3344 (2017). These agencies include the MSPB, and various banking regulatory agencies.

Most agency authorizing statutes also include language that explicitly authorizes the agency to promulgate rules and/or regulations. Those agencies that may promulgate rules, however, do not necessarily do so, and those that do promulgate rules sometimes do so only for minor administrative matters rather than to regulate or to set general policy. Table 19 lists the agencies engaged and *not* engaged in rulemaking of different forms. Specifically, it lists all agencies that have promulgated a rule deemed significant under Executive Order 12,866 in the last 15 years.⁴⁴⁴

⁴⁴⁴ A significant regulatory action means any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect the economy in a material way; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; or raise novel or legal policy issues arising out of legal mandates or the President's priorities. Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51735 (1993).

Table 19. Details of Federal Agencies' Rulemaking Activities

Agency has promulgated a significant rule in the last 15 years ^a			Agency has <i>not</i> promulgated a rule in the last 15 years		
ACF	FCC	NLRB	ANGTP	EOUSA	OEA
ACL	FCIC	NOAA	ARC	EOUST	OEDE
AMS	FDA	NPS	ASH	ERS	OELA
AOA	FDIC	NRC	ATSDR	ESA	OESA
APHIS	FED	NRCS	BGSEEF	FAMC	OFHEO
ARMY	FEMA	NTIS	BILA	FHA	OFPM
ATF	FHWA	OCC	BLS	FHITF	OFSA
BFS	FHFA	ODNCP	BVA	FIO	OHC
BIA	FINCEN	ODNI	CEA	FLETC	OHHLHC
BIS	FMC	OFCCP	CFBCI	FODSITF	OII
BLM	FMCS	OGE	CIVR	FSMITF	ONCHIT
BOEM	FMCSA	OJP	CPB	GNMA	ONSE
BOP	FNS	OLMS	DARPA	IRSOB	OPE
BOR	FRA	OMB	DCA	JCRA	OPIH
BSEE	FSA	ONRR	DCAA	HITSA	OVAW
CBP	FSIS	OPM	DCMA	LPO	PPFA
CCC	FSOC	OSHA	DFAS	MBDA	PRFOMB
CFPB	FTA	OSMR	DHA	MDA	PSER
CFTC	FTC	OWCP	DIA	MINT	RMA
CNCS	GIPSA	PGBC	DISA	MMC	SIPC
DARS	GSA	OC	DLSA	MUSUF	SJI
DEA	HHS	PHMSA	DMA	MWAA	SSAB
DHS	HUD	RBCS	DNDO	NARAB	TDA
DOC	HIS	RHS	DODATL	NASS	TRMC
DOD	IMLS	RRB	DODEA	NCA	USGS
DOE	INT	RUS	DODPR	NCCB	USIP
DOED	IRS	SBA	DPOW	NGPRA	USMS
DOJ	ITA	SEC	DRA	NIBS	USSS
DOL	MA	SSA	DSCA	NRO	VBA
DOT	MSHA	STAT	DSS	OAM	VHA
DVA	NARA	TRS	DTIC	OAP	WB
EBSA	NASA	TSA	DTRA	OCPD	WHS
EDA	NAVY	USAF	DTSA	ODEP	
EEOC	NCUA	USAID			
EOIR	NEA	USCG			
EPA	NEH	USDA			
ETA	NHTSA	USFS			
FAA	NIFA	USFWS			
FAS	NIGC	USPTO			
FBI	NIH	VETS			
FCA	NIST	WHD			

Note: Data as of Dec. 15, 2017

^a Identified by the *Federal Register* as promulgating a regulatory action deemed significant under Executive Order 12,866.

In total, there are a number of features of different agencies that determine their responsiveness to the President, Congress, and different groups. Some features of agency design are specifically chosen to limit political influence. Other features of agency design are chosen to enhance responsiveness. Beyond these features, however, are a host of agency-specific factors that affect responsiveness but are hard to characterize generally. Agency choices are influenced by constituency groups, professional norms, and the personality and choices of agency leaders and congressional over-

seers.⁴⁴⁵ When agencies are removed from direct political oversight, this sometimes makes agencies more amenable to influence by the agency's clients or pressure groups. The longer the history of autonomy, the stronger the culture and more difficult readjustment can be if political actors seek to direct agencies to do something quite different from what they have done in the past.

445. See, e.g., Sanford C. Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245 (2005); Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671 (2012); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

Conclusion

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

Arguably the most dramatic change in the federal executive establishment in the last 50 years has been the change in the federal personnel system. Elected officials, unhappy with the federal civil service system, have sought ways to make the executive establishment more responsive and/or efficient by increasing the number of political appointees, by granting agencies authority to create their own personnel systems outside of Title 5, and by increasing reliance on contract employees instead of civil servants. The increasing depth and penetration of political appointees has allowed presidents more control over a number of executive agencies, particularly those with government-wide reach such as the Office of Management and Budget, Office of Personnel Management, and General Services Administration. The penetration of political appointees arguably allows for more democratic accountability. Elected

presidents are more easily able to redirect agency activities to be responsive to the wishes of the public as expressed through elections. There is very little doubt that these political appointees have an influence on the policy outputs of federal agencies.

The increase in political appointees has been controversial, however, precisely because it increases presidential power, and members of Congress decry presidential politicization of federal agencies. Presidential appointees not only change agency policies to be in line with presidential ideological views (e.g., increase or decrease environmental citations, influence U.S. attorney prosecution decisions), they also provide presidents access to the distributional resources of government. Political appointees influence the distribution of federal contracts and grants in electorally consequential ways.⁴⁴⁶ Electorally competitive states receive more federal grants, particularly during election years. A number of parties such as the National Commission on the Public Service have worried publicly about how the large number of political appointees influences agency performance. Existing empirical evidence, while limited, suggests that agencies and programs run by a higher percentage of political appointees perform worse than other agencies, either in Program Assessment Rating Tool scores or federal surveys of employee attitudes.⁴⁴⁷

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

The stability in numbers of federal employees masks an expansion in the number of contract employees. The increased use of contract employees has been a common way of buying government capacity. If current estimates are correct, the growth in contract employees has been dramatic. The reliance on contract employees provides managers flexibility, the hope of lower costs, and the ability to buy capacity easily. However, the reliance on contract employees influences the public-sector labor market and the willingness of civil servants to invest in agency-specific expertise. Federal employees are less likely to make careers in government service, often leaving government service for private contracting firms. The proliferation of federal contractors also raises issues of monitoring and control. Precise counts of contract employees do not exist, and the Government Accountability Office has repeatedly identified federal contract management as a problem area for federal management.

446. JOHN HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* (2014); DOUGLAS L. KRINER AND ANDREW REEVES, *THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY* (2015).

447. LEWIS, *PRESIDENTIAL APPT.*, *supra* note 146; David E. Lewis & Nick Gallo, *The Consequences of Presidential Patronage for Agency Performance*, 22 J. PUB. ADMIN. RES. & THEORY 219 (2012).

The federal personnel system is in a state of profound transition. Beyond the expansions of agency-specific personnel systems and contract employment, the system is confronted with a number of serious problems, including an outdated pay system, a cumbersome hiring process, an ongoing retirement wave, and a current reduction in hiring.⁴⁴⁸ Budget cutting proposals targeted at federal employees reflect dissatisfaction with the size, structure, and efficiency of the federal personnel system. Difficulties with the traditional merit system have led to a series of ad hoc workarounds. Growing evidence from the experience of federal and state agencies may soon be enough to provide the foundation for a fundamental reevaluation of the entirety of the federal personnel system.

A second trend has been the growth of presidential and congressional mechanisms of control over agency policy. The expanded role, authority, and size of the White House Office and the Executive Office of the President and the development and increased use of presidential tools such as OMB budget and rule review have affected the way agencies in the executive establishment make policy. Similarly, Congress's increased use of appropriations riders and formal review procedures such as the Congressional Review Act have influenced agency decision-making. Yet, ironically, as the President and Congress have increasingly tried to enhance their control over the executive establishment, new ways of reviewing agency policy and exerting political influence may have resulted in an increase in the insulation of certain agencies. Statutory prohibitions on the use of certain tools in agencies or exemptions from traditional review procedures can free agencies from political interference and may have implications for democratic accountability.

A final trend that characterizes the period since 1980 is the increasing use of agency designs that insulate agencies from political control, either directly through devices like fixed terms or indirectly by creating agencies as private non-governmental entities. The federal executive establishment is increasingly characterized by agencies with features that create administrative autonomy, in some cases calling into question whether these instrumentalities are even agencies at all. These new and innovative designs hold out the promise of effectiveness and efficiency. The ability of new federal entities to avoid government-wide managerial mandates and rules creates managerial flexibility that can be employed to better accomplish government objectives.

With greater flexibility and autonomy, however, necessarily comes a lack of political accountability. There are cases where elected officials see the wisdom in limiting their own influence over agency activities. These choices, however, come at a cost when autonomous government actors make poor decisions or become embroiled in scandal. The proliferation of exceptions has significant consequences for centralized management of key policy areas by Congress and the President, including trade, foreign aid, lending, housing, banking, and transportation. Federal agencies designed

448. PAUL A. VOLCKER ET AL., *THE CHANGING NATURE OF GOVERNMENT SERVICE: A WOODROW WILSON SCHOOL TASK FORCE FINAL REPORT* (2009), <http://www.princeton.edu/gstf/Volcker-Report.pdf>.

to be insulated from political control endure longer than other agencies, and the accumulation of these organizations makes centralized coordination of these policy areas more difficult. There have also been visible scandals in hierarchically organized agencies such as the Federal Emergency Management Agency, Minerals Management Service, and the General Services Administration, so the conclusion is not that one structure guarantees excellent performance. Rather, it is impossible to have autonomy and control at the same time, and the increasing fragmentation of the federal executive establishment makes holistic planning difficult. The lack of one unified source to describe the executive establishment and the differences among existing lists is evidence in itself of the difficulty in control and oversight. The purpose of this work is, in large measure, to provide the background necessary for the oversight process to be improved and reformed.

Appendix A-1
**List of Agencies and
 Subunits—By Agency Name**⁴⁴⁹

Agency	Bureau
Administrative Conference of the United States	
AMTRAK	
Appalachian Regional Commission	
Barry Goldwater Scholarship and Excellence in Education Foundation	
Board of Governors of the Federal Reserve System	
	Consumer Financial Protection Bureau
Broadcasting Board of Governors	
Board of Trustees for the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund	

449. All agencies and subunits in this list fall within the definition of agency or politically important subunit provided *supra* Part II, A, with two exceptions. First, while the National Indian Gaming Commission does not fall within any of the three requirements for consideration as a “bureau,” the Commission is included for consistency with the first edition of the *Sourcebook* and because of scholarly attention to the Commission’s independent structure. *E.g.*, Breger & Edles, *Established by Practice*, *supra* note 2. Second, whether the Puerto Rico Financial Oversight and Management Board satisfies the *Sourcebook*’s definition of “agency” depends upon the individuals nominated by the President. If the President appoints members suggested by specified members of Congress, Senate confirmation is not required. 48 U.S.C. § 2121(2) (2017). However, because Senate confirmation is required if the President appoints an individual who is not referenced in a list provided by Congress, the Financial Oversight and Management Board is included. *See id.*

Agency	Bureau
Central Intelligence Agency	
Chemical Safety and Hazard Investigation Board	
Commodity Futures Trading Commission	
Consumer Product Safety Commission	
Corporation for National and Community Service	
Corporation for Public Broadcasting	
Defense Nuclear Facilities Safety Board	
Delta Regional Authority	
Department of Agriculture	
	Agricultural Marketing Service Agricultural Research Service Animal and Plant Health Inspection Service Commodity Credit Corporation Economic Research Service Farm Service Agency Federal Crop Insurance Corporation Food and Nutrition Service Food Safety and Inspection Service Foreign Agricultural Service Forest Service Grain Inspection, Packers, and Stockyards Administration National Agricultural Statistics Service National Institute of Food and Agriculture Natural Resources Conservation Service Risk Management Agency Rural Business-Cooperative Service Rural Housing Service Rural Utilities Service
Department of Commerce	
	Bureau of Economic Analysis Bureau of Industry and Security Economics and Statistics Administration Economic Development Administration International Trade Administration Minority Business Development Agency National Institute of Standards and Technology National Oceanic and Atmospheric Administration National Technical Information Service National Telecommunications and Information Administration United States Census Bureau United States Patent and Trademark Office

Agency	Bureau
Department of Defense	
	Air Force Army Defense Acquisition Regulations System Defense Advanced Research Projects Agency Defense Commissary Agency Defense Contract Audit Agency Defense Contract Management Agency Defense Finance and Accounting Service Defense Health Agency Defense Information Systems Agency Defense Intelligence Agency Defense Legal Services Agency Defense Logistics Agency Defense Media Activity Defense POW/MIA Accounting Agency Defense Security Cooperation Agency Defense Security Service Defense Technical Information Center Defense Technology Security Administration Defense Threat Reduction Agency DOD Education Activity DOD Test Resource Management Center Joint Improvised-Threat Defeat Agency Missile Defense Agency National Geospatial-Intelligence Agency National Reconnaissance Office National Security Agency/Central Security Service Navy Office of Economic Adjustment Pentagon Force Protection Agency Under Secretary for Acquisition, Technology, and Logistics Under Secretary for Personnel and Readiness Washington Headquarters Services
Department of Education	
	Federal Student Aid Office of Elementary and Secondary Education Office of English Language Acquisition Office of Innovation and Improvement Office of Postsecondary Education Office of Special Education and Rehabilitative Services

Agency	Bureau
Department of Energy	
	Federal Energy Regulatory Commission Loan Programs Office National Nuclear Security Administration Office of Acquisition Management Office of Electricity Delivery and Energy Reliability Office of Energy Efficiency and Renewable Energy Office of Nuclear Safety Enforcement
Department of Health and Human Services	
	Administration for Children and Families Administration for Community Living Administration on Aging Agency for Healthcare Research and Quality Agency for Toxic Substances and Disease Registry Centers for Disease Control and Prevention Centers for Medicare and Medicaid Services Food and Drug Administration Health Resources and Services Administration Indian Health Service National Institutes of Health Office of the Assistant Secretary for Health Office of the National Coordinator for Health Information Technology Substance Abuse and Mental Health Services Administration
Department of Homeland Security	
	Domestic Nuclear Detection Office Federal Emergency Management Agency Federal Law Enforcement Training Center Transportation Security Administration United States Citizenship and Immigration Services United States Coast Guard United States Customs and Border Protection United States Immigration and Customs Enforcement United States Secret Service
Department of Housing and Urban Development	
	Center for Faith-Based and Community Initiatives Federal Housing Administration Government National Mortgage Association Office of Community Planning and Development Office of Fair Housing and Equal Opportunity Office of Field Policy and Management Office of Healthy Homes and Lead Hazard Control Office of Housing Counseling Office of Public and Indian Housing

Agency	Bureau
Department of Justice	
	Bureau of Alcohol, Tobacco, Firearms and Explosives Bureau of Prisons Civil Rights Division Community Relations Service Drug Enforcement Administration Executive Office for Immigration Review Executive Office for United States Attorneys Executive Office for United States Trustees Federal Bureau of Investigation Foreign Claims Settlement Commission Office of Justice Programs Office on Violence Against Women United States Marshals Service United States Parole Commission
Department of Labor	
	Bureau of International Labor Affairs Bureau of Labor Statistics Employee Benefits Security Administration Employment and Training Administration Mine Safety and Health Administration Occupational Safety and Health Administration Office of Disability Employment Policy Office of Federal Contract Compliance Programs Office of Labor-Management Standards Office of Workers' Compensation Programs Pension Benefit Guaranty Corporation Veterans' Employment and Training Service Wage and Hour Division Women's Bureau
Department of State	
	United States Agency for International Development
Department of the Interior	
	Bureau of Indian Affairs Bureau of Land Management Bureau of Ocean Energy Management Bureau of Reclamation Bureau of Safety and Environmental Enforcement National Indian Gaming Commission National Park Service Office of Natural Resources Revenue Office of Surface Mining Reclamation and Enforcement United States Fish and Wildlife Service United States Geological Survey

Agency	Bureau
Department of the Treasury	
	Alcohol and Tobacco Tax and Trade Bureau Bureau of Engraving and Printing Bureau of the Fiscal Service Federal Insurance Office Financial Crimes Enforcement Network Financial Stability Oversight Council Internal Revenue Service Internal Revenue Service Oversight Board Office of Foreign Assets Control Office of the Comptroller of the Currency United States Mint
Department of Transportation	
	Federal Aviation Administration Federal Highway Administration Federal Motor Carrier Safety Administration Federal Railroad Administration Federal Transit Administration Maritime Administration National Highway Traffic Safety Administration Pipeline and Hazardous Materials Safety Administration Saint Lawrence Seaway Development Corporation
Department of Veterans Affairs	
	Board of Veterans Appeals National Cemetery Administration Veterans Benefits Administration Veterans Health Administration
Election Assistance Commission	
Environmental Protection Agency	
Equal Employment Opportunity Commission	
Executive Office of the President	
	Council of Economic Advisers Council on Environmental Quality Office of Management and Budget Office of National Drug Control Policy Office of Science and Technology Policy Office of the United States Trade Representative
Export-Import Bank of the United States	
Farm Credit Administration	
Farm Credit System Insurance Corporation	
Federal Agricultural Mortgage Corporation	
Federal Communications Commission	
Federal Deposit Insurance Corporation	
Federal Election Commission	

Agency	Bureau
Federal Hospital Insurance Trust Fund	
Federal Housing Finance Agency	
Federal Labor Relations Authority	
Federal Maritime Commission	
Federal Mediation and Conciliation Service	
Federal Mine Safety and Health Review Commission	
Federal Retirement Thrift Investment Board	
Federal Supplementary Medical Insurance Trust Fund	
Federal Trade Commission	
General Services Administration	
	Office of Acquisition Policy
Harry S. Truman Scholarship Foundation	
Institute of Museum and Library Services	
Inter-American Foundation	
James Madison Memorial Fellowship Foundation	
Legal Services Corporation	
Marine Mammal Commission	
Merit Systems Protection Board	
Metropolitan Washington Airports Authority	
Millennium Challenge Corporation	
Morris K. Udall and Stewart L. Udall Foundation	
National Aeronautics and Space Administration	
National Archives and Records Administration	
National Association of Registered Agents and Brokers	
National Consumer Cooperative Bank	
National Credit Union Administration	
National Endowment for the Arts	
National Endowment for the Humanities	
National Institute of Building Sciences	
National Labor Relations Board	
National Mediation Board	
National Transportation Safety Board	
Northern Great Plains Regional Authority	
Nuclear Regulatory Commission	
Occupational Safety and Health Review Commission	
Office of Government Ethics	
Office of Personnel Management	

Agency	Bureau
Office of Special Counsel	
Office of the Director of National Intelligence	
Overseas Private Investment Corporation	
Peace Corps	
Postal Regulatory Commission	
Privacy and Civil Liberties Oversight Board	
Puerto Rico Financial Oversight and Management Board	
Railroad Retirement Board	
Securities and Exchange Commission	
Securities Investor Protection Corporation	
Small Business Administration	
Social Security Administration	
Social Security Advisory Board	
State Justice Institute	
Surface Transportation Board	
Tennessee Valley Authority	
Trade and Development Agency	
United States African Development Foundation	
United States Institute of Peace	
United States International Trade Commission	
United States Postal Service	

Appendix A-2

List of Agencies and Subunits—By Abbreviation

Abbreviation	Agency Name
ACF	Administration for Children and Families (HHS)
ACL	Administration for Community Living (HHS)
ACUS	Administrative Conference of the United States
AHRQ	Agency for Healthcare Research and Quality (HHS)
AMS	Agricultural Marketing Service (USDA)
AMTRAK	AMTRAK
AOA	Administration on Aging
ARC	Appalachian Regional Commission
ARMY	Army (DOD)
ARS	Agricultural Research Service (USDA)
ASH	Office of the Assistant Secretary for Health (HHS)
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives (DOJ)
ATSDR	Agency for Toxic Substances and Disease Registry (HHS)
ATTTB	Alcohol and Tobacco Tax and Trade Bureau (TRS)
BBG	Broadcasting Board of Governors
BEA	Bureau of Economic Analysis (DOC)
BEP	Bureau of Engraving and Printing (TRS)

Abbreviation	Agency Name
BFS	Bureau of the Fiscal Service (TRS)
BGSEEF	Barry Goldwater Scholarship and Excellence in Education Foundation
BIA	Bureau of Indian Affairs (INT)
BILA	Bureau of International Labor Affairs (DOL)
BIS	Bureau of Industry and Security (DOC)
BLM	Bureau of Land Management (INT)
BLS	Bureau of Labor Statistics (DOL)
BOEM	Bureau of Ocean Energy Management (INT)
BOP	Bureau of Prisons (DOJ)
BOR	Bureau of Reclamation (INT)
BSEE	Bureau of Safety and Environmental Enforcement (INT)
BVA	Board of Veterans Appeals (DVA)
CBP	United States Customs and Border Protection (DHS)
CCC	Commodity Credit Corporation (USDA)
CDC	Centers for Disease Control and Prevention (HHS)
CEA	Council of Economic Advisers (EOP)
CEN	U.S. Census Bureau (COM)
CEQ	Council on Environmental Quality (EOP)
CFBCI	Center for Faith-Based and Community Initiatives (HUD)
CFPB	Consumer Financial Protection Bureau (FED)
CFTC	Commodity Futures Trading Commission
CIA	Central Intelligence Agency
CIS	United States Citizenship and Immigration Services (DHS)
CIVR	Civil Rights Division (DOJ)
CMS	Centers for Medicare and Medicaid Services (HHS)
CNCS	Corporation for National and Community Service
CPB	Corporation for Public Broadcasting
CPSC	Consumer Product Safety Commission
CSHIB	Chemical Safety and Hazard Investigation Board
DARPA	Defense Advanced Research Projects Agency (DOD)
DARS	Defense Acquisition Regulations System (DOD)
DCA	Defense Commissary Agency (DOD)
DCAA	Defense Contract Audit Agency (DOD)
DCMA	Defense Contract Management Agency (DOD)
DEA	Drug Enforcement Administration (DOJ)
DFAS	Defense Finance and Accounting Service (DOD)
DHA	Defense Health Agency (DOD)

Abbreviation	Agency Name
DHS	Department of Homeland Security
DIA	Defense Intelligence Agency (DOD)
DISA	Defense Information Systems Agency (DOD)
DLA	Defense Logistics Agency (DOD)
DLSA	Defense Legal Services Agency (DOD)
DMA	Defense Media Activity (DOD)
DNDO	Domestic Nuclear Detection Office (DHS)
DNFSB	Defense Nuclear Facilities Safety Board
DOC	Department of Commerce
DOD	Department of Defense
DODATL	Under Secretary for Acquisition, Technology, and Logistics (DOD)
DODEA	DOD Education Activity (DOD)
DODPR	Under Secretary for Personnel and Readiness (DOD)
DOE	Department of Energy
DOED	Department of Education
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DPOW	Defense POW/MIA Accounting Agency (DOD)
DRA	Delta Regional Authority
DSCA	Defense Security Cooperation Agency (DOD)
DSS	Defense Security Service (DOD)
DTIC	Defense Technical Information Center (DOD)
DTRA	Defense Threat Reduction Agency (DOD)
DTSA	Defense Technology Security Administration (DOD)
DVA	Department of Veterans Affairs
EAC	Election Assistance Commission
EBSA	Employee Benefits Security Administration (DOL)
EDA	Economic Development Administration (DOC)
EEOC	Equal Employment Opportunity Commission
EOIR	Executive Office for Immigration Review (DOJ)
EOUSA	Executive Office for United States Attorneys (DOJ)
EOUST	Executive Office for United States Trustees (DOJ)
EPA	Environmental Protection Agency
ERS	Economic Research Service (USDA)
ESA	Economics and Statistics Administration (DOC)
ETA	Employment and Training Administration (DOL)

Abbreviation	Agency Name
EXIM	Export-Import Bank of the United States
FAA	Federal Aviation Administration (DOT)
FAMC	Federal Agricultural Mortgage Corporation
FAS	Foreign Agricultural Service (USDA)
FBI	Federal Bureau of Investigation (DOJ)
FCA	Farm Credit Administration
FCC	Federal Communications Commission
FCIC	Federal Crop Insurance Corporation (USDA)
FCSC	Foreign Claims Settlement Commission (DOJ)
FCSIC	Farm Credit System Insurance Corporation
FDA	Food and Drug Administration (HHS)
FDIC	Federal Deposit Insurance Corporation
FEC	Federal Election Commission
FED	Board of Governors of the Federal Reserve System
FEMA	Federal Emergency Management Agency (DHS)
FERC	Federal Energy Regulatory Commission (DOE)
FHA	Federal Housing Administration (HUD)
FHFA	Federal Housing Finance Agency
FHITF	Federal Hospital Insurance Trust Fund
FHWA	Federal Highway Administration (DOT)
FINCEN	Financial Crimes Enforcement Network (TRS)
FIO	Federal Insurance Office (TRS)
FLETC	Federal Law Enforcement Training Center (DHS)
FLRA	Federal Labor Relations Authority
FMC	Federal Maritime Commission
FMCS	Federal Mediation and Conciliation Service
FMCSA	Federal Motor Carrier Safety Administration (DOT)
FMSHRC	Federal Mine Safety and Health Review Commission
FNS	Food and Nutrition Service (USDA)
FODSITF	Board of Trustees for the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund
FRA	Federal Railroad Administration (DOT)
FRTIB	Federal Retirement Thrift Investment Board
FSA	Farm Service Agency (USDA)
FSIS	Food Safety and Inspection Service (USDA)
FSMITF	Federal Supplementary Medical Insurance Trust Fund
FSOC	Financial Stability Oversight Council (TRS)
FTA	Federal Transit Administration (DOT)

Abbreviation	Agency Name
FTC	Federal Trade Commission
GIPSA	Grain Inspection, Packers, and Stockyards Administration (USDA)
GNMA	Government National Mortgage Association (HUD)
GSA	General Services Administration
HHS	Department of Health and Human Services
HRSA	Health Resources and Services Administration (HHS)
HSTSF	Harry S. Truman Scholarship Foundation
HUD	Department of Housing and Urban Development
IAF	Inter-American Foundation
ICE	United States Immigration and Customs Enforcement (DHS)
IHS	Indian Health Service (HHS)
IMLS	Institute of Museum and Library Services
INT	Department of the Interior
IRS	Internal Revenue Service (TRS)
IRSOB	Internal Revenue Service Oversight Board (TRS)
ITA	International Trade Administration (DOC)
JCRS	Community Relations Service (DOJ)
JITDA	Joint Improvised-Threat Defeat Agency (DOD)
JMMFF	James Madison Memorial Fellowship Foundation
LPO	Loan Programs Office (DOE)
LSC	Legal Services Corporation
MA	Maritime Administration (DOT)
MBDA	Minority Business Development Agency (DOC)
MCC	Millennium Challenge Corporation
MDA	Missile Defense Agency (DOD)
MINT	United States Mint (TRS)
MMC	Marine Mammal Commission
MSHA	Mine Safety and Health Administration (DOL)
MSPB	Merit Systems Protection Board
MUSUF	Morris K. Udall and Stewart L. Udall Foundation
MWAA	Metropolitan Washington Airports Authority
NARA	National Archives and Records Administration
NARAB	National Association of Registered Agents and Brokers
NASA	National Aeronautics and Space Administration
NASS	National Agricultural Statistics Service (USDA)
NAVY	Navy (DOD)
NCA	National Cemetery Administration (DVA)

Abbreviation	Agency Name
NCCB	National Consumer Cooperative Bank
NCUA	National Credit Union Administration
NEA	National Endowment for the Arts
NEH	National Endowment for the Humanities
NGIA	National Geospatial-Intelligence Agency (DOD)
NGPRA	Northern Great Plains Regional Authority
NHTSA	National Highway Traffic Safety Administration (DOT)
NIBS	National Institute of Building Sciences
NIFA	National Institute of Food and Agriculture (USDA)
NIGC	National Indian Gaming Commission (INT)
NIH	National Institutes of Health (HHS)
NIST	National Institute of Standards and Technology (DOC)
NLRB	National Labor Relations Board
NMB	National Mediation Board
NNSA	National Nuclear Security Administration (DOE)
NOAA	National Oceanic and Atmospheric Administration (DOC)
NPS	National Park Service (INT)
NRC	Nuclear Regulatory Commission
NRCS	Natural Resources Conservation Service (USDA)
NRO	National Reconnaissance Office (DOD)
NSA	National Security Agency/Central Security Service (DOD)
NTIA	National Telecommunications and Information Administration (DOC)
NTIS	National Technical Information Service (DOC)
NTSB	National Transportation Safety Board
OAM	Office of Acquisition Management (DOE)
OAP	Office of Acquisition Policy (GSA)
OCC	Office of the Comptroller of the Currency (TRS)
OCPD	Office of Community Planning and Development (HUD)
ODEP	Office of Disability Employment Policy (DOL)
ODNCP	Office of National Drug Control Policy (EOP)
ODNI	Office of the Director of National Intelligence
OEA	Office of Economic Adjustment (DOD)
OEDE	Office of Electricity Delivery and Energy Reliability (DOE)
OEERE	Office of Energy Efficiency and Renewable Energy (DOE)
OELA	Office of English Language Acquisition (DOED)
OESA	Office of Elementary and Secondary Education (DOED)
OFAC	Office of Foreign Assets Control (TRS)

Abbreviation	Agency Name
OFCCP	Office of Federal Contract Compliance Programs (DOL)
OFHEO	Office of Fair Housing and Equal Opportunity (HUD)
OFPM	Office of Field Policy and Management (HUD)
OFSA	Federal Student Aid (DOED)
OGE	Office of Government Ethics
OHC	Office of Housing Counseling (HUD)
OHHLHC	Office of Healthy Homes and Lead Hazard Control (HUD)
OII	Office of Innovation and Improvement (DOED)
OJP	Office of Justice Programs (DOJ)
OLMS	Office of Labor-Management Standards (DOL)
OMB	Office of Management and Budget (EOP)
ONCHIT	Office of the National Coordinator for Health Information Technology (HHS)
ONRR	Office of Natural Resources Revenue (INT)
ONSE	Office of Nuclear Safety Enforcement (DOE)
OPE	Office of Postsecondary Education (DOED)
OPIC	Overseas Private Investment Corporation
OPIH	Office of Public and Indian Housing (HUD)
OPM	Office of Personnel Management
OSC	Office of Special Counsel
OSHA	Occupational Safety and Health Administration (DOL)
OSHRC	Occupational Safety and Health Review Commission
OSMR	Office of Surface Mining Reclamation and Enforcement (INT)
OSTP	Office of Science and Technology Policy (EOP)
OVAW	Office on Violence Against Women (DOJ)
OWCP	Office of Workers' Compensation Programs (DOL)
PBGC	Pension Benefit Guaranty Corporation (DOL)
PC	Peace Corps
PCLOB	Privacy and Civil Liberties Oversight Board
PFPA	Pentagon Force Protection Agency (DOD)
PHMSA	Pipeline and Hazardous Materials Safety Administration (DOT)
PRC	Postal Regulatory Commission
PRFOMB	Puerto Rico Financial Oversight and Management Board
PSER	Office of Special Education and Rehabilitative Services (DOED)
RBCS	Rural Business-Cooperative Service (USDA)
RHS	Rural Housing Service (USDA)
RMA	Risk Management Agency (USDA)
RRB	Railroad Retirement Board

Abbreviation	Agency Name
RUS	Rural Utilities Service (USDA)
SAMHSA	Substance Abuse and Mental Health Services Administration (HHS)
SBA	Small Business Administration
SEC	Securities and Exchange Commission
SIPC	Securities Investor Protection Corporation
SJI	State Justice Institute
SSA	Social Security Administration
SSAB	Social Security Advisory Board
STAT	Department of State
STB	Surface Transportation Board
STLSDC	Saint Lawrence Seaway Development Corporation (DOT)
TDA	Trade and Development Agency
TRMC	DOD Test Resource Management Center (DOD)
TRS	Department of the Treasury
TSA	Transportation Security Administration (DHS)
TVA	Tennessee Valley Authority
USADF	United States African Development Foundation
USAF	Air Force (DOD)
USAID	United States Agency for International Development (STAT)
USCG	United States Coast Guard (DHS)
USDA	Department of Agriculture
USFS	Forest Service (USDA)
USFWS	United States Fish and Wildlife Service (INT)
USGS	United States Geological Survey (INT)
USIP	United States Institute of Peace
USITC	United States International Trade Commission
USMS	United States Marshals Service (DOJ)
USPC	United States Parole Commission (DOJ)
USPS	United States Postal Service
USPTO	United States Patent and Trademark Office (DOC)
USSS	United States Secret Service (DHS)
USTR	Office of the United States Trade Representative (EOP)
VBA	Veterans Benefits Administration (DVA)
VETS	Veterans' Employment and Training Service (DOL)
VHA	Veterans Health Administration (DVA)
WB	Women's Bureau (DOL)
WHD	Wage and Hour Division (DOL)
WHS	Washington Headquarters Services (DOD)

Appendix B

Senate Committees Confirming Agency and Subunit Nominees⁴⁵⁰

Agency	Number of Committees	Committees
ACF	3	Finance; Health, Education, Labor, and Pensions; Indian Affairs
ACL	1	Health, Education, Labor, and Pensions
ACUS	1	Judiciary
AHRQ	0	
AMS	0	
AMTRAK	1	Commerce, Science, and Transportation
AOA	1	Health, Education, Labor, and Pensions
APHIS	0	
ARC	1	Environment and Public Works
ARMY	2	Armed Services; Environment and Public Works

450. This table considers Senate committees that confirm presidential nominees to specific positions within an agency or subunit. It does not consider PAS appointees who are appointed to one position in government but serve in an additional position. For example, the Farm Credit System Insurance Corporation is managed by a Board of Directors that consists solely of the members of the Farm Credit Administration Board. 12 U.S.C. § 2277a-2(a) (2017). While the Senate Committee on Agriculture, Nutrition, and Forestry confirms the FCA's Board, that committee is not listed as a confirming committee for the Farm Credit System Insurance Corporation. Additionally, this table does not account for the confirmation of inspectors general or other individuals appointed through government-wide statutory mandates.

Agency	Number of Committees	Committees
ARS	0	
ASH	1	Health, Education, Labor, and Pensions
ATF	1	Judiciary
ATSDR	0	
ATTTB	0	
BBG	1	Foreign Relations
BEA	0	
BEP	0	
BFS	0	
BGSEEF	1	Health, Education, Labor, and Pensions
BIA	1	Indian Affairs
BILA	0	
BIS	1	Banking, Housing, and Urban Affairs
BLM	1	Energy and Natural Resources
BLS	1	Health, Education, Labor, and Pensions
BOEM	0	
BOP	0	
BOR	1	Energy and Natural Resources
BSEE	0	
BVA	1	Veterans Affairs
CBP	1	Finance
CCC	0	
CDC	0	
CEA	1	Banking, Housing, and Urban Affairs
CEN	1	Homeland Security and Governmental Affairs
CEQ	1	Environment and Public Works
CFBCI	0	
CFPB	1	Banking, Housing, and Urban Affairs
CFTC	1	Agriculture, Nutrition, and Forestry
CIA	1	Intelligence
CIS	1	Judiciary
CIVR	1	Judiciary
CMS	1	Finance
CNCS	1	Health, Education, Labor, and Pensions
CPB	1	Commerce, Science, and Transportation
CPSC	1	Commerce, Science, and Transportation
CSHIB	1	Environment and Public Works

Agency	Number of Committees	Committees
DARPA	0	
DARS	0	
DCA	0	
DCAA	0	
DCMA	0	
DEA	1	Judiciary
DFAS	0	
DHA	0	
DHS	5	Commerce, Science, and Transportation; Finance; Homeland Security and Governmental Affairs; Intelligence; Judiciary
DIA	0	
DISA	0	
DLA	0	
DLSA	0	
DMA	0	
DNDO	0	
DNFSB	1	Armed Services
DOC	6	Banking, Housing, and Urban Affairs; Commerce, Science, and Transportation; Environment and Public Works; Finance; Homeland Security and Governmental Affairs; Judiciary
DOD	3	Armed Services; Environment and Public Works; Intelligence
DODATL	1	Armed Services
DODEA	0	
DODPR	1	Armed Services
DOE	2	Armed Services; Energy and Natural Resources
DOED	1	Health, Education, Labor, and Pensions
DOJ	2	Intelligence; Judiciary
DOL	3	Finance; Health, Education, Labor, and Pensions; Veterans Affairs
DOT	3	Banking, Housing, and Urban Affairs; Commerce, Science, and Transportation; Environment and Public Works
DPOW	0	
DRA	1	Environment and Public Works
DSCA	0	
DSS	0	
DTIC	0	
DTRA	0	
DTSA	0	
DVA	1	Veterans Affairs

Agency	Number of Committees	Committees
EAC	1	Rules and Administration
EBSA	1	Health, Education, Labor, and Pensions
EDA	1	Environment and Public Works
EEOC	1	Health, Education, Labor, and Pensions
EOIR	0	
EOUSA	1	Judiciary
EOUST	0	
EPA	1	Environment and Public Works
ERS	0	
ESA	1	Commerce, Science, and Transportation
ETA	1	Health, Education, Labor, and Pensions
EXIM	1	Banking, Housing, and Urban Affairs
FAA	1	Commerce, Science, and Transportation
FAMC	1	Agriculture, Nutrition, and Forestry
FAS	0	
FBI	1	Judiciary
FCA	1	Agriculture, Nutrition, and Forestry
FCC	1	Commerce, Science, and Transportation
FCIC	0	
FCSC	1	Judiciary
FCSIC	0	
FDA	1	Health, Education, Labor, and Pensions
FDIC	1	Banking, Housing, and Urban Affairs
FEC	1	Rules and Administration
FED	1	Banking, Housing, and Urban Affairs
FEMA	1	Homeland Security and Governmental Affairs
FERC	1	Energy and Natural Resources
FHA	1	Banking, Housing, and Urban Affairs
FHFA	1	Banking, Housing, and Urban Affairs
FHITF	1	Finance
FHWA	1	Environment and Public Works
FINCEN	0	
FIO	0	
FLETC	0	
FLRA	1	Homeland Security and Governmental Affairs
FMC	1	Commerce, Science, and Transportation
FMCS	1	Health, Education, Labor, and Pensions

Agency	Number of Committees	Committees
FMCSA	1	Commerce, Science, and Transportation
FMSHRC	1	Health, Education, Labor, and Pensions
FNS	0	
FODSITF	1	Finance
FRA	1	Commerce, Science, and Transportation
FRTIB	1	Homeland Security and Governmental Affairs
FSA	0	
FSIS	0	
FSMITF	1	Finance
FSOC	1	Banking, Housing, and Urban Affairs
FTA	1	Banking, Housing, and Urban Affairs
FTC	1	Commerce, Science, and Transportation
GIPSA	0	
GNMA	1	Banking, Housing, and Urban Affairs
GSA	1	Homeland Security and Governmental Affairs
HHS	3	Finance; Health, Education, Labor, and Pensions; Indian Affairs
HRSA	0	
HSTSIF	1	Health, Education, Labor, and Pensions
HUD	1	Banking, Housing, and Urban Affairs
IAF	1	Foreign Relations
ICE	2	Homeland Security and Governmental Affairs; Judiciary
IHS	1	Indian Affairs
IMLS	1	Health, Education, Labor, and Pensions
INT	2	Energy and Natural Resources; Environment and Public Works
IRS	1	Finance
IRSOB	1	Finance
ITA	1	Finance
JCRS	1	Judiciary
JITDA	0	
JMMFF	1	Health, Education, Labor, and Pensions
LPO	0	
LSC	1	Health, Education, Labor, and Pensions
MA	1	Commerce, Science, and Transportation
MBDA	0	
MCC	1	Foreign Relations
MDA	0	
MINT	1	Banking, Housing, and Urban Affairs

Agency	Number of Committees	Committees
MMC	1	Commerce, Science, and Transportation
MSHA	1	Health, Education, Labor, and Pensions
MSPB	1	Homeland Security and Governmental Affairs
MUSUF	1	Environment and Public Works
MWAA	1	Commerce, Science, and Transportation
NARA	1	Homeland Security and Governmental Affairs
NARAB	1	Banking, Housing, and Urban Affairs
NASA	1	Commerce, Science, and Transportation
NASS	0	
NAVY	1	Armed Services
NCA	1	Veterans Affairs
NCCB	1	Banking, Housing, and Urban Affairs
NCUA	1	Banking, Housing, and Urban Affairs
NEA	1	Health, Education, Labor, and Pensions
NEH	1	Health, Education, Labor, and Pensions
NGIA	0	
NGPRA		
NHTSA	1	Commerce, Science, and Transportation
NIBS	1	Banking, Housing, and Urban Affairs
NIFA	0	
NIGC	1	Indian Affairs
NIH	1	Health, Education, Labor, and Pensions
NIST	1	Commerce, Science, and Transportation
NLRB	1	Health, Education, Labor, and Pensions
NMB	1	Health, Education, Labor, and Pensions
NNSA	1	Armed Services
NOAA	1	Commerce, Science, and Transportation
NPS	1	Energy and Natural Resources
NRC	1	Environment and Public Works
NRCS	0	
NRO	2	Armed Services; Intelligence
NSA	2	Armed Services; Intelligence
NTIA	1	Commerce, Science, and Transportation
NTIS	0	
NTSB	1	Commerce, Science, and Transportation
OAM	0	
OAP	0	

Agency	Number of Committees	Committees
OCC	1	Banking, Housing, and Urban Affairs
OCPD	1	Banking, Housing, and Urban Affairs
ODEP	1	Health, Education, Labor, and Pensions
ODNCP	1	Judiciary
ODNI	2	Homeland Security and Governmental Affairs; Intelligence
OEA	0	
OEDE	1	Energy and Natural Resources
OEERE	1	Energy and Natural Resources
OELA	0	
OESA	1	Health, Education, Labor, and Pensions
OFAC	0	
OFCCP	0	
OFHEO	1	Banking, Housing, and Urban Affairs
OFPM	0	
OFSA	0	
OGE	1	Homeland Security and Governmental Affairs
OHC	0	
OHHLHC	0	
OII	0	
OJP	1	Judiciary
OLMS	0	
OMB	2	Budget; Homeland Security and Governmental Affairs
ONCHIT	0	
ONRR	0	
ONSE	0	
OPE	1	Health, Education, Labor, and Pensions
OPIC	1	Foreign Relations
OPIH	1	Banking, Housing, and Urban Affairs
OPM	1	Homeland Security and Governmental Affairs
OSC	1	Homeland Security and Governmental Affairs
OSHA	1	Health, Education, Labor, and Pensions
OSHRC	1	Health, Education, Labor, and Pensions
OSMR	1	Energy and Natural Resources
OSTEP	1	Commerce, Science, and Transportation
OVAW	1	Judiciary
OWCP	0	
PBGC	2	Finance; Health, Education, Labor, and Pensions

Agency	Number of Committees	Committees
PC	1	Foreign Relations
PCLOB	1	Judiciary
PFFA	0	
PHMSA	1	Commerce, Science, and Transportation
PRC	1	Homeland Security and Governmental Affairs
PRFOMB	1	Energy and Natural Resources
PSER	1	Health, Education, Labor, and Pensions
RBCS	0	
RHS	0	
RMA	0	
RRB	1	Health, Education, Labor, and Pensions
RUS	0	
SAMHSA	1	Health, Education, Labor, and Pensions
SBA	1	Small Business and Entrepreneurship
SEC	1	Banking, Housing, and Urban Affairs
SIPC	1	Banking, Housing, and Urban Affairs
SJI	1	Judiciary
SSA	1	Finance
SSAB	1	Finance
STAT	2	Foreign Relations; Intelligence
STB	1	Commerce, Science, and Transportation
STLSDC	1	Commerce, Science, and Transportation
TDA	1	Foreign Relations
TRMC	0	
TRS	3	Banking, Housing, and Urban Affairs; Finance; Intelligence
TSA	2	Commerce, Science, and Transportation; Homeland Security and Governmental Affairs
TVA	1	Environment and Public Works
USADF	1	Foreign Relations
USAF	1	Armed Services
USAID	1	Foreign Relations
USCG	1	Commerce, Science, and Transportation
USDA	1	Agriculture, Nutrition, and Forestry
USFS	0	
USFWS	1	Environment and Public Works
USGS	1	Energy and Natural Resources
USIP	1	Health, Education, Labor, and Pensions

Agency	Number of Committees	Committees
USITC	1	Finance
USMS	1	Judiciary
USPC	1	Judiciary
USPS	1	Homeland Security and Governmental Affairs
USPTO	1	Judiciary
USSS	0	
USTR	1	Finance
VBA	1	Veterans Affairs
VETS	2	Health, Education, Labor, and Pensions; Veterans Affairs
VHA	1	Veterans Affairs
WB	0	
WHD	1	Health, Education, Labor, and Pensions
WHS	0	

Appendix C

Agency Structure Codebook

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

Data Collection

The data collection process for the second edition of the *Sourcebook* was similar to that of the first. During the summer of 2017, the authors updated the data for the 250 agency and bureau⁴⁵¹ statutes that had previously been analyzed in either the first ver-

451. Any provision involving a bureau must specifically recognize the bureau by name. Provisions that involve a bureau's policy jurisdiction but grant authority to an official higher in the agency hierarchy are not included as part of the bureau's structural features. For example, statutory provisions granting the Secretary of Agriculture authority to do things relating to national forest land likely implicate the U.S. Forest Service, but are not considered part of the Forest Service's responsibilities unless the statute specifically recognizes the Service by name.

sion of the *Sourcebook*⁴⁵² or in Professor Selin's *What Makes an Agency Independent?* dataset⁴⁵³ to account for statutory changes since the data were originally collected. For the remaining 28 agency statutes that had not previously been analyzed, the authors found the original public law that established the agency or bureau and the law's corresponding updated section in the United States Code. Next, the research team read that section of the Code to extract information about agency structure. When possible, all data were validated using a variety of different sources depending upon the type of agency and characteristic.

The *Sourcebook* continues to rely primarily on the statutory language of authorizing statutes rather than administrative practice. This choice was made for the sake of consistency between editions and also to capture the structural "deal" between Congress and the President. While this allows for statutory comparisons across agencies, it does place some limitations on the data. For example, the United States Code references the United States Postal Service (USPS) in 32 different titles. While

452. Data collection proceeded in three phases. In the first phase, each researcher on the team was responsible for approximately 15 agencies. Each researcher found the original public law that established the agency and that law's corresponding updated section in the U.S. Code. Unless otherwise specified, all information referring to "statute" in the codebook comes from this updated section of the U.S. Code. Next, each researcher read that section of the Code and extracted information about the agency's structure. Researchers noted statutory features of each agency along with a statutory reference for each feature. A total of 61 statutory characteristics of agencies were tracked for the seven components of the EOP, the 15 executive departments, and 85 independent agencies. Researchers noted the location of each agency (e.g., EOP, executive department, etc.), features of agency governance (e.g., commission, fixed terms, number of appointees), agency powers (e.g., power to raise funds, independent litigating authority), and aspects of agency political oversight (e.g., OMB and congressional reporting requirements, congressional committee jurisdiction).

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

In the final phase, coding of the data was validated using a variety of different sources depending upon the type of agency and characteristic. Where discrepancies emerged, statutes were reread and a judgment was made about what source was correct. If discrepancies existed, they were often the result of the team using the provisions of the statutory law described above to code the structural features of the agency. This report relies on the portions of the U.S. Code related to agency structure, but it is possible that other statutory provisions outside of the establishing statute impose additional requirements on the agency or specify additional structural features of the agency. In addition, not all structural features are detailed in statute. Many are determined by agency action. Agencies promulgate regulations to implement law and clarify areas where statutory law is unclear. For example, many commission statutes are silent on the question of what constitutes a quorum in an agency yet such rules are necessary for the functioning of the agency. Agencies clarify this uncertainty in regulation, practice, or agency by-laws. Finally, in some cases administrative common law adds content to what is not explicitly included in statute. For example, the statute authorizing the Securities and Exchange Commission does not include explicit for-cause protections for the removal of commissioners. Yet, federal courts recognize the existence of for-cause protections in the agency despite no explicit mention in statute. *See, e.g.*, SEC v. Blinder, Robinson, and Co., 855 F.2d 677 (10th Cir. 1988).

453. Selin, *supra* note 2 (data available at <http://faculty.missouri.edu/selinj/data.shtml>).

the *Sourcebook* references the USPS's structure as laid out in Title 39, other titles undoubtedly impose additional requirements and administrative procedures that affect USPS governance. In addition, the reliance on authorizing statutes does not explain how these agencies implement the law in practice nor does it elaborate upon the policy implications of agency design decisions. For a few areas of interest, governmental publications supplement the information obtained from statute. Those publications are noted in the codebook.

Variables

This section of the codebook includes a description of each variable and how each variable is coded in the dataset.

Housekeeping Variables

Name:	Name of Agency.
Statute:	Sections of the U.S. Code that establish the agency.
Date of Creation:	Date the establishing statute for the agency became law. In most cases the date of creation is clear. In some cases, however, there is some uncertainty. For example, the Department of Labor was created as an independent agency in 1888, became part of the Department of Labor and Commerce in 1903, and was named an executive department in 1913. Where there was uncertainty we relied on agency self-interpretation. <i>Source:</i> Agency statute; Agency-issued statements about agency history (usually from the agency's website).
EOP:	This variable is coded with a (1) if the agency is a component of the EOP and (0) otherwise. <i>Source:</i> Agency statute.
Exec. Dept.:	This variable is coded with a (1) if the agency is an executive department or a component of an executive department and (0) otherwise. <i>Source:</i> Agency statute.
Bureau:	This variable is coded with a (1) if the agency is a component of a larger department or agency and (0) otherwise. <i>Source:</i> Agency statute.
Corporation:	This variable is coded with a (1) if the agency is a wholly owned government corporation and (0) otherwise. Federally chartered private corporations or nonprofit entities are coded (0). <i>Source:</i> 31 U.S.C. § 9101(3) (2017).

- CodeRef:** This variable is coded with a (1) if the agency is referenced anywhere in the United States Code and (0) otherwise. *Source:* United States Code.
- StatMandate:** This variable is coded with a (1) if a federal statute mandates the establishment of the agency and (0) otherwise. Examples of statutory language mandating the establishment of an agency include the statute authorizing the Food and Drug Administration, which states “There is established in the Department of Health and Human Services the Food and Drug Administration,”⁴⁵⁴ and the statute authorizing the National Telecommunications and Information Administration, which states “There shall be within the Department of Commerce an administration to be known as the National Telecommunications and Information Administration.”⁴⁵⁵ *Source:* Agency statute.
- StatPermit:** This variable is coded with a (1) if a federal statute permits, but does not mandate, the establishment of the agency and (0) otherwise. An example of statutory language merely permitting the establishment of an agency includes the statute recognizing the Natural Resources Conservation Service, which states that “The Secretary is authorized to establish and maintain within the Department [of Agriculture] a Natural Resources Conservation Service.”⁴⁵⁶ *Source:* Agency statute.

Leadership Structure and Agency Personnel

- Multimember:** This variable is coded with a (1) if the agency is a multi-member commission, has a board of directors, or the like and (0) otherwise. *Source:* Agency statute.
- NumberMembers:** If the agency is a multi-member commission or board, the number of *voting* members on the commission or board of directors. (.) denotes an agency that is not a commission or does not have a board. This includes multi-member bodies that do or do not have fixed terms. *Source:* Agency statute.

454. 21 U.S.C. § 393(a) (2017).

455. 47 U.S.C. § 902(a)(1) (2017).

456. 7 U.S.C. § 6962(a) (2017).

QuorumRules: (1) Statute specifies the number of commissioners or board members that constitute a quorum; (0) Statute does not specify the number of commissioners or board members that constitute a quorum; (.) Quorum rules not applicable because not commission or board. An example of a statute defining a quorum is the statute authorizing the Corporation for National and Community Service, which states, “A majority of the appointed members of the Board shall constitute a quorum.”⁴⁵⁷ *Source:* Agency statute.

QuorumNumber: If QuorumRules is coded (1), the number of members or commissioners the statute specifies constitute a quorum. *Source:* Agency statute.

Appointees:

PAS: Number of positions in agency subject to presidential appointment with Senate confirmation. *Source:* S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (G.P.O. 2016).

NA: Number of Senior Executive Service general positions in agency filled by non-career appointment. *Source:* S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (G.P.O. 2016).

SchC: Number of positions in agency filled by Schedule C Excepted Appointment. *Source:* S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (G.P.O. 2016).

PA: Number of positions in agency subject to presidential appointment without Senate confirmation that are not non-career SES positions or Schedule C positions. *Source:* S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (G.P.O. 2016).

457. 42 U.S.C. § 12651b(b) (2017).

XS: Number of policy and supporting positions in the agency subject to statutory excepted appointment that are not PAS, NA, SC, or PA positions. *Source*: S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., POLICY AND SUPPORTING POSITIONS (G.P.O. 2016).

Agency-specific
Personnel:

For the purposes of the chapters of Title 5 relating to pay and allowances, certain agencies' employees are excluded from the definition of "employee"⁴⁵⁸ and other agencies' statutes permit employment systems particular to that agency. Examples of statutory language indicating separate employment systems include "members, alternates, officers, and employees of the Commission are not federal employees for any purpose"⁴⁵⁹ or "rates of basic pay for all employees may be set and adjusted by the agency without regard to" civil service provisions.⁴⁶⁰ Other statutes allow for some agency employees to fall outside of civil service provisions but place limitations on the number. Examples of this sort of language include the agency "may appoint not more than 425 of the scientific, engineering, and administrative personnel of the Administration without regard to [civil service] laws."⁴⁶¹ Agency-specific personnel system is coded (3) if 5 U.S.C. § 5102 excepts agency employees from the definition of "employee"; (2) if the agency's statute permits the agency to use employment systems particular to that agency; (1) if the agency statute allows a limited number of employees to fall outside of civil service provisions; (0) if the statute does not specifically allow for any agency employees to fall outside of civil service provisions. *Source*: 5 U.S.C. § 5102 (2017); Agency statute.

458. 5 U.S.C. § 5102 (2017).

459. 40 U.S.C. § 14301(f) (2017) (Appalachian Regional Commission).

460. 7 U.S.C. § 2(a)(7)(B) (2017) (Commodity Futures Trading Commission).

461. 51 U.S.C. § 20113(b)(1) (2017) (National Aeronautics and Space Administration).

Employees: The number of employees in the agency as of September 2016. *Source:* Office of Personnel Management. *Central Personnel Data File*, September 2016, <http://www.fedscope.opm.gov/employment.asp>. For some agencies, the Office of Personnel Management does not collect employment data. Sources used to obtain employee data in those cases include OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018 (2017) (Appendix, 2016 Actual FTE).

In cases where OPM does not collect employment data researchers relied on other sources such as Congressional Research Service reports, Presidential budget documents, communications with agency officials, and secondary sources for estimates of agency employment.

Limitation on Appointments:

Citizen of U.S. (1) Statute mandates that board members or commissioners or the agency head must be citizens of the United States; (0) Statute does not mandate members/commissioners/agency head be citizens of the United States. An example of such a statute is the statute authorizing the Farm Credit Administration which stipulates, “The Board members shall be citizens of the United States and broadly representative of the public interest.”⁴⁶² *Source:* Agency statute.

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

462. 12 U.S.C. § 2242(a) (2017).

- Geographic: (1) Statute places a geographic limitation on the nomination/selection of board members or commissioners or the agency head; (0) Statute does not place a geographic limitation on members/commissioners/agency head. A statute that advises the President to consider geography “to the maximum extent possible,” “as nearly as practicable,” or similar language is coded as a (1). One example of a statute that places a geographic limitation is the statute authorizing the Board of Governors of the Federal Reserve. It states, “In selecting members of the Board, not more than one of whom shall be selected from any one federal reserve district, the president shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests and geographical divisions of the country.”⁴⁶³ *Source:* Agency statute.
- Demographic: (1) Statute places a demographic limitation on the nomination/selection of board members or commissioners or the agency head; (0) Statute does not place a demographic limitation on members/commissioners/agency head. A statute that advises the President to appoint members so that the Board shall be diverse according to race, ethnicity, age, gender, or other characteristics “to the maximum extent possible,” “as nearly as practicable,” or similar language is coded as a (1). One example of a demographic limitation is from the statute authorizing the Corporation for National and Community Service, which states that one of the 15 members must be “an individual between the ages of 16 and 25.”⁴⁶⁴ *Source:* Agency statute.

463. 12 U.S.C. § 241 (2017).

464. 42 U.S.C. § 12651a(a)(1)(A) (2017).

Expertise: (1) Statute places an expertise or experience limitation on the nomination/selection of members or commissioners or the agency head; (0) Statute does not place an expertise or experience limitation on members/commissioners/agency head. For example, the statute authorizing the Chemical Safety and Hazard Investigation Board states, “Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation.”⁴⁶⁵ *Source:* Agency statute.

LLExpertise: (1) Statute places an expertise or experience limitation on the nomination/selection of individuals below the level of agency head; (0) Statute does not place any expertise or experience limitation on individuals below the level of members/commissioners/agency head. For example, the Judge Advocate General of the U.S. Army “shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State, and who have had at least eight years of experience in legal duties as commissioned officers.”⁴⁶⁶ Expertise requirements for members of advisory commissions are excluded from this variable. *Source:* Agency statute.

Conflict of Interest: (1) Statute places a conflict of interest limitation on the nomination/selection of members; (0) Statute does not place a conflict of interest limitation on members. For example, the statute authorizing the Commodity Futures Trading Commission states, “No Commissioner or employee of the Commission shall accept employment or compensation from any person, exchange, or clearinghouse subject to regulation by the Commission under this chapter during his term of office, nor shall he participate, directly or indirectly, in any registered entity operations or transactions of a character subject to regulation by the Commission.”⁴⁶⁷ *Source:* Agency statute.

465. 42 U.S.C. § 7412(r)(6)(B) (2017).

466. 10 U.S.C. § 3037(b) (2017).

467. 7 U.S.C. § 2(a)(8) (2017).

Congressional

Input:

(1) Statute provides some mechanism for congressional input in the nomination process aside from confirmation; (0) Statute does not provide for congressional input. Examples of congressional input include “appointed by the President after taking into consideration the recommendation made by the Speaker of the House,” “appointed by the President upon the recommendation of the President of the Senate,” or similar language. Agencies where members of Congress are voting members of an agency Board are also coded as (1). *Source:* Agency statute.

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

Limitations on Removals

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

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

LL Fixed Terms: (1) Statute specifies a fixed term for an employee of the agency other than members, commissioners, or agency heads; (0) Statute does not specify a fixed term for employees other than members/commissioners/agency head. For example, the Chief of Chaplains of the Air Force serves a term of three years and is coded (1).⁴⁶⁸ Fixed terms for members of advisory commissions are excluded from this variable. *Source:* Agency statute

468. 10 U.S.C. § 8039(a)(2) (2017).

Staggered

Terms:

(1) If the agency is a commission or has a board of directors and the statute fixes the terms of the initial members of the commission or board so that nominations in future years will be staggered; (0) If the agency is a commission or has a board of directors and the statute does not fix terms so that nominations will be staggered; (.) The agency is not a commission or does not have a board of directors. An example of a statute that staggers terms is the statute authorizing the Consumer Product Safety Commission. It states, “The Commissioners first appointed shall be appointed for terms ending three, four, five, six, and seven years, respectively, after October 27, 1972, the term of each to be designated by the President at the time of nomination and each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.”⁴⁶⁹ *Source:* Agency statute.

For Cause:

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

Serve President:

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

469. 15 U.S.C. § 2053(b)(1) (2017).

Continuation

Replacement: (1) If Fixed Terms is coded (1) and statute provides that members or commissioners or the agency head whose term has expired may serve until a successor has been appointed and qualified; (0) If Fixed Terms is coded (1) and statute does not provide for continuation until replacement; (.) The commission or board members or agency head do not have fixed terms.⁴⁷⁰ Some provisions for continuation provide that a member may serve until a successor has been appointed and qualified or until some other point such as the end of the next congressional session. For example, the statute authorizing the Consumer Product Safety Commission states, “A Commissioner may continue to serve after the expiration of term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire.”⁴⁷¹ *Source:* Agency statute.

Acting Service

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

⁴⁷⁰. The Department of the Treasury’s statute provides that when a term of office of any officer of the Department of the Treasury ends, the officer may continue to serve until a successor is appointed and qualified. 31 U.S.C. § 315 (2017). However, because the Secretary of the Treasury does not have a fixed term, the Treasury Department is coded (.).

⁴⁷¹. 15 U.S.C. § 2053(b)(2) (2017).

Agency Head Selection and Retention

- PAS Head:⁴⁷² (1) Statute specifies that the President, with advice and consent of Senate, appoints the agency head and the agency head is not an official from another agency;⁴⁷³ (0) Statute does not specify that the President appoints the agency head with the advice and consent of the Senate. *Source:* Agency statute.
- President
Selects Chair: (1) Statute specifies that President designates the agency head but does not provide for Senate advice and consent; (0) Statute does not specify that President designates agency head without Senate advice and consent. *Source:* Agency statute.
- Sec/Com
Selects Head: For bureaus within larger agencies, (1) Statute specifies that the head of the larger organization designates the agency head; (0) Statute does not specify that the head of the larger organization designates the agency head. For example, the Bureau of Prisons is coded (1) because the statute provides that its director shall be “appointed by and serving directly under the Attorney General.”⁴⁷⁴ *Source:* Agency statute.
- Elected Head: (1) Statute provides that the head of the agency is elected from among members or commissioners of the agency; (0) Statute does not provide for the election of the agency head.⁴⁷⁵ *Source:* Agency statute.

472. Cochairmen selected by different means are coded as a (1) in two categories. For example, the Appalachian Regional Commission has two cochairmen, one appointed by the President and confirmed by the Senate and one elected by the state members of the board. 40 U.S.C. § 14301(b) (2017). This agency is coded as a (1) under PAS Head of Agency and as a (1) under Elected Head.

473. For example, the Managing Trustee of the Federal Hospital Insurance Trust Fund Board is the Secretary of the Treasury. 42 U.S.C. § 1395i(b) (2017). This position is coded as a (0).

474. 18 U.S.C. § 4041 (2017).

475. In the following agencies, the agency statute uses a term other than “elect”: National Mediation Board (“designate”), Tennessee Valley Authority (“select”), and U.S. Election Assistance Commission (“select”).

Outside Head: (1) Statute specifies that the head of the agency is an official who also serves in a position in the administration that is outside of the agency; (0) Statute does not specify that the head of the agency is an outside official. For example, the Secretary of the Treasury is the Managing Trustee of the Federal Hospital Insurance Trust Fund Board.⁴⁷⁶ The Board is therefore coded (1). *Source:* Agency statute.

Head Removal: (2) Statute specifies that the head may only be removed for inefficiency, neglect of duty, or malfeasance in office; (1) Statute specifies a term of office for the head of the agency; (0) Statute does not specify a term of office for the head and does not state the head may only be removed for cause, and does not state the head serves at the pleasure of the President. For the purposes of this variable only, the chair is considered the head of the agency if the agency is a board or commission. Statutes that specify terms of office or for-cause protections for board members or commissioners generally, but are silent with respect to the chair specifically, are coded (0). *Source:* Agency statute.

ChairServe
President:

(1) Statute specifies that head of agency serves at the pleasure of the President; (0) Statute does not specifically state that head of agency serves at the pleasure of the President. *Source:* Agency statute.

476. 42 U.S.C. § 1395i(b) (2017).

Features Insulating Agency Policy

Centralized OMB Review:

No OMB

Budget

Review:⁴⁷⁷

(2) The President must submit the agency's budget requests to Congress without revision, together with the President's own budget proposals; (1) The agency submits its budget directly to Congress without OMB review; (0) The agency is not able to bypass OMB budget review. *Source:* Agency statute; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-11 (2017); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, on Agencies with Legislative and Budget "Bypass" Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf>.

No OMB

Rule Review:

(1) The agency is exempted from submitting all regulatory actions to the administrator of the Office of Information and Regulatory Affairs (OIRA); (0) The agency is not exempted from OIRA review. *Source:* Agency statute; Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993); 44 U.S.C. § 3502 (2017).

⁴⁷⁷ The Federal Aviation Administration, which is part of the Department of Transportation, has statutorily based budgetary bypass authority. However, because the entire DOT does not have bypass authority, DOT is coded (0).

No OMB
Communications
Review:⁴⁷⁸

(2) The agency asserts “informal” legislative bypass authority without any explicit authority, statutory or otherwise, even though OMB Circular A-19 does cover the agency; (1) Statutory law exempts the agency from submitting its communications to Congress to OMB for coordination and clearance prior to transmittal to Congress; (0) The agency must submit communications to Congress to OMB for coordination and clearance prior to transmittal to Congress. *Source:* Agency statute; 12 U.S.C. § 250 (2017); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR No. A-19 (1979); Memorandum from Jim Jukes, Assistant Director for Legislative Reference, Office of Management and Budget, on Agencies with Legislative and Budget “Bypass” Authorities (Feb. 20, 2001), <http://www.citizen.org/documents/OMBDocument1.pdf>.

Independent
Litigating:

In general, the Attorney General retains full authority over all litigation, civil and criminal, to which the United States, its agencies, or its departments are parties unless otherwise authorized by law. Some statutes establish an exception to the Attorney General’s authority and expressly authorize an agency to represent itself in legal proceedings. Courts interpret these statutes narrowly, and only statutes that are clear and unambiguous will establish an exception.⁴⁷⁹ We also interpret the statutes narrowly. (1) Agency authorizing statute includes provisions relating to independent litigating authority; (0) Statute does not include provisions concerning the agency’s ability to represent itself in legal proceedings. *Source:* Agency statute.

478. The Federal Aviation Administration (part of the Department of Transportation) and the Office of the Comptroller of the Currency (part of the Department of the Treasury) have statutorily based legislative bypass authority. However, because neither the entire Department of Transportation nor the Department of the Treasury have bypass authority, these departments are coded as (0).

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

Independent
Funding:

(5) Statute authorizes agency to assess and collect fees or charges for the purpose of covering a substantial portion of the cost of operating expenses incurred by the agency;⁴⁸⁰ (4) Statute authorizes the agency to participate in activities generally associated with the business of banking, such as the authority to receive deposits, to insure credit risks of loss, to borrow and lend money, to purchase, sell, and guarantee securities, or other similar functions; (3) Statute establishes a working capital fund or other similar fund to be available to the agency without fiscal year limitation for one or more purposes; (2) Statute authorizes the agency to charge and collect reasonable administrative fees for products, services, access to data, etc.; (1) Statute authorizes the agency to accept, use, and dispose of gifts, donations, or property (real, personal, or mixed) in furtherance of the agency's purposes; (0) Statute does not include provision authorizing the agency to collect funds outside of congressional appropriations. For all classifications, any statutory provision that permits an outside actor to credit money from one agency to another is not included as a source of independent funding. *Source:* Agency statute.

No Approp:

(1) Statute authorizes agency to assess and collect fees or charges for the purpose of covering a substantial portion of the cost of operating expenses incurred by the agency⁴⁸¹; (0) Statute does not authorize agency to collect fees for the purpose of covering a substantial portion of the cost of operating expenses. *Source:* Agency statute.

480. Even if the statute authorizes a specific subunit within an executive department to collect fees, that executive department is not as a whole funded substantially by these fees and therefore does not fall under (5). For example, while the Federal Energy Regulatory Commission shall assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year, the Department of Energy is coded (2) because these fees do not cover a substantial portion of the operating costs of the entire Department of Energy.

481. Also coded as (5) under Independent Funding.

Congressional Oversight

Reporting

Requirements:⁴⁸² Number of statutorily mandated recurring agency reports to Congress. *Source:* CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 115TH CONG., REPORTS TO BE MADE TO CONGRESS (H.R. DOC. NO. 115-4) (2017).

Number

Committees:⁴⁸³ Number of committees specified by statute as overseeing the agency in any way, including, *inter alia*, receiving reports, hearing testimony, or exercising a legislative veto. *Source:* Agency statute.

Other Key Structural Features

Government-Wide Management Laws

CIO: (1) The agency is statutorily mandated to have a Chief Information Officer; (0) The agency is not statutorily mandated to have a Chief Information Officer. *Source:* 40 U.S.C. § 11101(2); 40 U.S.C. § 11315 (2017); 31 U.S.C. § 901 (2017).

482. The statutory provisions identified in this codebook exclusively contain references to reporting requirements in the agencies' authorizing statutes, while the count in the Excel spreadsheet includes all statutorily mandated recurring agency reports as published by the Clerk of the U.S. House of Representatives. Neither the statutory provisions nor the count recognize reports that are required of most or all agencies across the executive establishment (e.g., inspectors general's reports, etc.).

483. House Committees of the 115th Congress include: Agriculture; Appropriations; Armed Services; Budget; Education and the Workforce; Energy and Commerce; Ethics; Financial Services; Foreign Affairs; Homeland Security; House Administration; Intelligence; Judiciary; Natural Resources; Oversight and Government Reform; Rules; Science, Space, and Technology; Small Business; Transportation and Infrastructure; Veterans Affairs; Ways and Means; and the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi. Senate Committees of the 115th Congress include: Aging; Agriculture, Nutrition, and Forestry; Appropriations; Armed Services; Banking, Housing, and Urban Affairs; Budget; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Ethics; Finance; Foreign Relations; Health, Education, Labor, and Pensions; Homeland Security and Governmental Affairs; Indian Affairs; Intelligence; Judiciary; Rules and Administration; Small Business and Entrepreneurship; and Veterans Affairs. Joint Committees of the 115th Congress include: Joint Economic; Joint Library; Joint Printing; and Joint Taxation.

IG: (3) The agency is an “establishment” as defined by the Inspector General Act of 1978 and has an Office of Inspector General that is headed by an Inspector General who is appointed by the President by and with the advice and consent of the Senate⁴⁸⁴; (2) The agency is a “designated federal entity” as defined by the Inspector General Act of 1978 and OMB’s published list of designated federal entities, and has an Office of Inspector General that is headed by an Inspector General who is appointed by the agency; (1) The agency is a “federal entity” as defined by the Inspector General Act of 1978 and OMB’s published list of federal entities and has an audit office that is required to report an annual audit and investigative activities to each house of Congress and the Director of OMB; (0) The agency is not an “establishment,” a “designated federal entity,” or a “federal entity.” *Source:* 5 U.S.C. app. 3 §§ 8G, 12 (2017); Office of Mgmt. & Budget, Executive Office of the President 79 Fed. Reg. 1896-1901 (Jan. 10, 2014).

CFO: (2) The Chief Financial Officers Act mandates that the agency have a Chief Financial Officer appointed by the President and confirmed by the Senate; (1) The Chief Financial Officers Act mandates that the agency have a Chief Financial Officer appointed by the head of the agency and is a career executive from either the competitive service or the Senior Executive Service; (0) The Chief Financial Officers Act places no requirements on the agency. *Source:* 31 U.S.C. § 901(b) (2017).

484. Even though the Inspector General Act does not include them, two agencies are coded as (3) because they have statutorily mandated PAS Inspectors General. *See* 50 U.S.C. § 3517(a) (2017) (Central Intelligence Agency); 50 U.S.C. § 3033(c)(1) (2017) (the Office of the Director of National Intelligence’s IG requirements). In addition, 3 agencies are coded as (2), despite not being recognized as designated federal entities in the OMB List of Designated Federal Entities because they have Inspectors General appointed by the head of the agency. *See* 10 U.S.C. § 3020(a) (2017) (Army); 10 U.S.C. § 5020(a) (2017) (Navy); 10 U.S.C. § 8020(a) (2017) (Air Force).

Sunshine: (1) The agency is subject to the Government in Sunshine Act of 1976;⁴⁸⁵ (0) The agency is not subject to the Government in Sunshine Act of 1976. Ambiguity resulting from the Act's provision relating to the phrase "collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate"⁴⁸⁶ is resolved by following the rule of *Symons v. Chrysler Corporation Loan Guarantee Board*,⁴⁸⁷ which does not count ex officio members or members of the agency who are appointed to other offices. For example, the Federal Hospital Insurance Trust Fund board, which is composed of the Commissioner of Social Security, the Secretaries of the Treasury, Labor, and Health and Human Services, and two members of the public appointed by the President by and with the advice and consent of the Senate is coded (0).⁴⁸⁸ *Source*: Agency statute; 5 U.S.C. § 522b (2017).

Advisory

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

485. Despite the fact that they do not fall within the list of entities to which the Government in Sunshine Act is applicable, two corporate entities are coded as (1) because their authorizing statutes suggest the entity shall be subject to § 552b or that meetings shall be open to the public. *See* 42 U.S.C. § 2996c(g) (2017) (all meetings of the Legal Services Corporation shall be open and subject to the requirements of the Sunshine Act); 47 U.S.C. § 396(g)(4) (2017) (Corporation for Public Broadcasting shall hold open meetings with reasonable notice to the public).

486. 5 U.S.C. § 552b(a)(1) (2017).

487. 670 F.2d 238, 243-44 (D.C. Cir. 1981).

488. Note that this coding is for the agency itself and does not consider entities within the agency. For example, the National Council on the Humanities, composed of 26 members appointed by the President with the advice and consent of the Senate, falls under the Sunshine Act, but the National Endowment for the Humanities, which is headed by a single chairperson appointed by the President by and with the advice and consent of the Senate, does not, and is therefore coded (0).

Establish Advisory

Commissions: (1) Statute specifies that one or more advisory commissions may be established to advise the agency, or any of its subparts, in any way; (0) Statute does not specify that advisory commissions may be established. For example, the Department of Energy is coded (1) because its authorizing statute states: “The Secretary is authorized to establish in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate to assist in the performance of his functions.”⁴⁸⁹ *Source:* Agency statute.

Outside Approval: Some agencies cannot take specific action without getting prior approval from one or more actors outside the agency. This approval may come from another part of the executive branch (including the agency head in the case of a bureau), or may come in the form of a legislative veto. For example, the Commodity Futures Trading Commission cannot implement any plan to charge and collect fees until that plan is approved by the House Agriculture Committee and the Senate Agriculture, Nutrition, and Forestry Committee.⁴⁹⁰ The mere requirement to “consult with” or “consider views” of an outside body does not constitute outside approval. (1) Statute specifies that one or more agency actions require outside approval before being taken; (0) Statute does not specify that any agency actions require outside approval. *Source:* Agency statute.

Rulemaking: (1) Statute authorizes agency to promulgate rules and/or regulations; (0) Statute does not specifically authorize agency to promulgate rules and/or regulations. *Source:* Agency statute.⁴⁹¹

Significant Rule: (1) According to the *Federal Register*, agency has promulgated a rule in the last 15 years that the Unified Agenda of Regulatory and Deregulatory Actions classified as significant under Executive Order 12,866; (0) According to the *Federal Register*, agency has not promulgated a significant rule in the last 15 years. *Source:* *Federal Register*, <https://www.federalregister.gov>.

489. 42 U.S.C. § 7234 (2017).

490. 7 U.S.C. § 16a(a) (2017).

491. The coding for this variable was verified by using the *Federal Register*'s website and checking that the agency promulgated at least one rule in the last 15 years. *Federal Register*, Article Search, <https://www.federalregister.gov/articles/search>.

Adjudication: (1) Statute gives agency, or any subpart of the agency,⁴⁹² the authority to conduct or hold hearings or adjudication, take testimony, receive evidence, employ administrative law judges, or other similar adjudicatory functions including the employment of administrative judges; (0) Statute does not specifically authorize adjudication or the employment of administrative law judges. Mere authority to conduct hearings is not enough to constitute a coding as (1). There must be some evidence in the statute that the authority to conduct hearings is accompanied by some other function indicative of adjudication. *Source:* Agency statute

Administrative Law Judges: (1) Agency employs Administrative Law Judges; (0) Agency does not employ Administrative Law Judges. *Source:* Office of Personnel Management's list of federal Administrative Law Judges by agency and level (as of March 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>.

⁴⁹² For example, several bureaus within executive departments have adjudication authority whereas the departments as a whole do not conduct adjudication (*see, e.g.*, Departmental Appeals Board in the Department of Health and Human Services; Executive Office for Immigration Review in the Department of Justice).



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